

**BEFORE THE WORLD TRADE ORGANIZATION**

**UNITED STATES – FINAL ANTI-DUMPING MEASURES ON STAINLESS STEEL  
FROM MEXICO  
(DS344)**

**FIRST WRITTEN SUBMISSION  
BY MEXICO**

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## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	SUMMARY OF CLAIMS.....	2
A.	Zeroing Procedures are Challenged “As Such” .....	2
B.	The Concepts of “Dumping” and “Margins of Dumping” are Central to the Analysis of Zeroing .....	3
C.	Zeroing Procedures “As Such” and “As Applied” in Original Investigations.....	3
D.	Zeroing Procedures “As Such” and “As Applied” in Periodic Reviews .....	4
III.	FACTS AND SUMMARY OF EVIDENTIARY SUPPORT.....	6
A.	United States Laws and Regulations Governing Anti-Dumping Proceedings.....	6
1.	Statutory Provisions .....	6
2.	Regulatory Provisions .....	7
3.	Status of Zeroing Procedures Under U.S. Law .....	8
B.	United States Measures Challenged “As Such” .....	9
1.	A Single Rule or Norm .....	9
2.	USDOC Zeroing Procedures in Original Investigations .....	10
(a)	Overview of Model Zeroing .....	10
(b)	Evidence Identifying Model Zeroing as a Manifestation of the Zeroing Procedures Used in Original Investigations .....	11
(i)	Standard Computer Programs for Original Investigations .....	11
(1)	Standard Anti-Dumping Margin Calculation Program.....	12
(2)	Standard Computer Programs as Models for Case-Specific Programs in Original Investigations. ....	13
(ii)	The Antidumping Manual .....	14
(iii)	Application in Original Investigation of <i>Stainless Steel from Mexico</i> .....	14
(iv)	Further Evidence of the Consistent Application of the Zeroing Procedures in All Previously Conducted Original Investigations .....	14
(1)	Expert Opinion .....	14
(2)	U.S. Concessions and Statements of U.S. Authorities.....	15
(3)	Prior WTO Dispute Settlement Panel Reports .....	16
(v)	Evidence of Continued Application in Current Cases.....	17
3.	USDOC Zeroing Procedures in Periodic Reviews.....	18
(a)	Overview of Simple Zeroing .....	18
(b)	Evidence Identifying Simple Zeroing as a Manifestation of the Zeroing Procedures in Periodic Reviews .....	20
(i)	The Existence of Standard Computer Programs for Periodic Reviews.....	20
(1)	Standard Anti-Dumping Margin Calculation Program.....	20
(2)	Overall Weighted Average Dumping Margin Calculation .....	21
(3)	Calculation of Importer-Specific Assessment Rates in the Standard Programs .....	22
(4)	Standard Computer Programs as Models for Case-Specific Programs in Periodic Reviews.....	23
(ii)	Antidumping Manual .....	23
(iii)	Application in <i>All</i> of the Periodic Reviews of <i>Stainless Steel from Mexico</i> .....	24
(iv)	Further Evidence of Past Consistent Application of the Zeroing Procedures in Periodic Reviews.....	24
(1)	Expert Statements .....	24
(2)	U.S. Concessions and Statements of U.S. Authorities.....	24
(3)	Prior WTO Dispute Settlement Panel Reports .....	25
(v)	Evidence of Continued Application in Current Periodic Reviews .....	25
C.	The Measures Challenged “As Applied”.....	26
1.	The Original Investigation of <i>Stainless Steel from Mexico</i> .....	26

2.	Periodic Reviews of <i>Stainless Steel from Mexico</i> .....	27
IV.	STANDARD OF REVIEW .....	31
A.	General Considerations .....	31
B.	Adherence to Prior Decisions of the Appellate Body .....	32
V.	THE ZEROING PROCEDURES MAY BE CHALLENGED “AS SUCH” .....	33
A.	The Scope of Measures that May be Challenged “As Such” .....	33
B.	The Zeroing Procedures Comprise a Rule or Norm that Can be the Subject of WTO Dispute Settlement .....	35
1.	Zeroing Is Attributable To The Responding Member, The United States .....	35
2.	The Specific Content Of The Zeroing Procedures Has Been Precisely Identified .....	36
3.	The Zeroing Procedures Have General And Prospective Application .....	38
4.	Conclusion .....	41
VI.	THE CONCEPTS OF “DUMPING” AND “MARGINS OF DUMPING” .....	41
A.	“Margins Of Dumping” May Only Be Calculated For the Product as a Whole and Not for Individual Transactions or Models .....	41
B.	Margins of Dumping May be Calculated Only with Respect to Individual Exporters or Foreign Producers.....	45
VII.	THE ZEROING PROCEDURES IN ORIGINAL INVESTIGATIONS .....	47
A.	As Such Claims .....	47
1.	Inconsistency with Article VI:1 and VI:2 of the GATT 1994 and Article 2.1 of the <i>Anti-Dumping Agreement</i> .....	48
2.	Inconsistency with Article 2.4.2 of the <i>Anti-Dumping Agreement</i> .....	49
3.	Inconsistency With Article 2.4, First Sentence of the <i>Anti-Dumping Agreement</i> .....	52
4.	Inconsistency with Article XVI:4 of the WTO Agreement and Article 18.4 of the <i>Anti-Dumping Agreement</i> .....	55
B.	As Applied Claims .....	56
1.	Inconsistency with Articles VI:1 and VI:2 of the GATT 1994 and Article 2.1 of the <i>Anti-Dumping Agreement</i> .....	56
2.	Inconsistency with Article 2.4.2 of the <i>Anti-Dumping Agreement</i> .....	56
3.	Inconsistency with Article 2.4.2, First sentence of the <i>Anti-Dumping Agreement</i> .....	57
4.	Inconsistency with XVI:4 of the WTO Agreement and Article 18.4 of the <i>Anti- Dumping Agreement</i> .....	57
VIII.	THE ZEROING PROCEDURES IN PERIODIC REVIEWS .....	57
A.	As Such Claims .....	57
(a)	The Zeroing Procedures Used in Periodic Reviews Violate Articles 2.1 and 9.3 of the <i>Anti-Dumping Agreement</i> and Articles VI:1 and VI:2 of the GATT 1994 Because the Margins Calculated Exceed the Exporter or Foreign Producer’s Margin of Dumping for the Product as a Whole .....	57
2.	Inconsistency With Article 2.4, First Sentence of the <i>Anti-Dumping Agreement</i> .....	60
3.	Inconsistency with Article XVI:4 of the WTO Agreement and Article 18.4 of the <i>Anti-Dumping Agreement</i> .....	61
B.	As Applied Claims .....	62
1.	Inconsistency with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1 and 9.3 of the <i>Anti-Dumping Agreement</i> .....	63
2.	Inconsistency with Article 2.4, First Sentence of the <i>Anti-Dumping Agreement</i> .....	63
3.	Inconsistency with XVI:4 of the WTO Agreement and Article 18.4 of the <i>Anti- Dumping Agreement</i> .....	63
IX.	CONCLUSION .....	64

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Short Title	Full Case Title and Citation
<i>Argentina – Poultry AD Duties</i>	Panel Report, <i>Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil</i> , WT/DS241/R, adopted 19 May 2003
<i>EC – Bed Linen</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India</i> , WT/DS141/AB/R, adopted 12 March 2001, DSR 2001:V, 2049
<i>Guatemala – Cement II</i>	Panel Report, <i>Definitive Anti-Dumping Measures on Gray Portland Cement from Mexico</i> , WT/DS156/R, adopted 17 November 2000
<i>Mexico – Anti-Dumping Measures on Rice</i>	Appellate Body Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , WT/DS295/AB/R, adopted 20 December 2005
<i>US – Cotton Yarn</i>	Panel Report, <i>United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan</i> , WT/DS192/R, adopted 5 November 2001
<i>US – Corrosion-Resistant Steel Sunset Review</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R, adopted 9 January 2004
<i>US – DRAMS</i>	Panel Report, <i>United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea</i> , WT/DS99/R, adopted 19 March 1999, DSR 1999:II, 521
<i>US – Hot-Rolled Steel</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697
<i>US – Lead Bars</i>	Panel Report, <i>United States – Imposition of Countervailing Duties on Certain Hot-Rolled Bismuth Carbon Steel Products Originating in the United Kingdom</i> , WT/DS138/R, adopted 7 June 2000
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<i>US – Oil Country Tubular Goods Sunset Reviews</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R, adopted 17 December 2004

<b>Short Title</b>	<b>Full Case Title and Citation</b>
<i>US – Softwood Lumber V</i>	Appellate Body Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/AB/R, adopted 31 August 2004
<i>US – Softwood Lumber V (Article 21.5 – Canada)</i>	Appellate Body Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS264/AB/RW, adopted 15 August 2006
<i>US – Zeroing (EC I)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)</i> , WT/DS294/AB/R, adopted 9 May 2006
<i>US – Zeroing (EC I)</i>	Panel Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)</i> , WT/DS294/R, adopted 9 May 2006, modified by Appellate Body Report, WT/DS294/AB/R
<i>US – Zeroing (Japan)</i>	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews</i> , WT/DS322/AB/R, circulated to WTO Members 9 January 2007
<i>US – Zeroing (Japan)</i>	Panel Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews</i> , WT/DS322/R, circulated to WTO Members 20 September 2006

## I. INTRODUCTION

1. Mexico's claims in this dispute all refer to one specific issue: the Zeroing Procedures used by the United States.
2. In simple terms, the Zeroing Procedures allow the United States to artificially inflate the margin of dumping in all procedural contexts. More specifically, the United States Department of Commerce ("USDOC") disregards or treats as zero the results of intermediate price comparisons where the export price exceeds the normal value. This measure has been consistently manifested in all procedural contexts including original investigations, periodic reviews and sunset reviews. Furthermore, it is applied regardless of the price comparison methodology used (whether average-to-average, transaction-to-transaction, or average-to-transaction).
3. This is not the first time that a WTO Member initiates a dispute settlement proceeding against the United States for the same reason. Indeed, a long and consistent line of Appellate Body decisions, commencing with the 2001 report of the Appellate Body in *EC – Bed Linen*, culminated in the decision in *US – Zeroing (Japan)*, in which the Appellate Body broadly, and comprehensively, ruled the United States' Zeroing Procedures to be inconsistent with the WTO agreements "as such" in "original investigations" under Article 5 of the *Anti-Dumping Agreement*, "periodic reviews" under Article 9, "sunset reviews," and "changed circumstances" reviews under Article 11.
4. The Appellate Body has conclusively found the Zeroing Procedures, in all procedural contexts and under all possible comparison methodologies, to be inconsistent with the United States' international obligations. By using these Zeroing Procedures, that Appellate Body found that the United States has failed to comply with its international obligations established in the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*").
5. The USDOC's violation of its obligations to Mexico under the mentioned agreements has resulted in excessive assessments of duties in the six periodic reviews that have been completed so far of the anti-dumping duty order on *Stainless Steel Sheet and Strip in Coils from Mexico*. The exporter concerned has estimated that these excessive assessments have totaled at least \$22 million U.S. dollars. This figure grows larger with every periodic review that is completed by the U.S. authorities.
6. As demonstrated herein, the measure challenged as such by Mexico in this dispute settlement proceeding is identical to the Zeroing Procedures that were found by the Appellate Body in *US – Zeroing (Japan)* to be contrary to the United States' obligations. The Appellate Body's prior conclusions are not only clear, they are also correct. The U.S. Zeroing Procedures prevent an accurate assessment of the actual "margin of dumping" within the meaning of the relevant agreements. There is no factual or legal reason why this Panel should not adopt the same conclusions as the Appellate Body in no less than six previous cases.
7. As a Member of the WTO, the United States has the unavoidable obligation to fully respect its international commitments. In this Organization, it is expected that Members comply with decisions of the panel or Appellate Body, whether or not they agree with the reasoning expressed in them.
8. Mexico regrets that it has been compelled to bring this dispute settlement proceeding before the WTO. Against the current backdrop of recent WTO litigation, the multiple panel and Appellate

Body decisions that have already considered this issue, and the multiple new dispute settlement proceedings that are now pending on the same issue, Mexico would have expected the United States by now to have voluntarily complied with its clearly-defined WTO obligations by eliminating zeroing. Indeed, Mexico has exercised extraordinary patience by deferring until now the pursuit of its claims in anticipation of voluntary compliance on the part of the United States.

9. Mexico observes that the United States has just recently announced its intention to implement the decision in *U.S. – Zeroing (EC I)* by eliminating, on a prospective basis, the practice of zeroing in the narrow context of average-to-average comparisons in initial investigations.<sup>1</sup> However, to date the United States has not disclaimed the ability to apply zeroing in original investigations under the average-to-transaction or the transaction-to-transaction methods in initial investigations. The United States also continues to use zeroing in periodic reviews.
10. Although the United States has also informed the DSB that it will accept the *US – Zeroing (Japan)* ruling, it has not taken steps under its domestic law to stop using Zeroing Procedures in all contexts. Moreover, because of the manner in which the United States implements WTO dispute settlement decisions, the United States will not refund any antidumping duties that it has improperly collected – and continues to collect – because of the Zeroing Procedures. It is therefore necessary for Mexico go forward with this proceeding expeditiously.
11. In this First Written Submission, Mexico sets forth in detail the factual information evidencing the existence of the United States’ Zeroing Procedures. Mexico will also demonstrate that this measure is inconsistent with the text of the relevant agreements, in particular, that it conflicts with the definitions of “dumping” and “margins of dumping” contained in those agreements, that it is inconsistent with the terms of Articles VI:1 and VI:2 of the GATT 1994, that it is inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*, and that it is also, *inter alia*, inconsistent with Articles 2.1, 2.4, and 9.3 of the *Anti-Dumping Agreement*. Mexico will also demonstrate that this inconsistent measure necessarily leads to artificially inflated margins of dumping in violation of the United States’ obligation to other Members never to impose or collect anti-dumping duties in amounts exceeding the margin of dumping for each exporter or foreign producer under consideration.

## **II. SUMMARY OF CLAIMS**

### **A. Zeroing Procedures are Challenged “As Such”**

12. The specific measure at issue in this proceeding is the “Zeroing Procedures,” which constitutes a norm or rule of general and prospective application pursuant to which the USDOC, in calculating overall margins of dumping, disregards or treats as zero the results of intermediate price comparisons where the export price exceeds the normal value (“negative results” or “negative margins”). This measure has been consistently manifested in all procedural contexts including original investigations, periodic reviews and sunset reviews. Furthermore, it is applied regardless of the price comparison methodology used (whether average-to-average, transaction-to-transaction, or average-to-transaction). The evidence of the existence and precise content of this measure has not been reasonably disputed by the United States. Because this measure is attributable to the United States, because its precise content is known and well-documented, and

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<sup>1</sup> The United States has made notice of its implementation publicly available at <http://ia.ita.doc.gov/download/zeroing/20070222-Zeroing-FR-Notice.pdf>.

because it is a general rule or norm of prospective application, it may be challenged “as such.” Mexico is challenging the Zeroing Procedures as an “as such” violation of the GATT 1994 and the *Anti-Dumping Agreement*.

**B. The Concepts of “Dumping” and “Margins of Dumping” are Central to the Analysis of Zeroing**

13. At the foundation of Mexico’s position are certain core legal principles contained in the text of the relevant agreements that are of critical importance. First, the concepts of “dumping” and “margins of dumping” contained in Articles VI:1 and VI:2 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement*, refer to the “product” under consideration taken as a whole in each anti-dumping proceeding. These definitions should be interpreted consistently across the relevant agreements and should apply in *all* procedural contexts and in relation to *all* price comparison methodologies used. The significance of these definitions is that any price comparison results made at a level other than that of the entire “product” under consideration are not “margins of dumping” within the meaning of the relevant agreements.
14. Second, “dumping” and “margins of dumping” are concepts that relate exclusively to the pricing behavior of individual exporters or producers. Accordingly, dumping and margins of dumping can exist within the meaning of the relevant agreements only with respect to individual exporters or producers. Individual price comparisons and aggregations of price comparisons with respect to individual importers or sub-product groupings of sales transactions will not constitute “margins of dumping” as recognized in the text of the relevant agreements.

**C. Zeroing Procedures “As Such” and “As Applied” in Original Investigations**

15. As set forth below, in pursuance of the challenged Zeroing Procedures, the USDOC calculates margins of dumping in original investigations, by first making intermediate price comparisons, on a model-by-model basis, between period average export prices and period average normal values for each model. The USDOC then aggregates the results of these comparisons to calculate a margin of dumping for the exporter or producer. However, in aggregating these comparison results, the USDOC disregards, or treats as zero, any comparison results where the average export price exceeds the average normal value for the model. This manifestation of the Zeroing Procedures is commonly referred to as “model zeroing.” This calculation methodology systematically results in margins of dumping which are inflated when compared to the margin of dumping that would have resulted had the Zeroing Procedures not been used. The USDOC applied the Zeroing Procedures in the original investigation of *Stainless Steel Sheet and Strip in Coils from Mexico* (“*Stainless Steel from Mexico*”)
16. Mexico is of the view that the Zeroing Procedures applied in original investigations as described above violate the relevant agreements, specifically Articles VI:1 and VI:2 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement* because the margins of dumping calculated using the Zeroing Procedures – by disregarding or treating as zero individual comparison results where the export price exceeds the normal value in calculating margins of dumping – do not reflect a margin of dumping for the product as a whole under consideration. The Zeroing Procedures instead result in a margin of dumping for the exporter or producer that reflects only part of the product under investigation, in violation of the definitions of “dumping” and “margins of dumping” contained in the relevant agreements.



17. The Zeroing Procedures followed by the USDOC in original investigations are also inconsistent with the terms of the first sentence of Article 2.4.2 of the *Anti-Dumping Agreement*, which requires a comparison of the weighted-average normal value with a weighted-average of prices of “all comparable export transactions.” As determined in a consistent line of Appellate Body decisions, this language in Article 2.4.2 likewise requires determination of a single margin of dumping for the product under consideration taken “as a whole.” Accordingly, price comparison results obtained at the level of individual models are not “margins of dumping” within the meaning of the agreements. The United States may not, therefore, consistent with the first sentence of Article 2.4.2, ignore or treat as zero intermediate comparison results where the export price exceeds the normal value. Mexico notes that the United States, in both of the most recently completed panel proceedings dealing with the Zeroing Procedures as used in original investigations (i.e., *US – Zeroing (EC I)* and *US – Zeroing (Japan)*), chose not to contest the Panel findings of inconsistency of that measure with the first sentence of Article 2.4.2 of the *Anti-Dumping Agreement*.
18. Mexico is also of the view that the Zeroing Procedures followed in original investigations are “as such” inconsistent with the “fair comparison” requirement of the first sentence of Article 2.4. As the Appellate Body most recently found in *US – Zeroing (Japan)*, any measure that results in the collection of duties in excess of the margin of dumping for the product as a whole for the exporter or producer under consideration necessarily fails to meet the “fair comparison” standard contained in the first sentence of Article 2.4. The U.S. Zeroing Procedures also violate Article 2.4 because, as the Appellate Body has also found, such zeroing is unnecessarily inflates margins of dumping.
19. Finally, because the Zeroing Procedures challenged are an “administrative procedure” within the meaning of Article XVI:4 of the Marrakech Agreement establishing the World Trade Organization (“WTO Agreement”) and Article 18.4 of the *Anti-Dumping Agreement*, this measure is also in violation of those provisions, as the Zeroing Procedures as applied in administrative proceedings are not in conformity with the United States’ obligations under the relevant agreements for the reasons noted.
20. The USDOC applied “model zeroing” as described above in the original investigation of *Stainless Steel from Mexico*. For the same reasons the Zeroing Procedures used in original investigations are “as such” inconsistent with the relevant agreements, the United States’ specific application of zeroing in the original investigation of *Stainless Steel from Mexico* is consequently “as applied” inconsistent with the United States’ obligations under the relevant agreements.

#### **D. Zeroing Procedures “As Such” and “As Applied” in Periodic Reviews**

21. In periodic reviews, the USDOC calculates margins of dumping by first making intermediate price comparisons between individual export prices and monthly average normal values. The USDOC then aggregates the results of these comparisons to calculate a margin of dumping for the exporter or producer of the subject product. However, in aggregating these comparison results, the USDOC disregards, or treats as zero, any comparison results where the average export price exceeds the average normal value for the model. This manifestation of the Zeroing Procedures is commonly referred to as “simple zeroing.”<sup>2</sup> Where negative price comparisons

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<sup>2</sup> As mentioned by the Panel in *US – Zeroing (Japan)*:

“...simple zeroing is very similar to model zeroing. The key difference stems from the differences between the W-to-W comparison, on the one hand, and the T-to-T and W-to-T comparisons, on the other. Whereas the W-to-W

- appear in the database, the resulting “margin of dumping” is systematically inflated in relation to the actual margin of dumping for the product as a whole that would result if the Zeroing Procedures were not used.
22. Mexico is of the view that the Zeroing Procedures used in periodic reviews likewise violate the United States’ obligations under Articles VI:1 and VI:2 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement* because margins of dumping calculated using zeroing do not reflect the margin of dumping for the exporter or foreign producer for the product as a whole under consideration. By selectively disregarding, or treating as zero, any individual comparison results where the export price exceeds the normal value in calculating “margins of dumping,” the U.S. authorities violate their obligation to calculate a margin for the “product” as a whole.
23. Mexico is further of the view that the Zeroing Procedures used by the USDOC in periodic reviews violate the terms of Article 9.3 of the *Anti-Dumping Agreement* with regard to the imposition and collection of anti-dumping duties. Article 9.3 of the *Anti-Dumping Agreement* states that “the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.” As noted above, by disregarding the comparison results for certain transactions (those where the export price exceeds normal value), the USDOC’s Zeroing Procedures calculate a margin of dumping that is inconsistent with Article 2. Moreover, by disregarding intermediate comparison results where the export price exceeds normal value, the margin of dumping determined by the USDOC on this basis results in an inflated “margin of dumping” for the “product.” Accordingly, the Zeroing Procedures applied in periodic reviews exceed the margin of dumping for the exporter or producer under Article 2 as provided for by Article 9.3 of the *Anti-Dumping Agreement*. Mexico’s conclusion is fully consistent with the Appellate Body’s reasoning and findings in prior cases, including, *inter alia*, *US – Zeroing (EC I)* and *US – Zeroing (Japan)*.
24. Mexico is also of the view that the Zeroing Procedures followed in periodic reviews are “as such” inconsistent with the “fair comparison” requirement of the first sentence of Article 2.4. As the Appellate Body recently found (in *US – Zeroing (Japan)*), any measure that results in the collection of duties in excess of the margin of dumping for the product as a whole for the exporter or producer under consideration necessarily fails to meet the “fair comparison” standard contained in Article 2.4, first sentence. The U.S. Zeroing Procedures also violate Article 2.4 because, as the Appellate Body has also found, such zeroing systematically inflates margins of dumping.
25. The USDOC applied “simple zeroing” as described above in each of the five periodic reviews of *Stainless Steel from Mexico* challenged by Mexico. For the same reasons the Zeroing Procedures used in periodic reviews are “as such” inconsistent with the relevant agreements, the United States’ specific application of zeroing in the periodic reviews of the anti-dumping order on *Stainless Steel from Mexico* is consequently “as applied” inconsistent with the United States’ obligations under the relevant agreements.

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comparison is based on a comparison of export transactions grouped by model, the other two methods are based on comparisons with individual export transactions. Thus, instead of zeroing by model, the USDOC zeroes by individual export transaction under the simple zeroing procedures....” (See para.4.12, citing Japan’s arguments)

26. For all of the foregoing reasons, and as further documented and explained below, Mexico urges this Panel to find that the measures challenged are “as such” and “as applied” in the contested determinations inconsistent with the United States’ obligations under the relevant WTO agreements.

### **III. FACTS AND SUMMARY OF EVIDENTIARY SUPPORT**

#### **A. United States Laws and Regulations Governing Anti-Dumping Proceedings**

27. The U.S. anti-dumping laws are comprised of governing statutes enacted by the U.S. Congress and signed into law by the President. Principally, Title VII of the Tariff Act of 1930, as amended (“Tariff Act”), implementing regulations promulgated by the USDOC pursuant to authority granted under the statute (codified under Title 19 of the Code of Federal Regulations (“C.F.R.”)). In addition to these main statutes, other instruments include (i) formal “policy bulletins” and similar policy statements occasionally published by the agency; (ii) unpublished rules and norms; and (iii) practices, and methodologies that are followed by the USDOC in implementing its legal authority, and that are evidenced in published determinations, decision memoranda, computer programs, the Import Administration *Anti-Dumping Manual*, and other documents.
28. The United States has implemented the Uruguay Round Agreements through domestic legislation (the Uruguay Round Agreements Act or “URAA”).<sup>3</sup> The *Statement of Administrative Action* (“SAA”) accompanying the URAA expressly notes that this legislation and the authority granted thereunder to the relevant U.S. agencies to issue implementing regulations “is intended to bring U.S. law fully into compliance with U.S. obligations under {the WTO} agreements.”<sup>4</sup> The URAA accordingly encompasses a broad range of laws implementing the Uruguay Round Agreements and adding relevant sections to the Tariff Act that governs U.S. administration of the anti-dumping laws. These statutory provisions were further implemented at the U.S. agency level through adoption of regulations in the C.F.R., including relevant regulations issued by the USDOC at Part 351 of Title 19 of the C.F.R.<sup>5</sup>

#### **1. Statutory Provisions**

29. Title 19, United States Code (“U.S.C.”), Chapter 4, Subtitle IV, Parts II, III, and IV address the imposition of anti-dumping duties, including provisions for the initiation and termination of original investigations. Section 773 of the Tariff Act (19 U.S.C. § 1673)<sup>6</sup> provides for the imposition by the United States of an anti-dumping duty on imported merchandise found to have been sold in the United States at “less than fair value” and found to have materially injured a U.S. industry or threatened a U.S. industry with material injury. Such a duty is imposed “in an amount equal to the amount by which the normal value exceeds the export price (or the constructed

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<sup>3</sup> Pub. L. 103-465; 108 Stat. 4809; 19 U.S.C. §§ 3501-3624 (Dec. 8, 1994). Pursuant to 101(a) of the URAA, 19 U.S.C. § 3511 (1982), the United States Congress expressly approved both the GATT 1994 and the *Anti-Dumping Agreement*.

<sup>4</sup> *Statement of Administrative Action Accompanying the Uruguay Round Agreements Act* at 13, reprinted in H. Doc. 103-316, vol. 1, 103d Cong., 2d Sess. (1994) at 669.

<sup>5</sup> See generally 19 C.F.R. Part 351. See Exhibit MEX-3.

<sup>6</sup> Sections of the relevant statute, such as Section 773 of the Tariff Act, are compiled and codified into a published code of laws (the “U.S. Code”) that is organized by “titles.” The provisions of the Tariff Act of 1930 and other trade statutes, such as the URAA, are codified in Title 19 of the U.S. Code.

export price) for the merchandise.”<sup>7</sup> Subsequent sections of the Tariff Act set forth procedures for the conduct and scheduling of original investigations.<sup>8</sup>

30. Section 736 of the Tariff Act (19 U.S.C. § 1673e) provides for the issuance by the investigating authority of anti-dumping “orders” and the “assessment” of anti-dumping duties. In accordance with these provisions, the U.S. customs authorities (U.S. Customs and Border Protection) are instructed to assess an anti-dumping duty “equal to the amount by which the normal value exceeds the export price (or the constructed export price) of the merchandise.”<sup>9</sup> Under the retrospective system applied by the United States, such instructions are issued by the investigating authority in accordance with the results of periodic “administrative reviews” conducted by the USDOC, upon request of interested parties, under authority of Section 751(a) of the Tariff Act.<sup>10</sup>
31. Provisions relating to reviews of anti-dumping orders, including periodic reviews, are found in Section 751 of the Tariff Act.<sup>11</sup> The statute authorizes annual periodic reviews upon request of interested parties and directs the USDOC to determine the normal value and export price of each entry of the subject merchandise and the “dumping margin” for each entry.<sup>12</sup>
32. Section 771 of the Tariff Act contains definitional provisions. The term “dumping margin” is defined in Section 771(35)(A) as “the amount by which normal value exceeds export price or constructed export price of the subject merchandise.”<sup>13</sup> A “weighted average dumping margin” is defined in Section 771(35)(B) 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.”<sup>14</sup>

## **2. Regulatory Provisions**

33. The USDOC is the designated administering authority in U.S. anti-dumping proceedings for purposes of determining margins of dumping and determining the amount of anti-dumping duties that are to be collected and assessed. Anti-Dumping proceedings, including original investigations, periodic and new shipper reviews, and sunset reviews, are conducted by officials in the Import Administration, a subdivision of the International Trade Administration, within the USDOC.<sup>15</sup>

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<sup>7</sup> 19 U.S.C. § 1673. *See* Exhibit MEX-2.

<sup>8</sup> 19 U.S.C. §§ 1673a through 1673d. *See* Exhibit MEX-2.

<sup>9</sup> 19 U.S.C. § 1673e(a). *See* Exhibit MEX-2.

<sup>10</sup> 19 U.S.C. § 1675. *See* Exhibit MEX-2.

<sup>11</sup> 19 U.S.C. § 1675. *See* Exhibit MEX-2.

<sup>12</sup> 19 U.S.C. § 1675(a)(1) and (2). *See* Exhibit MEX-2.

<sup>13</sup> 19 U.S.C. § 1677(35)(A). *See* Exhibit MEX-2.

<sup>14</sup> 19 U.S.C. § 1677(35)(B). *See* Exhibit MEX-2.

<sup>15</sup> Unless otherwise indicated, references made herein to the “USDOC” may be understood to refer to the International Trade Administration.

34. The USDOC regulations implementing the anti-dumping statute are contained in Part 351 of Title 19 of the C.F.R. Provisions governing procedures for original investigations are principally set forth in Sections 201 through 211.<sup>16</sup> Provisions governing procedures for periodic reviews are principally set forth in Sections 213 through 221.<sup>17</sup> Section 414 of the USDOC regulations governs the methodologies used to compare export price (or constructed export price) and normal value. Section 414(c) specifically codifies a preference for the use of “average-to-average” comparisons in original investigations and the use of “average-to-transaction” comparisons in periodic reviews.<sup>18</sup> In the case of “targeted dumping” (defined in Section 414(f)), the USDOC regulations alternatively permit the agency to use the “average-to-transaction” comparison methodology in original investigations.<sup>19</sup> The regulations also permit the USDOC to use the “transaction-to-transaction” comparison methodology in original investigations.<sup>20</sup>
35. Pursuant to Section 212 of the USDOC regulations, where the agency has conducted a periodic review under Section 751(a) of the Tariff Act, the agency is required to calculate an assessment rate for each importer of subject merchandise covered by the review with the assessment rate normally calculated by “dividing the dumping margin found on the subject merchandise examined by the entered value of such merchandise for normal customs duty purposes.”<sup>21</sup> The USDOC instructs the U.S. Customs authorities to assess anti-dumping duties “by applying the assessment rate to the entered value of the merchandise.”<sup>22</sup> If no periodic review is requested, assessment is “automatically” made “at rates equal to the cash deposit of, or bond for, estimated duties required at the time of entry, or withdrawal from warehouse, for consumption.”<sup>23</sup>

### 3. Status of Zeroing Procedures Under U.S. Law

36. Until fairly recently, the USDOC publicly maintained that the terms of the U.S. statute and regulations defining “margin of dumping” require zeroing of the negative results of intermediate price comparisons – a position that is still held by some members of the U.S. Congress.<sup>24</sup> However, this position has been rejected by the U.S. courts, including the United States Court of

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<sup>16</sup> 19 C.F.R. § 351.201, *et seq.* See Exhibit MEX-3.

<sup>17</sup> 19 C.F.R. § 351.213, *et seq.* See Exhibit MEX-3.

<sup>18</sup> 19 C.F.R. § 351.414(c). See Exhibit MEX-3.

<sup>19</sup> 19 C.F.R. § 351.414(f). See Exhibit MEX-3.

<sup>20</sup> 19 C.F.R. § 351.414(c). See Exhibit MEX-3.

<sup>21</sup> 19 C.F.R. § 351.212(b)(1). See Exhibit MEX-3.

<sup>22</sup> 19 C.F.R. § 351.212(b)(1). See Exhibit MEX-3.

<sup>23</sup> 19 C.F.R. § 351.212(c)(1). See Exhibit MEX-3.

<sup>24</sup> Letter from Senators Jay Rockefeller, Larry Craig, Michael Crapo, Max Baucus, Richard Durbin, Robert Byrd, George Voinovich, Lindsey Graham, Elizabeth Dole, Kent Conrad and Evan Bayh, to The Honorable Carlos M. Gutierrez, Secretary of Commerce, and The Honorable Susan C. Schwab, U.S. Trade Representative (11 December 2006) (“In our view, any effort to implement these decisions by discontinuing the practice of ‘zeroing’ would be flatly inconsistent with U.S. law, which *requires* the use of this methodology”)(emphasis added). See Exhibit MEX-7.

Appeals for the Federal Circuit, which has expressly held that zeroing is not mandated by the U.S. statute.<sup>25</sup>

## B. United States Measures Challenged “As Such”

### 1. A Single Rule or Norm

37. Although it is applied in various procedural contexts (*e.g.*, investigations, periodic reviews, and new shipper reviews) and in conjunction with different price comparison methodologies (*i.e.*, average-to-average, average-to-transaction, transaction-to-transaction), it bears emphasizing at the outset that there exists in reality a single zeroing measure, the Zeroing Procedures, that is being challenged by Mexico “as such.” That measure is the rule or norm, of general and prospective application, in accordance with which the U.S. investigating authorities in calculating aggregate margins of dumping disregard, or treat as zero, the results of intermediate price comparisons in which the export price exceeds the normal value.
38. The fact that the U.S. Zeroing Procedures constitute a single rule, regardless of procedural context or comparison methodology, was explicitly acknowledged in *US – Zeroing (Japan)*, in which the Appellate Body stated that the evidence presented to the Panel was sufficient
- to conclude that the “zeroing procedures” under different comparison methodologies, and in different stages of anti-dumping proceedings, do not correspond to separate rules or norms, but simply reflect different manifestations of a single rule or norm.<sup>26</sup>
39. As defined by the Panel below, and accepted by the Appellate Body, the term “zeroing” as identified and documented by Japan denotes the methodology under which the USDOC “disregards intermediate negative dumping margins . . . through the USDOC’s AD Margin Calculation Computer Programme and other related procedures, in the process of establishing the overall dumping margin for the product as a whole.”<sup>27</sup> The term “zeroing procedures” was used by both the Panel and the Appellate Body in *US – Zeroing (Japan)* to refer to “the zeroing methodology *per se*, as distinguished from the standard zeroing line.”<sup>28</sup>

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<sup>25</sup> See *Timken Co. v. United States*, 354 F.3d 1334, 1341 (Fed. Cir. 2004) (finding that “the statute does not plainly require consideration of only those dumping margins with a positive value”); accord *Corus Staal BV v. United States*, 395 F.3d 1343 (Fed. Cir. 2005) (upholding the USDOC’s use of zeroing on the basis of the Federal Circuit’s decision in *Timken v. United States*). See Exhibit MEX-6. Under the U.S. laws governing judicial review, appeals from anti-dumping determinations by the USDOC are heard by the U.S. Court of International Trade (“CIT”) or, in the case of imports from Mexico or Canada, by a bi-national Panel established under Chapter 19 of the North American Free Trade Agreement. See 19 U.S.C. § 1516a. See Exhibit MEX-2. Appeals from the CIT are made to the U.S. Court of Appeals for the Federal Circuit (“CAFC”), and from there, at the discretion of the Court, to the U.S. Supreme Court. CAFC decisions are binding on the CIT. Because the U.S. Supreme Court rarely grants requests for review, decisions by the CAFC are usually considered to be the “final word” on the legality of USDOC anti-dumping decisions.

<sup>26</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 88.

<sup>27</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 2, footnote 3.

<sup>28</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 2, footnote 3.



40. The Zeroing Procedures challenged as such by Mexico in this dispute (which are more fully described and documented by Mexico below) are the *same* measure that was under consideration in *US – Zeroing (Japan)*. The Zeroing Procedures challenged by Mexico likewise reflect a single zeroing rule or norm that is manifested in different stages of the anti-dumping proceedings (*e.g.*, original investigations and periodic reviews) and employing different comparison methodologies (*e.g.*, average-to-average, transaction-to transaction, and average-to-transaction).
41. Recognizing the above, and to facilitate a greater understanding of the precise nature and content of this measure, Mexico provides separately below in Section III a detailed summary of evidence concerning the specific content of the Zeroing Procedures that are challenged, the United States' adherence to the Zeroing Procedures in the specific context of original investigations and periodic reviews, as well as the comparison and margin calculation methodologies that are customarily employed in those two types of proceedings. Mexico emphasizes, however, that the Zeroing Procedures at issue in this dispute are as such inconsistent with the United States' obligations, regardless of procedural setting or the comparison methodology employed by the United States authorities.

## 2. USDOC Zeroing Procedures in Original Investigations

### (a) Overview of Model Zeroing

42. In calculating a dumping margin for an individual exporter or producer in an original anti-dumping duty investigation, the USDOC usually compares normal value and export price based on a comparison of "a weighted average normal value with a weighted average of prices of all comparable export transactions" ("average-to-average method").<sup>29</sup> The USDOC also may compare "the normal values of individual transactions with the export prices of individual transactions for comparable merchandise" ("transaction-to-transaction method").<sup>30</sup> However, according to the USDOC's regulations, the transaction-to-transaction method is intended to be used only in unusual situations, *e.g.*, "when there are very few sales of subject merchandise and merchandise sold in each market is identical or very similar or is custom-made".<sup>31</sup>
43. The USDOC calculates margins of dumping in original investigations in a three-step process. In Step 1, reported comparison market and export sales are subdivided by "control number" into a series of "averaging groups." A control number is a code that is assigned to each product to designate goods that are identical in terms of a defined range of significant physical characteristics and can be comprised of one or literally hundreds or more individual sales transactions. The comparison market and export values are usually determined by calculating a model-specific average price for each control number for the entire period of investigation (or the

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<sup>29</sup> 19 C.F.R. § 351.414(b)(1) and (c)(1). *See* Exhibit MEX-3.

<sup>30</sup> 19 C.F.R. § 351.414(b)(2). *See* Exhibit MEX-3.

<sup>31</sup> 19 C.F.R. § 351.414(c)(1). *See* Exhibit MEX-3. The plain language of the USDOC regulations contemplates that the transaction-to-transaction method is to be used only in "unusual situations." However, in its Section 129 determination in *Antidumping Measures on Certain Softwood Lumber Products from Canada*, the USDOC applied this method even where such "unusual situations" did not exist. *See Antidumping Measures on Certain Softwood Lumber Products from Canada*, 70 FR 22636 (Dep't Commerce)(2 May 2005)(notice of determination under section 129 of the Uruguay Rounds Agreements Act). *See* Exhibit MEX-8. The use of zeroing in that implementation proceeding was found by the Appellate Body to be inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement* in *US – Softwood Lumber V (Article 21.5 - Canada)* at para. 147.

- “POI”).<sup>32</sup> An intermediate comparison between normal value and export price is then made within each averaging group. The USDOC considers the amount by which normal value exceeds export price in these intermediate comparisons to be a “dumping margin.”
44. In Step 2, the USDOC aggregates the results of the multiple model-based comparisons made in Step 1. However, in doing so, the USDOC sums only the “positive” comparison results, disregarding (or treating as zero) any results for the comparisons where the difference between the applicable normal value and the export price was negative. This is the practice commonly referred to as “model zeroing.”
45. In Step 3, the USDOC calculates an overall margin of dumping for the period of investigation by dividing the sum of the positive differences (the numerator) by the total value of all of the export sales used for comparisons (including those with negative differences) (the denominator). The USDOC expresses the result as a percentage overall margin of dumping, called the “weighted average dumping margin.”<sup>33</sup> This percentage is applied to the entered value of imports to establish the amount of anti-dumping duty deposits on future entries of the product, pending future assessment of final duties as a result of a periodic review or, in the absence of a request for a periodic review, through “automatic liquidation” at the amounts originally asserted by the importer.

**(b) Evidence Identifying Model Zeroing as a Manifestation of the Zeroing Procedures Used in Original Investigations**

46. Paragraphs 47 to 48 below discuss in detail the documentary evidence presented by Mexico in Exhibits MEX-1 to MEX-9 of the specific content of this particular manifestation of the Zeroing Procedures, and the USDOC’s deliberate and consistent use of model zeroing in original investigations.

**(i) Standard Computer Programs for Original Investigations**

47. In original investigations, the USDOC uses a standard computer program that contains a unique SAS® software application programming code written to incorporate the USDOC’s dumping margin calculation methodology.<sup>34</sup> For reasons of practicality and convenience, the USDOC typically divides the Standard Anti-Dumping Margin Calculation Program (“Standard AD Margin Program”) into two or three sub-programs. When three sub-programs are utilized, the sub-programs are typically identified as the “arm’s-length” test program, the “concordance” (or “model match”) program, and the “margin calculation” (or “AD margin”) program (together, the “Standard Computer Programs”). When two sub-programs are utilized, the sub-programs are typically identified as the “home market” (or “comparison market”) sales program and the “U.S.

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<sup>32</sup> In identifying “averaging groups,” the USDOC accounts for differences in level of trade and, where appropriate, the region of the United States in which the merchandise is sold and such other factors as the Secretary considers relevant. 19 C.F.R. § 351.414(d)(2). See Exhibit MEX-3.

<sup>33</sup> 19 U.S.C. § 1677(35)(B). See Exhibit MEX-2.

<sup>34</sup> The USDOC Import Administration Anti-Dumping Manual, 1997 edition, (“AD Manual”), Ch. 9, at 9-10. See Exhibit MEX-4.D. The 1997 edition of the AD Manual is publicly available on the USDOC’s website at <http://ia.ita.doc.gov/admanual/index.html>. SAS® refers to a proprietary commercial software licensed by SAS Institute, Inc. The Standard Computer Programs are written in SAS® code and are executed by USDOC analysts using SAS® software.



sales” program, with the former sub-program including the “arm’s-length” test program and the latter sub-program including the concordance program and the margin calculation program.<sup>35</sup>

### **(1) Standard Anti-Dumping Margin Calculation Program**

48. The Standard AD Margin Program is used in original investigations and incorporates the Zeroing Procedures that are used to calculate margins of dumping.
49. In original investigations, the USDOC calculates an overall “weighted average dumping margin” using a three-step process that is reflected in the specific programming lines of the Standard AD Margin Program. The programming steps (which are further described below and in the declaration of Valerie Owenby contained in Exhibit MEX-1) are designed to implement the three margin calculation steps described above in paragraphs 42 to 45.
50. In Step 1, the Standard Computer Programs carry out the various average-to-average comparisons by model (control number). For each of the comparisons, the per-unit difference (represented by the variable “UMARGIN”) and total difference (represented by the variable “EMARGIN”) are determined for each model.<sup>36</sup>
51. The USDOC stores data representing export price, normal value, UMARGIN, EMARGIN, and other variables in a dataset called “MARGIN.”<sup>37</sup> As stored in this dataset, the UMARGIN and EMARGIN are positive values where normal value exceeds export price; where export price exceeds normal value, the values are negative. The UMARGIN and EMARGIN are zero where export price and normal value are equal.
52. A subsection of the Standard Computer Programs headed “Calculate Overall Margin” sets forth procedures for executing Steps 2 and 3 of the overall dumping margin calculation, and it also contains the USDOC’s standard Zeroing Procedures, among others.<sup>38</sup> The calculations carried out according to this subsection do not vary regardless of whether average-to-average, average-to-transaction or transaction-to-transaction comparisons are being made. The “Calculate Overall Margin” subsection cannot be turned “off” or “on” via computer-noded switches (unlike other sections of the Standard Computer Programs) because the procedures for calculating the overall percentage “weighted average dumping margin,” including standard Zeroing Procedures, are always a component of the programming procedures and they are used in every margin calculation.<sup>39</sup> The USDOC has not altered these calculation procedures since at least 1993.<sup>40</sup>
53. In Step 2 of the overall weighted average dumping margin process, the USDOC derives a fraction used to calculate the overall percentage weighted average dumping margin for the product, the denominator of which equals the total value of all comparable export transactions. The

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<sup>35</sup> AD Manual, Ch. 9, at 9-10. For purposes of this submission, Mexico addresses only the AD margin program as it incorporates the Zeroing Procedures at issue.

<sup>36</sup> See Exhibit MEX-1 (“Owenby Statement”), para. 31.

<sup>37</sup> Owenby Statement, paras. 29-32.

<sup>38</sup> Owenby Statement, paras. 33-35.

<sup>39</sup> Owenby Statement, paras. 15-17.

<sup>40</sup> Owenby Statement, para. 17.

programming procedures determine this value by adding the sales values of all models or transactions stored in the MARGIN dataset.

54. The fraction's numerator equals the total positive amount of comparison results for all models or transactions. In determining this figure, the programming procedures total the sums of the positive EMARGIN values, by model or transaction, as they are stored in the MARGIN dataset.
55. In doing so, the programming procedures disregard all negative comparison results in accordance with a specific line of programming code that is inserted into this step in the calculation process: "WHERE EMARGIN GT 0." This language effectively orders the SAS® application to ignore all negative comparison results when determining the numerator of the fraction. It is this line of computer programming (the "Standard Zeroing Line") that implements the contested Zeroing Procedures.
56. In Step 3, the final step, the percentage weighted average dumping margin is calculated using the variables of the fraction determined in Step 2. The total of the positive price comparison differences (*i.e.*, the numerator) is divided by the total value of all comparable export transactions (*i.e.*, the denominator), and the result is multiplied by 100 to create a percentage. It is this percentage that represents the overall "weighted average dumping margin" for the product.<sup>41</sup>

## **(2) Standard Computer Programs as Models for Case-Specific Programs in Original Investigations.**

57. The USDOC creates case-specific programs for each anti-dumping investigation. However, the established framework of the standard computer programs described above is not altered when the USDOC develops case-specific programs for such proceedings.<sup>42</sup> Although the USDOC often adjusts certain aspects of the standard computer programs according to the facts of individual cases, the model Zeroing Procedures are a constant and unaltered component of the USDOC anti-dumping calculation.<sup>43</sup>
58. In particular, based on the available evidence, the Standard Zeroing Line is always included without change. As Ms. Owenby confirms:

Every USDOC antidumping program calculation I have examined in the past, and as recently as today, including both standard and case-specific programs, has contained the same overall percentage dumping margin programming language, including the "zeroing" line...<sup>44</sup>

59. This Standard Zeroing Line is used to implement model zeroing in all original investigations. Indeed, as documented below, this Standard Zeroing Line was applied in the original investigation of *Stainless Steel from Mexico*, and has been applied in every prior original investigation conducted by the USDOC. The United States has not denied that this is so and, as documented below, has acknowledged that it can identify no case in which zeroing was not used.

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<sup>41</sup> Owenby Statement, para. 37.

<sup>42</sup> Owenby Statement, para. 14.

<sup>43</sup> Owenby Statement, paras. 15, 17.

<sup>44</sup> Owenby Statement, para. 17.

**(ii) The Antidumping Manual**

60. The Antidumping Manual (“AD Manual”) further demonstrates the USDOC’s use of the standard computer programs, discussed in detail above, to conduct and manage the entire process of calculating margins of dumping in anti-dumping proceedings. The AD Manual contains a chapter entitled “Data Submission, Computer Processing, and Calculation Review,” which states that the programming procedures of the standard computer programs are designed to ensure consistency and accuracy of calculations, and that consistency occurs “when every program uses the same standard calculation methodology.” The programming procedures are further designed to ensure consistency and accuracy “by ensuring that the standard programs conform with current AD calculation methodology.”<sup>45</sup> Accordingly, the AD Manual represents a key evidentiary element to the extent that it shows that the USDOC employs standard computer programs which incorporate the USDOC’s current margin calculation procedures.

**(iii) Application in Original Investigation of *Stainless Steel from Mexico***

61. As additional evidence, Mexico submits the United States application of the model Zeroing Procedures in the original investigation of *Stainless Steel from Mexico*.<sup>46</sup> The Zeroing Procedures used in that case are embedded in the margin programming language. Specifically, the case-specific AD Margin Program at Exhibit MEX-5.A. used for the final determination in *Stainless Steel from Mexico*, includes the following specific line of programming code: “WHERE EMARGIN GT 0.” This language effectively ordered the SAS® application to ignore all negative dumping amounts when determining the numerator.
62. As evidenced in Exhibit MEX-5.A., the application of model zeroing in the original investigation of *Stainless Steel from Mexico* inflated the margin of dumping calculated for ThyssenKrupp Mexinox S.A. de C.V. (“Mexinox”), the sole exporter or producer investigated, and for the corresponding “all others” rate, from 30.69% to 30.85%.

**(iv) Further Evidence of the Consistent Application of the Zeroing Procedures in All Previously Conducted Original Investigations**

63. The specific content of the Zeroing Procedures used in original investigations has not previously been disputed by the United States. Nor has the United States disputed that the Zeroing Procedures have been followed, without exception, in all previously-conducted original investigations. In the interests of thoroughness, however, Mexico offers the following summary of additional evidence demonstrating this fact.

**(1) Expert Opinion**

64. Further evidence of the existence, content, and consistent application of the Zeroing Procedures in prior original investigations is provided in the attached statement of Valerie Owenby, an expert in the USDOC’s margin calculation procedures based on her employment with the USDOC from 1993 to 1998.

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<sup>45</sup> AD Manual, Ch. 9, at 8.

<sup>46</sup> The specific application of the Zeroing Procedures in *Stainless Steel from Mexico* is also being challenged by Mexico as an “as applied” claim in this dispute.

65. In particular, Ms. Owenby testifies to the fact that the Zeroing Procedures, as implemented by the Standard Zeroing line, are a consistent element of both the standard and case-specific computer programs used by the USDOC to calculate margins of dumping in original investigations and periodic reviews.<sup>47</sup> In this regard, Ms. Owenby states that there are certain procedures that are executed in all anti-dumping margin calculations.<sup>48</sup> With respect to such procedures, the USDOC provides no option to switch off these portions of the computer programming, as they are universally applied in every margin calculation.<sup>49</sup> She further explains that the overall percentage dumping margin is one such procedure, stating:

[T]hroughout my career, the procedure for calculating the overall weighted-average percentage dumping margin has never changed. Every USDOC antidumping calculation program I have examined in the past, and as recently as today, including both standard and case-specific programs, has contained the same overall percentage dumping margin programming language, including the “zeroing” line...<sup>50</sup>

66. Accordingly, Ms. Owenby’s expert opinion provides further evidence of both the existence, content, and consistent application of the U.S. Zeroing Procedures in all previously-conducted original investigations.

## (2) U.S. Concessions and Statements of U.S. Authorities

67. While the United States has argued in other contexts that applying the Zeroing Procedures in original investigations is not legally binding, the Panel in *US – Zeroing (Japan)* found that the United States “has not identified a single case” in which a decision was taken not to apply the Zeroing Procedures.<sup>51</sup> Furthermore, the United States conceded to the Panel in *US – Zeroing (Japan)* that, regardless of the software being used, the USDOC disregards or treats as zero the results of comparisons where the export price exceeds normal value.<sup>52</sup> These concessions, coming from the United States itself, provide conclusive evidence that the Zeroing Procedures have been consistently employed by the United States in its original investigations.
68. Other statements made by officials of the USDOC and U.S. Department of Justice, and by the U.S. domestic courts, further establish the existence, content and consistent application of Zeroing Procedures in original investigations as a deliberate policy. For example, as cited to in the Panel Report in *US – Zeroing (Japan)*:

Thus, for example, USDOC has repeatedly stated that “we do not allow” export sales at prices above normal value to offset dumping margins on other export sales, has referred to its “practice” or

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<sup>47</sup> Owenby Statement, paras. 15, 17.

<sup>48</sup> Owenby Statement, para. 15.

<sup>49</sup> Owenby Statement, para. 15.

<sup>50</sup> Owenby Statement, para. 17.

<sup>51</sup> Panel Report, *US – Zeroing (Japan)*, para. 7.51.

<sup>52</sup> U.S. Answers to Panel’s Questions in Connection with the First Substantive Meeting – July 20, 2005, *US – Zeroing (Japan)*, para. 9. See Exhibit MEX-9.

"methodology" of not providing for offsets for non-dumped sales, has pointed out that the United States Court of Appeals for the Federal Circuit has ruled that the "zeroing practice" *i.e.* not allowing US sales not priced below normal value to offset margins found on other US sales, is a reasonable interpretation of the law, that the US Congress was aware of USDOC's methodology when it adopted the Uruguay Round Agreements Act, and that not granting an offset for non-dumped sales "has consistently been an integral part of the Department's weighted-average-to-weighted-average analysis". We also note that the United States Department of Justice has stated that USDOC "has consistently applied its practice of treating non-dumped sales as sales with a margin of zero since the implementation of the URAA" and has referred to USDOC's "long-standing methodology" and to "the zeroing practice, which has been followed for at least 20 years" and which "predated the passage of the latest major amendment of the Anti-dumping law". Finally, the United States Court of International Trade has stated that "Commerce's zeroing methodology in its calculation of dumping margins is grounded in long-standing practice."<sup>53</sup>

69. The Panel concluded on the basis of this and other evidence that the "USDOC's consistent application of zeroing reflects a deliberate policy."<sup>54</sup> Additional examples of such statements by U.S. authorities are set forth in the table (and accompanying cases) in Exhibit MEX-6.

### (3) Prior WTO Dispute Settlement Panel Reports

70. Prior WTO dispute settlement panel reports provide additional evidence of the specific content, as well as the general and prospective nature of the Zeroing Procedures that are invariably used by the USDOC in original investigations. Of particular note are the panel reports in *US – Zeroing (EC I)*, and *US – Zeroing (Japan)*.
71. For example, in addition to the persuasive evidence discussed above concerning statements by the USDOC, other United States' agencies, and the courts, the Panel in *US – Zeroing (Japan)* noted that (i) the evidence before the Panel showed that zeroing "has been a constant feature of USDOC's practice for a considerable period of time," (ii) the vast majority of computer programs used by the USDOC to calculate dumping and assessment rates in specific cases included the Standard Zeroing Line and, where the Standard Zeroing Line was not included, the USDOC "used other methods to exclude the export prices higher than the normal value from the numerator of the weighted average margin of dumping," and (iii) the United States could not identify a single case where zeroing was not applied.<sup>55</sup> The Panel concluded on this basis that "it is clear as a factual matter that USDOC always applies zeroing."<sup>56</sup>

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<sup>53</sup> Panel Report, *US – Zeroing (Japan)*, para. 7.52 (citations omitted).

<sup>54</sup> Panel Report, *US – Zeroing (Japan)*, para. 7.52.

<sup>55</sup> Panel Report, *US – Zeroing (Japan)*, para. 7.51.

<sup>56</sup> Panel Report, *US – Zeroing (Japan)*, para. 7.51.

72. Similarly, in *US – Zeroing (EC I)*, the Panel found that (i) the Zeroing Procedures are “reflected in certain lines of computer code that are always included in the computer programs used by USDOC in anti-dumping proceedings,” (ii) that the United States did not even contest that the lines of computer code identified by the European Communities as “Standard Zeroing Procedures” are “a constant feature of the computer programmes used by USDOC to perform dumping margin calculations,” (iii) that the exclusion of comparison results with negative margins “has been invariably performed by USDOC for an extended period of time,” (iv) that the United States, when asked, was “unable to identify any instance where USDOC had given a credit for non-dumped sales,” and, perhaps most telling of all, (v) that the United States did not even contest that the USDOC’s Zeroing Procedures “reflects a deliberate policy.”<sup>57</sup>
73. The lengthy discussion contained in these reports amply demonstrates that the Zeroing Procedures are a constant and invariable feature of U.S. dumping calculations used in original investigations (and periodic reviews) and have never varied.
74. Mexico further notes that the Panel reports issued in *US – Softwood Lumber V*, *US – Zeroing (EC I)*, *US – Zeroing (Japan)*, and, most recently, *US – Zeroing (Ecuador)*, directly evidence the consistent application of the Zeroing Procedures in a combined total of 18 additional original investigations conducted by the USDOC that were challenged by the complainant.<sup>58</sup>

**(v) Evidence of Continued Application in Current Cases**

75. Finally, Mexico refers the Panel to evidence of the continued application of the Zeroing Procedures in current cases before the USDOC. For this purpose, Mexico canvassed every original investigation completed since January 2006. While not every one of the published determinations or publicly available decision memoranda reference the Zeroing Procedures, it is clear that the USDOC continues to apply model zeroing in each of these cases. This is evidenced by the fact that the USDOC expressly defended the use of model zeroing in *every* original investigation concluded in 2006 in which the practice was challenged.
76. For example, in *Diamond Sawblades and Parts Thereof from the Republic of Korea*, the Korean respondents challenged the USDOC’s “‘zeroing’ out positive differences between U.S. price and NV in the calculation of the percentage margin.” The USDOC defended the application of model zeroing in that case, noting that the USDOC interprets the statutory definition of “dumping margin” contained in Section 771(35)(A) of the Tariff Act “to mean that a dumping margin exists only when NV is greater than EP or CEP. As no dumping margin exists with respect to sales where NV is equal to or less than EP or CEP, Commerce will not permit these non-dumped sales to offset the amount of dumping found with respect to other sales.”<sup>59</sup> As regards arguments from the Korean respondents that this position conflicts with the “as such” ruling of the Appellate Body in *US – Zeroing (EC I)*, the USDOC stated that the Appellate Body’s ruling has “no

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<sup>57</sup> Panel Report, *US – Zeroing (EC I)*, para. 7.103.

<sup>58</sup> See Request for the Establishment of a Panel by Canada, *US – Softwood Lumber V*; Request for the Establishment of a Panel by the European Communities, *US – Zeroing (EC I)*; Request for the Establishment of a Panel by Japan, *US – Zeroing (Japan)*; Request for the Establishment of a Panel by Ecuador, *US – Zeroing (Ecuador)*.

<sup>59</sup> Exhibit MEX-6.L. (*Diamond Sawblades and Parts Thereof from the Republic of Korea*, 71 FR 29310 (Dep’t Commerce)(22 May 2006)(final determination of sales at less than fair value)(Issues and Decision Memorandum: Comment 11)).



bearing on whether the Department’s denial of offsets in this investigation is consistent with U.S. law.”<sup>60</sup>

77. The USDOC took a similar position in the companion investigation of *Diamond Sawblades and Parts Thereof from the People’s Republic of China*, in which the Chinese respondents likewise challenged the USDOC’s continued application of model zeroing.<sup>61</sup> The response from the USDOC was substantively identical to that described above.
78. These cases demonstrate the continued, invariable application by the USDOC of the Zeroing Procedures in original investigations.<sup>62</sup>

### 3. USDOC Zeroing Procedures in Periodic Reviews

#### (a) Overview of Simple Zeroing

79. In calculating a margin of dumping in an anti-dumping duty administrative review (“periodic review”), the USDOC compares normal value and export price based on a comparison of “a weighted average normal value to the export prices (or constructed export prices) of individual transactions for comparable merchandise” (“average-to-transaction method”).<sup>63</sup> Mexico has been unable to identify any U.S. proceeding involving a market economy where another method was utilized in a periodic review. As described below, while the comparison methodology used in periodic reviews differs from the comparison methodology normally used in original

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<sup>60</sup> Exhibit MEX-6.L. (*Diamond Sawblades and Parts Thereof from the Republic of Korea*, 71 FR 29310 (Dep’t Commerce)(22 May 2006)(final determination of sales at less than fair value)(Issues and Decision Memorandum: Comment 11)).

<sup>61</sup> Exhibit MEX-6.M. (*Diamond Sawblades and Parts Thereof from the People’s Republic of China*, 71 FR 29303(Dep’t Commerce)(22 May 2006)(final determination of sales at less than fair value)(Issues and Decision Memorandum: Comment: 7)).

<sup>62</sup> Mexico acknowledges that the USDOC published a notice on December 27, 2006 stating that it is “modifying its methodology in antidumping investigations” to “no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons.” *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation*, 71 FR 77722 (Dep’t Commerce)(27 December 2006)(final modification). Exhibit MEX-10. The effective date for implementation of this modification (as of the date of this submission) is February 22, 2007. *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation*, 72 FR 1704 (Dep’t Commerce)(26 January 2007)(change in effective date of final modification). Exhibit MEX-11. In addition, Mexico notes that the United States on February 22, 2007 also publicly announced that it is implementing the WTO panel decision in *US – Zeroing (EC 1)* with respect to twelve original determinations disputed in that case. The United States has made notice of its implementation publicly available at <http://ia.ita.doc.gov/download/zeroing/20070222-Zeroing-FR-Notice.pdf>. While Mexico is pleased with these developments, Mexico notes that it is unaware of any final determination in an original investigation completed prior to the submission of this First Written Submission in which this modification was actually implemented. Moreover, even if this notice is implemented on a prospective basis it is still clearly insufficient because other uses of the Zeroing Procedures continue to be operative, and the results of the original investigation of *Stainless Steel from Mexico* in 1999 will remain in place under this new policy, which is at best prospective only.

<sup>63</sup> 19 C.F.R. § 351.414(b)(3) and (c)(2). Exhibit MEX-3. The calculation methodology described in this section of Mexico’s First Written Submission is further explained and documented in the Owenby Statement at Exhibit MEX-1.

investigations, the Zeroing Procedures contested by Mexico are manifested in a virtually identical manner.

80. The USDOC calculates margins of dumping in periodic reviews a three-step process. In Step 1, reported foreign market or third country comparison market sales and export sales are subdivided by a “control number” into a series of “averaging groups,” each one consisting of sales of merchandise within a single control number. A control number is a code that is assigned to each product to designate goods that are identical in terms of a defined range of significant physical characteristics. A single control number can be comprised of one or hundreds or more of individual sales transactions. The comparison normal value is determined by calculating an average price for each control number for each month of the period of review (“POR”) in which a sale of that control number was made.<sup>64</sup> Each individual reported export transaction is then compared to the normal value for the identical or most similar control number to which it corresponds, in the same month as the export sale, or, if there is no “normal value” in that month, in an earlier or later month that is most “contemporaneous” to the month in which the export sale was made. If no normal value sale for the control number is available for a six-month period beginning three months before the month of the export sale, an alternative normal value, based on constructed value, will be used to compare to that sale.
81. In Step 2, the USDOC aggregates the results of the intermediate comparisons made in Step 1. However, in doing so, the USDOC sums only the intermediate comparison results that yield a positive number when the export price is subtracted from the normal value, ignoring any results for the comparisons where the difference between the applicable normal value and the price of the export sale was negative. This is the practice commonly referred to as “simple zeroing”.
82. In Step 3, the USDOC calculates a margin of dumping<sup>65</sup> for the exporter for the period of review by dividing the sum of the positive intermediate comparison differences by the total value of all the export sales used for comparisons (including those with negative differences). For assessment purposes the denominator used for this is the aggregate “entered value” (customs value) for the export sales examined, or an estimation of the same where that data is not available. The universe of such sales is frequently different from the universe of imports against which the dumping duties will actually be collected.<sup>66</sup> The USDOC will also separately calculate an

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<sup>64</sup> Section 777A(d)(2) of the Tariff Act, 19 U.S.C. § 1677f-1(d)(2), requires the USDOC to calculate average normal values for each calendar month of the period of review if the average-to-transaction method is used. *See* Exhibit MEX-2. In point of fact, for purposes of calculating the comparison market value, average prices are usually calculated for each available month over an extended period that includes every month of the period of review plus the three months prior to the month of sale of the first reported export sale and two months after the month of sale of the last reported export sale.

<sup>65</sup> This step is the “weighted average margin of dumping” as defined in the U.S. statute, 19 U.S.C. § 1677(35)(B). *See* Exhibit MEX-2. It is intended to be the “margin of dumping” as defined in the *Anti-Dumping Agreement*.

<sup>66</sup> In a periodic review, the U.S. authorities define the “period of review” for which they will retrospectively calculate margins of dumping. In accordance with the USDOC regulations, this period of review normally covers “entries, exports, or sales of the subject merchandise during the 12 months immediately preceding the most recent anniversary month” of the anti-dumping order. 19 C.F.R. § 351.213(e)(1)(i). *See* Exhibit MEX\_3. The standard questionnaire issued by the USDOC further defines the universe of export sales to be reported for this purpose, specifying differently depending upon whether the sales are classified as “export price” (“EP”) or constructed export price (“CEP”). *See* 19 U.S.C. § 1677a(a) and (b). *See* Exhibit MEX-2. For CEP sales, the exporter is instructed to report “each transaction that has a date of sale within the POR.” For EP sales, the U.S.



“assessment rate” on an importer-specific basis, by segregating the results of the intermediate comparisons from a specific exporter that apply to each individual importer.

83. For purposes of establishing a new anti-dumping deposit rate, which is done in each periodic review, the calculation is very similar to the determination of the assessment rate. However, the USDOC calculates a single margin of dumping for each exporter or producer reviewed and the denominator used for this purpose is the aggregate net value of all of the export sales for that exporter or producer examined for the periodic review.<sup>67</sup>

**(b) Evidence Identifying Simple Zeroing as a Manifestation of the Zeroing Procedures in Periodic Reviews**

84. Mexico provides below a brief description of the evidence more fully provided in Exhibits MEX-1 to MEX-9 establishing the precise content of the U.S. Zeroing Procedures as manifested in periodic reviews. As evidenced herein, and in the attached exhibits, the simple Zeroing Procedures are a measure, which is consistently applied by the USDOC in its margin calculations.

**(i) The Existence of Standard Computer Programs for Periodic Reviews**

85. As with original investigations, the USDOC uses a standard computer program that contains a unique SAS® software application programming code written to incorporate the USDOC’s dumping margin calculation methodology.<sup>68</sup> For reasons of practicality and convenience, the USDOC typically divides the Standard AD Margin Program into two or three sub-programs. When three sub-programs are utilized, the sub-programs are typically identified as the “arm’s-length” test program, the “concordance” (or “model match”) program, and the “margin calculation” (or “AD margin”) program. When two sub-programs are utilized, the sub-programs are typically identified as the “home market” (or “comparison market”) sales program and the “U.S. sales” program, with the former sub-program including the arm’s-length test program and the latter sub-program including the concordance program and the margin calculation program.<sup>69</sup>

**(1) Standard Anti-Dumping Margin Calculation Program**

86. The Standard AD Margin Program is used in periodic reviews and incorporates simple Zeroing Procedures that are used to calculate the margin of dumping.<sup>70</sup>

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authorities request the reporting of all sales that were “entered for consumption during the POR,” but, where the entry dates are not known to the exporter, the exporter is to report all sales that “shipped during the POR.” Therefore, there is only one possible (and relatively uncommon) scenario – *i.e.*, where the sales are classified as EP and the exporter also knows the entry date of every sale – in which the sales examined by the U.S. authorities and used in the determination of the “margins of dumping” are identical to the specific imports (“entries”) made during the POR.

<sup>67</sup> Owenby Statement, para. 50.

<sup>68</sup> AD Manual, Ch. 9, at 9-10. See Exhibit MEX-4.D.

<sup>69</sup> AD Manual, Ch. 9, at 9-10. For purposes of this submission, Mexico addresses only the AD margin program as it incorporates the Zeroing Procedures at issue.

<sup>70</sup> Owenby Statement, paras. 15-17.

## **(2) Overall Weighted Average Dumping Margin Calculation**

87. In periodic reviews, the USDOC calculates an overall “weighted average dumping margin” using a three-step process. The programming steps (which are further described below and in the declaration of Valerie Owenby contained in Exhibit MEX-1) are designed to implement the three margin calculation steps described above in paragraphs 79 to 83.
88. In Step 1, the Standard Computer Programs carry out the various intermediate average-to-transaction comparisons. For each of the intermediate comparisons, the per-unit difference (represented by the variable “UMARGIN”) and total difference (represented by the variable “EMARGIN”) are determined on a transaction-specific basis.<sup>71</sup>
89. The USDOC stores data representing export price, normal value, UMARGIN, EMARGIN, and other variables on a transaction-specific basis in a dataset called “MARGIN.”<sup>72</sup> As stored in this dataset, the UMARGIN and EMARGIN are positive values where normal value exceeds export price; where export price exceeds normal value, the values are negative. The UMARGIN and EMARGIN are zero where export price and normal value are equal.
90. A subsection of the Standard Computer Programs headed “Calculate Overall Margin” sets forth procedures for executing Steps 2 and 3 of the overall dumping margin calculation, and it also contains the USDOC’s standard Zeroing Procedures, among others.<sup>73</sup> The calculations carried out according to this subsection do not vary regardless of whether average-to-average, average-to-transaction or transaction-to-transaction comparisons are being made or whether model zeroing or simple zeroing are being applied. The “Calculate Overall Margin” subsection cannot be turned “off” or “on” via computer-noded switches (unlike other sections of the Standard Computer Programs) because the procedures for calculating the overall percentage “weighted average dumping margin,” including standard Zeroing Procedures, are always a component of the programming procedures and they are used in every margin calculation.<sup>74</sup> The USDOC has not altered these calculation procedures since at least 1993.<sup>75</sup>
91. In Step 2 of the overall weighted average dumping margin process, the USDOC derives a fraction used to calculate the overall percentage weighted average dumping margin for the product, the denominator of which equals the total value of all comparable export transactions. The programming procedures determine this value by adding the sales values of all transactions stored in the MARGIN dataset.
92. The fraction’s numerator equals the total positive intermediate comparison amounts for all transactions. In determining this figure, the programming procedures total the sums of the positive EMARGIN values, by transaction, as they are stored in the MARGIN dataset.
93. In doing so, the programming procedures disregard all negative intermediate comparison differences in accordance with a specific line of programming code that is inserted into this step

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<sup>71</sup> Owenby Statement, para. 31.

<sup>72</sup> Owenby Statement, paras. 29-32.

<sup>73</sup> Owenby Statement, paras. 33-35.

<sup>74</sup> Owenby Statement, paras. 15-17.

<sup>75</sup> Owenby Statement, para. 17.

in the calculation process: “WHERE EMARGIN GT 0.” This language effectively orders the SAS® application to ignore all negative comparison differences when determining the numerator of the fraction. It is this line of computer programming, the “Standard Zeroing Line,” that implements the contested Zeroing Procedures.

94. In Step 3, the percentage weighted average dumping margin is calculated using the variables of the fraction determined in Step 2. The total of the positive intermediate comparison differences (*i.e.*, the numerator) is divided by the total value of all comparable export transactions (*i.e.*, the denominator), and the result is multiplied by 100 to create a percentage. It is this percentage that represents the overall “weighted average dumping margin” for the product.<sup>76</sup> This rate establishes the amount of the duty deposit applied until completion of the next periodic review to entries of the product for the purpose of collecting estimated duties.

### **(3) Calculation of Importer-Specific Assessment Rates in the Standard Programs**

95. In addition to calculating the overall “weighted average dumping margin” or “deposit rate” for each exporter as described above, in periodic reviews the USDOC also determines the importer-specific “assessment rates.”
96. To this end, the Standard Computer Programs include an additional section of programming code for periodic reviews that calculates importer-specific assessment rates used by the USDOC to collect definitive anti-dumping duties from the importers of goods for the duration of the review period.<sup>77</sup> Instead of calculating an overall “weighted average dumping margin” as is done for exporters, the calculation procedures used to determine the importer-specific assessment rates divide among the importers of the exporter’s subject merchandise the total amount of dumping duties due for the product. In other words, the numerator of the overall dumping fraction (*i.e.*, the positive comparison differences or EMARGINS) is divided among the different importers, and this subdivided figure becomes the numerator of a new fraction for each importer. The denominator for each importer is the total value declared to U.S. Customs corresponding to the sales associated with that importer that were used by the USDOC in the price comparisons.
97. The Standard Computer Program application used to calculate these importer-specific assessment rates includes Zeroing Procedures in calculating the numerator of the importer-specific total dumping amounts. This particular application selects from among the comparison differences, on an importer-specific basis, only those values with positive dumping amounts and ignores any values reflecting negative differences. The programming code incorporated into the application to command this zeroing process is written as “WHERE UMARGIN GT 0.”
98. The resulting importer-specific assessment rates are then reported by the USDOC to the United States Customs and Border Protection (“CBP”) in the form of “liquidation instructions” pertaining to imports made by each importer during the relevant review period. CBP is instructed to assess anti-dumping duties against all imports of the subject merchandise made by the relevant importer during the period at the assessment rate determined by the USDOC.

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<sup>76</sup> Owenby Statement, para. 37.

<sup>77</sup> Owenby Statement, paras. 50-54.

**(4) Standard Computer Programs as Models for Case-Specific Programs in Periodic Reviews.**

99. The USDOC creates case-specific programs for each periodic review. However, the established framework of the standard computer programs described above is not altered when the USDOC develops case-specific programs for such proceedings.<sup>78</sup> Although the USDOC often adjusts certain aspects of the Standard Computer Programs according to the facts of individual cases, the Zeroing Procedures are a constant and unaltered component of the USDOC anti-dumping calculation.<sup>79</sup>

100. In particular, the Standard Zeroing Line is always included without change. As Ms. Owenby confirms:

Every USDOC antidumping program calculation I have examined in the past, and as recently as today, including both standard and case-specific programs, has contained the same overall percentage dumping margin programming language, including the “zeroing” line...<sup>80</sup>

101. This Standard Zeroing Line is used to implement simple zeroing in all periodic reviews. Indeed, as documented below, this Standard Zeroing Line was applied in each of the six periodic reviews of *Stainless Steel from Mexico* that have been completed to date and has been applied in every prior periodic review conducted by the USDOC. The United States has not denied that this is so and, as documented, has confessed that it can identify no case in which the Zeroing Procedures were not used in a periodic review.

**(ii) Antidumping Manual**

102. The AD Manual further demonstrates the USDOC’s use of the standard computer programs, discussed in detail above, to conduct and manage the entire process of calculating margins of dumping in anti-dumping proceedings.<sup>81</sup> As noted previously, the AD Manual contains a chapter entitled “Data Submission, Computer Processing, and Calculation Review,” which states that the programming procedures of the standard computer programs are designed to ensure consistency and accuracy of calculations, and that consistency occurs “when every program uses the same standard calculation methodology.”<sup>82</sup> The programming procedures are further designed to promote consistency and accuracy “by ensuring that the standard programs conform with current AD calculation methodology.”<sup>83</sup> Accordingly, the AD Manual represents a key evidentiary element to the extent that it shows that the USDOC employs standard computer programs which incorporate the USDOC’s current margin calculation procedures. Again, the United States has conceded this point in the course of the other WTO dispute settlement proceedings challenging this U.S. methodology.

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<sup>78</sup> Owenby Statement, para. 14.

<sup>79</sup> Owenby Statement, paras. 15, 17.

<sup>80</sup> Owenby Statement, para. 17.

<sup>81</sup> AD Manual, Ch. 9.

<sup>82</sup> AD Manual, Ch. 9, at 8.

<sup>83</sup> AD Manual, Ch. 9, at 8.

**(iii) Application in All of the Periodic Reviews of Stainless Steel from Mexico**

103. The United States applied the simple Zeroing Procedures in *each* of the five administrative reviews of *Stainless Steel from Mexico* that are the subject of Mexico’s “as such” claims in this dispute. The USDOC again applied the Zeroing Procedures in the recently completed 2004-2005 periodic review. The systematic implementation of the Zeroing Procedures by the United States is evidenced in the documents provided by Mexico at Exhibit MEX-5.
104. For example, with respect to the fifth periodic review of *Stainless Steel from Mexico*, the USDOC repeatedly defends the Zeroing Procedures applied in that case and refers to zeroing as a “methodology.” Specifically, the USDOC states that “our *methodology* is consistent with our statutory obligations under the Act.”<sup>84</sup> Likewise, the USDOC notes that “[t]he Federal Circuit has affirmed the Department’s *methodology*”<sup>85</sup> and that the Federal Circuit held that “the Department’s interpretation of section 771(35) of the Act to permit this *methodology* was permissible...”<sup>86</sup>
105. The evidence provided with respect to the other periodic reviews of *Stainless Steel from Mexico* discussed in paragraphs 120 to 142 below contains similar USDOC references to zeroing as a methodology. Accordingly, the “as applied” determinations provide further evidence of the systematic and deliberate implementation of the Zeroing Procedures in all United States anti-dumping proceedings.

**(iv) Further Evidence of Past Consistent Application of the Zeroing Procedures in Periodic Reviews**

**(1) Expert Statements**

106. Mexico provides further evidence of the existence, content, and consistent application of the Zeroing Procedures with the attached statement of Valerie Owenby, an expert in the USDOC’s margin calculation procedures based on her employment with the USDOC from 1993 to 1998. Ms. Owenby’s statement is described above in paragraphs 64 to 66.

**(2) U.S. Concessions and Statements of U.S. Authorities**

107. Further evidence of the long-standing, deliberate, and invariable application of the Zeroing Procedures by the USDOC in periodic reviews in the form of concessions and statements by the USDOC, other U.S. agencies, and the courts, is discussed in detail in paragraphs 67 to 69 above and supported by the documents contained in Mexico’s exhibits.
108. Other similar evidence includes a 2003 decision by the U.S. Court of International Trade in which the agency noted that “Commerce’s zeroing methodology in its calculation of dumping margins is grounded in long-standing practice.”<sup>87</sup> Indeed, the Court of International Trade concluded in a 2004 case that “Commerce’s zeroing methodology has been upheld by this court and the Federal

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<sup>84</sup> Exhibit MEX-5.F.

<sup>85</sup> Exhibit MEX-5.F.

<sup>86</sup> Exhibit MEX-5.F.

<sup>87</sup> Exhibit MEX-6.E. (*Pam S.p.A. v. U.S. Dep’t of Commerce*, 265 F.Supp.2d 1362, 1370 (CIT 2003)(citing *inter alia* *Timken Co. v. United States*, 240 F.Supp. 2d 1228 (CIT 2002))).

Circuit as reasonable on many previous occasions.”<sup>88</sup> Such statements by, and before, U.S. authorities make clear that the Zeroing Procedures used in periodic reviews are applied deliberately, generally, and prospectively. Additional examples of such statements are set forth in the table (and accompanying cases) at Exhibit MEX-6.

### (3) Prior WTO Dispute Settlement Panel Reports

109. Furthermore, as noted above with respect to the Zeroing Procedures applied in original investigations, reference should be made to the findings of the prior WTO dispute settlement panels that have considered the Zeroing Procedures used in periodic reviews, including, in particular, the Panel reports in *US – Zeroing (EC I)*, and *US – Zeroing (Japan)*. The lengthy discussion contained in those reports, discussed above in paragraphs 70 to 74, amply document the precise content of the Zeroing Procedures challenged by Mexico here and the application of that methodology in all past and present periodic reviews conducted by the USDOC.
110. Mexico further notes that the Panel Reports issued in *US – Zeroing (EC I)* and *US – Zeroing (Japan)* directly evidence the consistent application of the Zeroing Procedures in a combined total of 27 additional periodic reviews conducted by the USDOC where the measure was successfully challenged as applied in those determinations.<sup>89</sup>

### (v) Evidence of Continued Application in Current Periodic Reviews

111. Finally, Mexico refers the Panel to evidence of the continued application of the Zeroing Procedures in current periodic review cases before the USDOC. For this purpose, Mexico canvassed every periodic review completed since January 2006. While not every one of the published determinations or publicly available decision memoranda reference the Zeroing Procedures, it is clear that the USDOC continues to apply simple zeroing in each of these cases and has stated no intention to alter this policy. This is evidenced by the fact that the USDOC consistently defended the use of simple zeroing in every periodic review concluded since January 2006 in which the practice was challenged.
112. For example, in the 2006 periodic review determination involving *Carbon and Certain Alloy Steel Wire Rod from Canada*, the USDOC decision memorandum sets forth the USDOC’s position that it will continue “to deny offsets to dumping based on export transactions that exceed normal value.”<sup>90</sup> In reaching this conclusion, the USDOC cites to the fact that “[t]he Federal Circuit has affirmed the Department’s methodology as a reasonable interpretation of the statute.”<sup>91</sup>

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<sup>88</sup> Exhibit MEX-6.H. (*NSK Ltd. v. U.S.*, 346 F.Supp.2d 1312, 1320 (CIT 2004)(citing *inter alia Timken Co. v. United States*, 354 F.3d 1334, 1340-45 (Fed. Cir. 2004))).

<sup>89</sup> See Request for the Establishment of a Panel by the European Communities, *US – Zeroing (EC I)*; Request for the Establishment of a Panel by Japan, *US – Zeroing (Japan)*.

<sup>90</sup> Exhibit MEX-6.J. (*Carbon and Certain Alloy Steel Wire Rod from Canada*, 71 FR 3822 (Dep’t Commerce)(24 January 2006)(final results of anti-dumping duty second administrative review)(Issues and Decision Memorandum: Comment 9)).

<sup>91</sup> Exhibit MEX-6.J. (*Carbon and Certain Alloy Steel Wire Rod from Canada*, 71 FR 3822 (Dep’t Commerce)(24 January 2006)(final results of anti-dumping duty second administrative review)(Issues and Decision Memorandum: Comment 9)).



113. Likewise, in another 2006 periodic review determination involving *Carbon and Certain Alloy Steel Wire Rod from Mexico*, the USDOC concludes that it will not “permit [the] non-dumped sales to offset the amount of dumping found with respect to other sales.”<sup>92</sup> Similarly, in another 2006 periodic review determination, this time involving *Steel Concrete Reinforcing Bars from Latvia*, the USDOC notes – in upholding its zeroing practice – that “our [zeroing] methodology is consistent with our statutory obligations under the Act.”<sup>93</sup>
114. During 2007 (to date), Mexico has identified two completed periodic reviews where the Zeroing Procedures were challenged. In *Polyethylene Retail Carrier Bags from Thailand*, the USDOC defended the continued application of simple zeroing, providing its standard response that application of the Zeroing Procedures that “[a]s no dumping margins exist with respect to sales where normal value is equal to or less than export or constructed export price, the Department does not permit these non-dumped sales to offset the amount of dumping found with respect to other sales. The Court of Appeals for the Federal Circuit (“CAFC”) has held that this is a reasonable interpretation of the statute.”<sup>94</sup> As late as February 12, 2007, the USDOC again defended its use of the Zeroing Procedures on essentially the same grounds in *Individually Quick Frozen Red Raspberries from Chile*.<sup>95</sup>
115. These cases demonstrate the continued, and unvaried, application by the USDOC of the Zeroing Procedures in periodic reviews.

### C. The Measures Challenged “As Applied”

116. In addition to challenging the Zeroing Procedures “as such,” Mexico challenges the USDOC’s Zeroing Procedures as applied in one original investigation and five periodic reviews of *Stainless Steel from Mexico*. The specific application of the Zeroing Procedures in the challenged determinations are further described and documented in the exhibits of this submission.

#### 1. The Original Investigation of *Stainless Steel from Mexico*

117. On June 8, 1999, the USDOC issued a final determination of sales at less than fair value and on July 27, 1999, imposed an anti-dumping duty order on *Stainless Steel from Mexico*.<sup>96</sup> The ad

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<sup>92</sup> Exhibit MEX-6.K. (*Carbon and Alloy Steel Wire Rod from Mexico*, 71 FR 27989 (Dep’t Commerce)(15 May 2006)(final results of anti-dumping duty second administrative review)(Issues and Decision Memorandum: Comment 4)).

<sup>93</sup> Exhibit MEX-6.U. (*Steel Concrete Reinforcing Bars from Latvia*, 71 FR 74900 (Dep’t Commerce)(13 December 2006)(final results of anti-dumping duty administrative review)(Issues and Decision Memorandum: Comment 5)).

<sup>94</sup> Exhibit MEX-6.W. (*Polyethylene Retail Carrier Bags from Thailand*, 72 FR 1982 (Dep’t Commerce)(17 January 2007)(final results of administrative review)(Issues and Decision Memorandum: Comment 5)).

<sup>95</sup> Exhibit MEX-6.X. (*Individually Quick Frozen Red Raspberries from Chile*, 72 FR 6524 (Dep’t Commerce)(12 February 2007)(final results of administrative review)(Issues and Decision Memorandum: Comment 2)).

<sup>96</sup> Exhibit MEX-5.A. (*Stainless Steel Sheet and Strip in Coils from Mexico*, 64 FR 30790 (Dep’t Commerce)(8 June 1999) (notice of final determination of sales at less than fair value)). The USDOC amended the final results on July 27, 1999. (*See Stainless Steel Sheet and Strip in Coils from Mexico*, 64 FR 40560 (Dep’t

*valorem* rate of the anti-dumping duty was 30.85 percent for Mexinox, the sole participating Mexican producer and exporter.<sup>97</sup> The “all others” rate determined in the investigation was the same, 30.85 percent.<sup>98</sup>

118. In calculating the dumping margin in the original investigation of *Stainless Steel from Mexico*, the USDOC utilized the model Zeroing Procedures, as described in Section III.B.2 above.<sup>99</sup> In particular, in calculating the numerator of the weighted-average margin calculation, the USDOC summed only the “positive” intermediate comparison results obtained for each averaging group as part of the average-to-average comparison between normal value and export price. In other words, the USDOC ignored (*i.e.*, effectively set to zero) any intermediate comparison results where the difference between the applicable normal value and the export price was negative, *i.e.*, where normal value was lower than export price.<sup>100</sup> By using the above procedures, the USDOC calculated a dumping margin of 30.85 percent.<sup>101</sup>
119. Without application of the Zeroing Procedures (*i.e.*, with the negative margins included), the dumping margin would have been 30.69 percent.<sup>102</sup> The use of the Zeroing Procedures in this case therefore inflated Mexinox’s margin of dumping.

## 2. Periodic Reviews of *Stainless Steel from Mexico*

### a) First Periodic Review (Period of Review: January 1999 to June 2000)

120. On February 12, 2002, the USDOC issued final results in the first anti-dumping duty periodic review of *Stainless Steel from Mexico* covering the period January 4, 1999 through June 30, 2000.<sup>103</sup> Mexinox was the sole respondent to participate in the periodic review and its wholly-owned affiliate, Mexinox USA, Inc. (“Mexinox USA”) was the sole importer of the subject merchandise.

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Commerce)(27 July 1999)(notice of amended final determination of sales at less than fair value and anti-dumping duty order)).

<sup>97</sup> See Exhibit MEX-5.A.

<sup>98</sup> See Exhibit MEX-5.A.

<sup>99</sup> See Owenby Statement, para. 59, Exhibit MEX-1.I; Exhibit MEX-5.A (Program Log and Zeroing Analysis). Included in Exhibit MEX-5.A is an analysis linked to the relevant case-specific programming language and outputs demonstrating the calculation of margins of dumping and assessment rates with and without zeroing applied and the amount of excess duties assessed. A similar analysis of the margin calculations is provided in Exhibits MEX-5.B through MEX 5.G with respect to each of the periodic reviews completed to date.

<sup>100</sup> See Exhibit MEX-5.A.

<sup>101</sup> See Exhibit MEX-5.A.

<sup>102</sup> See Exhibit MEX-5.A.

<sup>103</sup> Exhibit MEX-5.B. (*Stainless Steel Sheet and Strip in Coils from Mexico*, 67 FR 6490 (Dep’t Commerce)(12 February 2002) (final results of anti-dumping duty administrative review)). The USDOC amended the final results on April 2, 2002. (*See Stainless Steel Sheet and Strip in Coils from Mexico*, 67 FR 15542 (Dep’t Commerce)(2 April 2002)(amended final results of anti-dumping duty administrative review)).



121. In calculating the margin of dumping in the first periodic review of *Stainless Steel from Mexico*, the USDOC utilized the Zeroing Procedures, as described in Section III.B.3.<sup>104</sup> In particular, in calculating the numerator of the weighted-average margin calculation, the USDOC summed only the intermediate transaction-specific “positive” comparison results obtained as part of the average-to-transaction comparison between normal value and export price.<sup>105</sup> In other words, the USDOC ignored (*i.e.*, treated as zero) any intermediate comparison results where the difference between the weighted-average monthly normal value and the individual export transaction was negative, *i.e.*, where normal value was lower than export price.<sup>106</sup>
122. To calculate the revised cash deposit rate for Mexinox, the numerator described above was divided by the total value of the export prices used in the price comparisons.<sup>107</sup> To calculate the assessment rate applicable to Mexinox USA, the numerator described above was divided by the total value declared to Customs for the same sales by Mexinox USA in the relevant period.<sup>108</sup>
123. By using the above procedures, the USDOC calculated a margin of dumping of 2.28 percent for Mexinox.<sup>109</sup> The assessment rate determined for Mexinox USA was 2.71 percent.<sup>110</sup> Without application of the Zeroing Procedures (*i.e.*, with the negative margins included), the margin of dumping would have been negative 6.02 percent, and no anti-dumping duty would have been collected.<sup>111</sup>
124. Mexinox USA was assessed and paid approximately \$5.3 million in anti-dumping duties for this period. *None* of these duties would have been assessed had the Zeroing Procedures not been applied.

**b) Second Periodic Review (Period of Review: July 2000 to June 2001)**

125. On February 11, 2003, the USDOC issued final results in the second anti-dumping duty periodic review of *Stainless Steel from Mexico*, covering the period July 1, 2000 through June 30, 2001.<sup>112</sup> Again, Mexinox was the sole participating Mexican exporter and producer and Mexinox USA

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<sup>104</sup> See Owenby Statement, para. 60, 61, Exhibit MEX-1.I; Exhibit MEX-5.B (Program Log and Zeroing Analysis).

<sup>105</sup> See Exhibit MEX-5.B.

<sup>106</sup> See Exhibit MEX-5.B.

<sup>107</sup> See Exhibit MEX-5.B.

<sup>108</sup> See Exhibit MEX-5.B. Again, because Mexinox USA was the sole importer of subject merchandise exported by Mexinox during the period, there was no need for the USDOC to calculate importer-specific assessment rates. This was true of each of the six periodic reviews conducted to date.

<sup>109</sup> See Exhibit MEX-5.B.

<sup>110</sup> See Exhibit MEX-5.B.

<sup>111</sup> See Exhibit MEX-5.B.

<sup>112</sup> See Exhibit MEX-5.C. (*Stainless Steel Sheet and Strip in Coils from Mexico*, 68 FR 6889 (Dep’t Commerce)(11 February 2003) (final results of the 2000-2001 anti-dumping duty administrative review)). The USDOC amended the final results on March 20, 2003. (*See Stainless Steel Sheet and Strip in Coils from Mexico*, 68 FR 13686 (Dep’t Commerce)(20 March 2003)(amended final results of anti-dumping duty administrative review)).

was the sole importer of record for the period. The Zeroing Procedures as applied in the second periodic review are the same as described above for the first review.<sup>113</sup>

126. The margin calculation methodology and the Zeroing Procedures applied in the second periodic review are the same as the methodologies applied in the first periodic review described above.<sup>114</sup>
127. By using the above procedures, the USDOC calculated a margin of dumping of 6.15 percent for Mexinox.<sup>115</sup> The assessment rate determined for Mexinox USA, Inc. was 6.10 percent.<sup>116</sup> Without application of the Zeroing Procedures (*i.e.*, with the negative margins included), the margin of dumping would have been 1.83 percent and the assessment rate would have been 1.81 percent.<sup>117</sup>
128. Mexinox USA was assessed and paid approximately \$6.7 million in anti-dumping duties for this period. Had the assessment rate been properly calculated without applying the Zeroing Procedures, Mexinox USA would have paid only approximately \$2.0 million in anti-dumping duties.

**c) Third Periodic Review (Period of Review: July 2001 to June 2002)**

129. On February 10, 2004, the USDOC issued final results in the anti-dumping duty administrative review of *Stainless Steel from Mexico*, covering the period July 1, 2001 through June 30, 2002.<sup>118</sup> Again, Mexinox was the sole participating Mexican exporter and producer and Mexinox USA was the sole importer of record for the period.
130. The margin calculation methodology and the Zeroing Procedures applied in the third periodic review are the same as the methodologies applied in the first periodic review described above.<sup>119</sup>
131. By using the above procedures, the USDOC calculated a margin of dumping of 7.43 percent for Mexinox. The assessment rate was 7.92 percent.<sup>120</sup> Without application of the Zeroing Procedures (*i.e.*, with the negative margins included), the margin of dumping for Mexinox would have been 4.96 percent.<sup>121</sup> The assessment rate for Mexinox USA would have been 5.29 percent.
132. Mexinox USA was assessed and paid approximately \$5.5 million in anti-dumping duties for this period. Had the assessment rate been properly calculated without applying the Zeroing

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<sup>113</sup> See Exhibit MEX-5.C.

<sup>114</sup> See Owenby Statement, para. 60, 62, Exhibit MEX-1.I; Exhibit MEX-5.C (Program Log and Zeroing Analysis).

<sup>115</sup> See Exhibit MEX-5.C.

<sup>116</sup> See Exhibit MEX-5.C.

<sup>117</sup> See Exhibit MEX-5.C.

<sup>118</sup> See Exhibit MEX-5.D. (*Stainless Steel Sheet and Strip in Coils from Mexico*, 69 FR 6259 (Dep't Commerce)(10 February 2004) (final results of anti-dumping duty administrative review)).

<sup>119</sup> See Owenby Statement, para. 60, 63, Exhibit MEX-1.I; Exhibit MEX-5.D (Program Log and Zeroing Analysis).

<sup>120</sup> See Exhibit MEX-5.D.

<sup>121</sup> See Exhibit MEX-5.D.

Procedures, Mexinox USA would have paid only approximately \$3.7 million in anti-dumping duties.

**d) Fourth Periodic Review (Period of Review: July 2002 to June 2003)**

133. On January 26, 2005, the USDOC issued final results in the fourth anti-dumping duty periodic review of *Stainless Steel from Mexico*, covering the period July 1, 2002 through June 30, 2003.<sup>122</sup> Again, Mexinox was the sole participating Mexican exporter and producer and Mexinox USA was the sole importer of record for the period.
134. The margin calculation methodology and the Zeroing Procedures applied in the fourth periodic review are the same as the methodologies applied in the first periodic review described above.<sup>123</sup> By using the above procedures, the USDOC calculated a margin of dumping for Mexinox of 5.42 percent for Mexinox. The assessment rate for Mexinox USA was 5.74 percent.<sup>124</sup> Without application of the Zeroing Procedures (*i.e.*, with the negative margins included), the margin of dumping would have been 1.54 percent, and the assessment rate for Mexinox USA would have been 1.63 percent.<sup>125</sup>
135. Mexinox USA was assessed and paid approximately \$5.2 million in anti-dumping duties for this period. Had the assessment rate been properly calculated without applying the Zeroing Procedures, Mexinox USA would have paid only approximately \$1.5 million in anti-dumping duties.

**e) Fifth Periodic Review (Period of Review: July 2003 to June 2004)**

136. On December 12, 2005, the USDOC issued final results in the anti-dumping duty administrative review of *Stainless Steel from Mexico*, covering the period July 1, 2003 through June 30, 2004.<sup>126</sup> Again, Mexinox was the sole participating Mexican exporter and producer and Mexinox USA was the sole importer of record for the period.
137. The margin calculation methodology and the Zeroing Procedures applied in the fifth periodic review are the same as the methodologies applied in the first periodic review described above.<sup>127</sup>
138. The *ad valorem* rate of the anti-dumping duty was 2.96 percent for Mexinox.<sup>128</sup> The assessment rate was 3.18 percent.<sup>129</sup> Without application of the Zeroing Procedures (*i.e.*, with the negative

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<sup>122</sup> See Exhibit MEX-5.E. (*Stainless Steel Sheet and Strip in Coils from Mexico*, 70 FR 3677 (Dep't Commerce)(26 January 2005) (final results of anti-dumping duty administrative review)).

<sup>123</sup> See Owenby Statement, para. 60, 66, Exhibit MEX-1.I; Exhibit MEX-5.E (Program Log and Zeroing Analysis).

<sup>124</sup> See Exhibit MEX-5.E.

<sup>125</sup> See Exhibit MEX-5.E.

<sup>126</sup> See Exhibit MEX-5.F. (*Stainless Steel Sheet and Strip in Coils from Mexico*, 70 FR 73444 (Dep't Commerce)(12 December 2005)(final results of anti-dumping duty administrative review)).

<sup>127</sup> See Owenby Statement, para. 60, 66, Exhibit MEX-1.I; Exhibit MEX-5.F (Program Log and Zeroing Analysis).

<sup>128</sup> See Exhibit MEX-5.F.

<sup>129</sup> See Exhibit MEX-5.F.

margins included), the margin of dumping for Mexinox would have been negative 4.57 percent and the assessment rate for Mexinox USA would have been negative 4.91 percent and no anti-dumping duties would have been collected.<sup>130</sup>

139. Mexinox USA was assessed and paid approximately \$4.9 million in anti-dumping duties for this period. *None* of these duties would have been assessed had the Zeroing Procedures not been applied.

**f) Sixth Periodic Review (Period of Review: July 2004 to June 2005)**

140. Although not referenced in the request for establishment of this Panel, for informational purposes and to demonstrate continued application of the challenged measure, Mexico notes that the USDOC on December 22, 2006, issued the final results of the anti-dumping administrative review of *Stainless Steel from Mexico*, covering the period July 1, 2004 through June 30, 2005.<sup>131</sup> Again, Mexinox was the sole participating Mexican exporter and producer and Mexinox USA was the sole importer of record for the period.
141. The margin calculation methodology and the Zeroing Procedures applied in the sixth periodic review are the same as the methodologies applied in the first periodic review described above.<sup>132</sup> The *ad valorem* rate of the anti-dumping duty was 1.16 percent for Mexinox.<sup>133</sup> The assessment rate calculated for Mexinox USA was 1.29 percent.<sup>134</sup> Without application of the Zeroing Procedures (*i.e.*, with the negative margins included), the margin of dumping for Mexinox would have been negative 9.95 percent and the assessment rate for Mexinox USA would have been negative 11.10 percent, and no anti-dumping duty would have been collected.<sup>135</sup>
142. Although Mexinox USA is appealing this determination to a NAFTA bi-national panel, it is currently facing assessments of approximately \$2.1 million in anti-dumping duties for this period. *None* of these duties should be assessed.

**IV. STANDARD OF REVIEW**

**A. General Considerations**

143. Article 11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (“DSU”) provides the standard of review for WTO panels in general. Article 11 specifically requires a panel to “make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making recommendations or in giving the rulings provided for in the covered agreements.” Article 3.2 of

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<sup>130</sup> See Exhibit MEX-5.F.

<sup>131</sup> See Exhibit MEX-5.G. (*Stainless Steel Sheet and Strip in Coils from Mexico*, 71 FR 76978 (Dep’t Commerce)(22 December 2006)(final results of anti-dumping duty administrative review)).

<sup>132</sup> See Exhibit MEX-5.G. (Program Log and Zeroing Analysis).

<sup>133</sup> See Exhibit MEX-5.G.

<sup>134</sup> See Exhibit MEX-5.G.

<sup>135</sup> See Exhibit MEX-5.G.

the DSU further provides that the provisions of the covered agreements are to be clarified “in accordance with customary rules of interpretation of public international law.”

144. Article 17.6 of the *Anti-Dumping Agreement* sets forth additional standards of review applicable to disputes under the *Anti-Dumping Agreement*, including the requirement that the panel, in its assessment of the facts of the matter, “shall determine whether the authorities’ establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective.”<sup>136</sup> If so, the panel should uphold the factual finding “even though the panel might have reached a different conclusion.”<sup>137</sup>
145. With respect to legal interpretations, Article 17.6 of the *Anti-Dumping Agreement* requires the panel to interpret the relevant provisions of the Agreement “in accordance with customary rules of interpretation of public international law.”<sup>138</sup> Where the panel finds that a relevant provision of the Agreement “admits of more than one permissible interpretation,” Article 17.6 requires the panel to uphold the authorities’ interpretation “if it rests upon one of those permissible interpretations.”<sup>139</sup>
146. It is generally accepted that the “customary rules of interpretation” referenced in Article 3.2 of the DSU and Article 17.6 of the *Anti-Dumping Agreement* are reflected in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* (“*Vienna Convention*”).<sup>140</sup> Article 31(1) of the *Vienna Convention* provides that a treaty shall be interpreted “in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose.”

## **B. Adherence to Prior Decisions of the Appellate Body**

147. A panel in a previous dispute stated that “although previous Appellate Body decisions are not strictly speaking binding on panels, there clearly is a legitimate expectation that panels will follow such decisions in subsequent cases raising issues that the Appellate Body has expressly addressed.”<sup>141</sup> This expectation that panels will respect prior Appellate Body rulings on the same issues is derived from Article 3.2 of the DSU which expressly requires panels to promote the systemic values of “security and predictability” in “the multilateral trading system.” The Appellate Body has supported this principle in, among other cases, *US – Oil Country Tubular Goods Sunset Reviews*, wherein the Appellate Body stated that “following the Appellate Body’s conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same.”<sup>142</sup>
148. The “as such” measure at issue in the present dispute – the USDOC’s Zeroing Procedures – is identical to the measure that was under consideration in *US – Zeroing (EC I)*, *US – Softwood*

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<sup>136</sup> *Anti-Dumping Agreement*, Art. 17.6(i).

<sup>137</sup> *Anti-Dumping Agreement*, Art. 17.6(i).

<sup>138</sup> *Anti-Dumping Agreement*, Art. 17.6(ii).

<sup>139</sup> *Anti-Dumping Agreement*, Art. 17.6(ii).

<sup>140</sup> See, e.g. Panel Report, *US – Zeroing (Japan)*, para. 7.10.

<sup>141</sup> Panel Report, *US – Zeroing (EC I)*, para. 7.30.

<sup>142</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 188.

*Lumber V*, *US – Softwood Lumber V* (Article 21.5 – Canada), and, most recently *US – Zeroing (Japan)*, and the Appellate Body in each of these cases has “expressly addressed” the issues raised by Mexico in this proceeding. To achieve the measure of “security and predictability” called for in Article 3.2 of the DSU, Mexico urges the Panel to follow these prior Appellate Body rulings in this case.

## V. THE ZEROING PROCEDURES MAY BE CHALLENGED “AS SUCH”

149. In the preceding paragraphs, Mexico has summarized the evidence concerning the existence, specific content, and general and prospective nature of the Zeroing Procedures that are the subject of this dispute settlement proceeding, particularly as that measure is manifested both in original investigations and periodic reviews. In the paragraphs that follow, Mexico substantiates its legal challenge to the Zeroing Procedures both “as such” and “as applied” in the original investigation and periodic reviews of *Stainless Steel from Mexico*. At the outset, however, Mexico first substantiates its claim that the Zeroing Procedures contested herein constitute a measure that is being challenged “as such.”

### A. The Scope of Measures that May be Challenged “As Such”

150. In accordance with Article 3.3 of the DSU, the WTO dispute settlement system is intended to resolve “situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member.”<sup>143</sup> In *US – Corrosion-Resistant Steel Sunset Review* the Appellate Body clarified the interpretation of “measure” as it applies to settlement of “as such” claims. Specifically, the Appellate Body found that the term “measure” extends to *any* act or omission attributable to a Member and that “acts setting forth rules or norms that are intended to have general and prospective application are measures subject to WTO dispute settlement.”<sup>144</sup> The Appellate Body further elaborated on the types of measures that can be the subject of “as such” challenges:

in GATT and WTO dispute settlement practice, panels have frequently examined measures consisting not only of particular acts applied only to a specific situation, but also of acts setting forth rules or norms that are intended to have general and prospective application. In other words, instruments of a Member containing rules or norms could constitute a “measure,” irrespective of how or whether those rules or norms are applied in a particular instance. This is so because the disciplines of the GATT and the WTO, as well as the dispute settlement system, are intended to protect not only the existing trade but also the security and predictability needed to conduct future trade . . . It would also lead to a multiplicity of litigation if instruments embodying rules or norms could not be challenged as such, but only in the instances of their application. Thus, allowing claims against measures, as such, serves the purpose of preventing

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<sup>143</sup> Art. 3.3 of the DSU.

<sup>144</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 81, 82.



future disputes by allowing the root of WTO-inconsistent behavior to be eliminated.<sup>145</sup>

151. Mexico also directs the Panel’s attention to Article 17 of the *Anti-Dumping Agreement*, which sets forth the rules applicable to anti-dumping dispute settlements and provides, in paragraph 3, that a complaining Member may request consultations when it considers that “any benefit accruing to it, directly or indirectly, under this Agreement is being nullified or impaired, or that the achievement of any objective is being impeded by another Member or Members” (emphasis added). The Appellate Body has correspondingly found that, “[t]here is no threshold requirement, in Article 17.3, that the measure in question be of a certain type.”<sup>146</sup>
152. Article 18.4 of the *Anti-Dumping Agreement* also addresses the type of measures that can, as such, be submitted to dispute settlement. It requires Members to ensure conformity of their “laws, regulations and administrative procedures” with the *Anti-Dumping Agreement*. As the Appellate Body stated in *US – Corrosion-Resistant Steel Sunset Review*, this phrase encompasses “the entire body of generally applicable rules, norms and standards adopted by Members in connection with the conduct of anti-dumping proceedings.”<sup>147</sup> Furthermore, the Appellate Body found there to be “no basis, either in the practice of the GATT and the WTO generally or in the provisions of the ADA, for finding that only certain types of measures can, as such, be challenged in dispute settlement proceedings under the ADA.”<sup>148</sup> Accordingly, an “as such” challenge may concern any “administrative procedures” that are rules, norms or standards of general and prospective application.
153. Finally, the Appellate Body has found that such rules, norms or standards need not be expressed as a written instrument in order to be subject to an “as such” challenge.<sup>149</sup> While accepting that “particular rigour is required” on the part of the panel to support a conclusion as to the existence of an unwritten rule or norm, including a “careful examination of the concrete instrumentalities that evidence the existence of purported rule or norm,” the Appellate Body found that an “as such” challenge can be sustained where a complaining party establishes clearly, “through arguments and supporting evidence,” three elements:

(1) that “the alleged ‘rule or norm’ is attributable to the responding Member”;

(2) its “precise content”; and

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<sup>145</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82 (footnote omitted).

<sup>146</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 86.

<sup>147</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 87.

<sup>148</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 88.

<sup>149</sup> Appellate Body Report, *US – Zeroing (EC I)*, para. 193 (“we see no basis to conclude that ‘rules or norms’ can be challenged, as such, only if they are expressed in the form of a written instrument”). Indeed, the United States conceded in *US – Zeroing (EC I)* and in *US – Zeroing (Japan)* that, in principle, “as such” challenges can be brought against measures that are not expressed in a written instrument. See, e.g., Appellate Body Report, *US – Zeroing (EC I)*, para. 195 (citing United States’ response to questioning at the oral hearing)(“...the United States agrees with the European Communities that an unwritten measure can, in principle, be challenged, as such...”); Opening Statement of the United States, *US – Zeroing (Japan)*, para. 4 (“While it is true that a measure need not have been applied in order to be subject to challenge as such, and it is true that a measure need not be written in order to be subject to challenge as such, the question here is whether Japan has proven the existence of an unwritten measure that has never been applied”)(emphasis added).

(3) “that it does have general and prospective application.”<sup>150</sup>

The Appellate Body added, with respect to the last criterion, that “[t]his evidence may include proof of the systematic application of the challenged ‘rule or norm.’”<sup>151</sup> This legal approach was most recently endorsed by the Appellate Body with respect to the Zeroing Procedures as challenged by Japan in *US – Zeroing (Japan)*.<sup>152</sup>

**B. The Zeroing Procedures Comprise a Rule or Norm that Can be the Subject of WTO Dispute Settlement**

154. Mexico has provided extensive evidence, as summarized in Section III, substantiating the precise content of the Zeroing Procedures, particularly as that measure is manifested by the USDOC in original investigations and periodic reviews. This evidence demonstrates that the Zeroing Procedures indeed reflect a rule or norm, attributable to the United States, that is of general and prospective application, thereby constituting a measure that can be challenged “as such.” In addition to substantiating the specific content of the measure, the evidence presented by Mexico further demonstrates, as prior Appellate Body reports have also found, that the USDOC has applied the Zeroing Procedures, without exception, and as a matter of deliberate policy, in every original investigation and periodic review conducted by the agency.
155. Prior to setting forth its case in this regard, Mexico notes that the Appellate Body in *US – Zeroing (EC I)* (with regard to original investigations), and *US – Zeroing (Japan)* (with regard to *all* anti-dumping proceedings, including both original investigations and periodic reviews), specifically upheld the determinations by the Panels in those cases that the USDOC Zeroing Procedures can be challenged, as such, in WTO dispute settlement.<sup>153</sup> It bears repeating that the dispute settlement panels in those cases were considering the *same* measure challenged by Mexico based on very similar, and in some cases identical, evidence. There is, therefore, no basis, evidentiary or legal, for this Panel to reach a different conclusion.

**1. Zeroing Is Attributable To The Responding Member, The United States**

156. There can be no legitimate disagreement that the Zeroing Procedures at issue in this case are attributable to the United States.<sup>154</sup> Article 3.3 of the DSU establishes, for purposes of dispute settlement proceedings, that a nexus must exist between the “measure” and a “Member.” This

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<sup>150</sup> Appellate Body Report, *US – Zeroing (EC I)*, para. 198.

<sup>151</sup> Appellate Body Report, *US – Zeroing (EC I)*, para. 198.

<sup>152</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 88.

<sup>153</sup> Appellate Body Report, *US – Zeroing (EC I)*, para. 205 (zeroing measure used in original investigations can be challenged “as such”); Appellate Body Report, *US – Zeroing (Japan)* at para. 88 (zeroing measure used in periodic reviews can be challenged “as such”).

<sup>154</sup> The issue of attribution was challenged by the United States in *US – Zeroing (Japan)* only in the context of whether zeroing in original investigations using the transaction-to-transaction or average-to-transaction comparison methodology was attributable to the United States, where the United States had (as of that date) only employed transaction-to-transaction comparisons once and had never employed average-to-transaction comparisons in original investigations. However, the Appellate Body affirmed that the measure (“zeroing procedures”) in fact constitutes a *single measure*, regardless of the comparison methodology employed or the type of proceeding. See Appellate Body Report, *US – Zeroing (Japan)*, para. 77. The United States did not appeal the issue of whether zeroing in periodic reviews was a measure attributable to the United States.



requirement is not particularly onerous or restrictive. As noted by the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*:

In principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings. The acts or omissions that are so attributable are, in the usual case, the acts or omissions of the organs of that state, including those of the executive branch.<sup>155</sup>

157. The Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*, citing the Panel Report in *US – DRAMS*, further noted that “[b]oth specific determinations made by a Member’s executive agencies and regulations issued by its executive branch can constitute acts attributable to that Member.”<sup>156</sup>
158. In this case, the evidence presented by Mexico clearly establishes that the Zeroing Procedures at issue are attributable to the United States. Specifically, the evidence presented by Mexico establishes that the International Trade Administration, within the USDOC, is the investigating authority and that the USDOC, as a matter of deliberate policy, consistently follows the Zeroing Procedures and, without exception, applies zeroing in the calculation of margins of dumping in original investigations and reviews (including periodic reviews). The USDOC is indisputably an Executive Branch agency of the United States. As such, the Zeroing Procedures at issue in this dispute are attributable to the United States, regardless of the procedural setting or the method of comparison used.<sup>157</sup>

## 2. The Specific Content Of The Zeroing Procedures Has Been Precisely Identified

159. The specific content of the Zeroing Procedures used by the USDOC in original investigations and periodic reviews is also fully evidenced by Mexico on the record of this proceeding and is likewise not reasonably disputed.
160. The precise content of the measure as manifested in both original investigations and periodic reviews is fully explained and summarized in detail in Section III above. As described and documented by the expert’s declaration provided by Ms. Owenby, the specific content of this rule is, among other things, manifested in the programming code (the “Zeroing Line”) and other

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<sup>155</sup> *US – Corrosion-Resistant Steel Sunset Review*, para. 81 (footnotes omitted), quoted in Panel Report, *US – Zeroing (Japan)*, para. 7.39; this finding was affirmed by the Appellate Body in Appellate Body Report, *US – Zeroing (Japan)*, paras. 74, 88.

<sup>156</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81, n.79.

<sup>157</sup> Mexico notes that the Appellate Body in *US – Zeroing (EC 1)* and, more recently, in *US – Zeroing (Japan)*, based on evidence before the Panel which is nearly identical to the evidence presented by Mexico in the current dispute and which describes the *same* measure, held that the Zeroing Procedures is attributable to the United States. See Appellate Body Report, *US – Zeroing (EC 1)*, para. 204 (“...we believe that, in the specific circumstances of this case, the evidence before the Panel was sufficient to identify the precise content of the zeroing methodology; that the zeroing methodology is attributable to the United States, and that it does have general and prospective application. This evidence consisted of considerably more than a string of cases, or repeat action, based on which the Panel would have simply divined the existence of a measure in the abstract”)(emphasis added); see also Appellate Body Report, *US – Zeroing (Japan)*, para. 88 (“The Panel also examined ample evidence regarding the precise content of this rule or norm, its nature as a measure of general and prospective application, and its attribution to the United States. In our view, the Panel properly assessed this evidence”)(emphasis added).

procedures through which the USDOC systematically disregards (and therefore treats as zero) negative differences between export prices and normal value.<sup>158</sup> The specific content of the Zeroing Procedures, as a measure, is further substantiated in Ms. Owenby's statement appended to this submission and the other supporting documentation provided by Mexico, including copies of the model computer programs used as a basis for programs used in specific original investigations and periodic reviews, the case-specific computer programs used in the original determination and subsequent six periodic reviews of *Stainless Steel from Mexico* (all of which contain the Zeroing Line), references to the Zeroing Procedures in the AD manual, numerous published statements by the U.S. authorities, and other documentary evidence precisely identifying the content of the zeroing rule that is challenged.<sup>159</sup>

161. Given that the measures at issue are the same, the evidence before the panel in this case concerning the specific content of the Zeroing Procedures is, not surprisingly, very similar in scope and content to the evidence that was before the panel in *US – Zeroing (Japan)* and found to be adequate to substantiate the “precise content” of the measure:

The evidence before the Panel in [*US – Zeroing (Japan)*] included model computer programs used by the USDOC that serve as a basis for programs used in specific original investigations and periodic reviews. These programs include an instruction to apply zeroing through the “standard zeroing line.” The Panel also had evidence before it regarding the application of the zeroing procedures in 16 different anti-dumping proceedings, including four original investigations, one new shipper review, and 11 periodic reviews.<sup>160</sup>

The Appellate Body appropriately described this evidence as “ample” and found it sufficient to establish the basis for challenging the measure “as such.”<sup>161</sup>

162. Lastly, Mexico notes that the detailed findings concerning the precise content of the Zeroing Procedures contained in the panel reports in *US-Zeroing (Japan)* and *US – Zeroing (EC I)*, *themselves* constitute conclusive evidence as to the precise content of the measure challenged by Mexico in this case, because the measures are the same. While the evidence presented by Mexico is sufficient on its own to substantiate the precise content of the Zeroing Procedures, given the

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<sup>158</sup> However, Mexico agrees with the Panel's statement in *US – Zeroing (Japan)*, para. 7.46, that the computer code is not *by itself* the “measure” that is challenged here. The measure challenged here is the unwritten rule or norm pursuant to which the United States systematically disregards or treats as zero negative intermediate comparison differences between export price and normal value.

<sup>159</sup> This evidence is summarized in Section III *supra*.

<sup>160</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 83 (footnotes omitted).

<sup>161</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 88. Also based upon evidence similar to that presented here by Mexico, and involving the same measure, the Panel in *US – Zeroing (EC I)* likewise found that “the zeroing methodology manifested in the ‘Standard Zeroing Procedures’ represents a well-established and well-defined norm followed by USDOC and ... it is possible based on this evidence to identify with precision the specific content of that norm and the future conduct that it will entail.” Panel Report, *US – Zeroing (EC I)*, para. 7.104 (footnote omitted). The Appellate Body agreed with this finding, stating that “the evidence before the Panel was sufficient to identify the precise content of the zeroing methodology.” Appellate Body Report, *US – Zeroing (EC I)*, para. 204.

identity of the measures, this Panel may freely make reference to, and draw legal conclusions, from the evidence and findings presented in those cases with respect to the specific content of the measure at issue here.

### 3. The Zeroing Procedures Have General And Prospective Application

163. Lastly, the evidence presented by Mexico clearly demonstrates, as prior Appellate Body reports have also found, that the Zeroing Procedures have general and prospective application – indeed that zeroing is a deliberate policy that has been, and continues to be, systematically applied by the USDOC, without exception, in *all* original investigations and periodic reviews. In the words of the Panel in *US – Zeroing (Japan)* (quoted approvingly by the Appellate Body) for the USDOC zeroing “goes beyond the simple repetition of the application of a certain methodology to specific cases” and instead “reflects a deliberate policy.”<sup>162</sup>
164. Evidence presented by Mexico of the general and prospective nature of this rule is more fully identified and discussed above in Section III of this submission. That evidence includes, but is not limited to, the following:
- The standard computer programs used by the USDOC that serve as the basis for programs used in specific original investigations and periodic reviews, including an instruction to apply zeroing through the Zeroing Line.<sup>163</sup>
  - Evidence of the application of the Zeroing Procedures in the original investigation of *Stainless Steel from Mexico* and in each of the subsequent six periodic reviews of *Stainless Steel from Mexico*.<sup>164</sup>
  - Detailed factual findings by the Panels in *US – Zeroing (EC I)*, *US – Softwood Lumber V*, *US – Zeroing (Japan)*, and *US – Zeroing (Ecuador)*, establishing that the USDOC applied the Zeroing Procedures in all 18 original investigations and 27 periodic reviews directly under consideration in those proceedings.<sup>165</sup>
  - A summary of anti-dumping determinations made by the USDOC since January 2006 demonstrating the *continued* application of zeroing in both original investigations and periodic reviews.<sup>166</sup>
  - Factual findings by the prior dispute settlement panels considering the USDOC’s Zeroing Procedures including, most recently, by the Panel in *US – Zeroing (Japan)* which found that the “standard zeroing line . . . has been included in the vast majority of computer program[s] used by the USDOC to calculate margins of dumping . . . and [even] where the line has not been included, the USDOC has used other methods to exclude export

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<sup>162</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 85 (quoting Panel Report, *US – Zeroing (Japan)*, para. 7.52).

<sup>163</sup> Exhibit MEX-5.

<sup>164</sup> Exhibit MEX-5.

<sup>165</sup> Panel Report, *US – Zeroing (EC I)*; Panel Report, *US – Softwood Lumber V*; Panel Report, *US – Zeroing (Japan)*; and Panel Report, *US – Zeroing (Ecuador)*.

<sup>166</sup> Exhibit MEX-6.

prices higher than the normal value from the numerator of the weighted average margin of dumping.”<sup>167</sup>

- Consistent public statements made by the USDOC and other government agencies by U.S. authorities, including statements made before the U.S. courts and in response to administrative challenges in specific anti-dumping proceedings, characterizing the Zeroing Procedures as a deliberate policy.<sup>168</sup>
- The fact that the Zeroing Procedures have a basis in the U.S. statutory legal framework by virtue, *inter alia*, of Section 771(35) of the Tariff Act.<sup>169</sup>
- Language in the AD Manual indicating that, in order to maintain consistency in calculation procedures, the Zeroing Procedures are included in every margin calculation procedure.<sup>170</sup>
- Concessions by the United States before the WTO dispute settlement panels in other proceedings that the Zeroing Procedures are incorporated into the standard computer programs that are used consistently by the USDOC in performing dumping margin calculations in periodic reviews.<sup>171</sup>
- Concessions by the United States in both *US – Zeroing (EC I)* and in *US – Zeroing (Japan)* that the United States could not identify *any* instance in which zeroing was not applied.<sup>172</sup>
- Statements by Ms. Owenby that the Zeroing Procedures as carried out by the USDOC in calculating anti-dumping margins has been performed invariably over an extended period of time.<sup>173</sup>

165. In addition to the above, Ms. Owenby’s testimony indicates that the procedures used to calculate the overall weighted average dumping margin, which include the standard Zeroing Procedures, are executed in all antidumping margin calculations:

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<sup>167</sup> Panel Report, *US – Zeroing (Japan)*, para. 7.51 (footnotes omitted).

<sup>168</sup> Exhibit MEX-6.

<sup>169</sup> See Panel Report, *US – Zeroing (Japan)*, para. 7.53 (noting that a measure is more susceptible to being challenged as such when it has basis in a legal framework, and further finding that such basis in a legal framework exists for the zeroing measure by virtue of Section 771(35) of the Tariff Act).

<sup>170</sup> AD Manual, Ch. 9, at 8; see *supra* paras 55, 97.

<sup>171</sup> See Panel Report, *US – Zeroing (EC I)*, para. 7.103.

<sup>172</sup> See Appellate Body Report, *US – Zeroing (EC I)*, para. 201; Panel Report, *US – Zeroing (EC I)*, para. 7.103. See Appellate Body Report, *US – Zeroing (Japan)*, para. 87.

<sup>173</sup> See Owenby Statement, para. 17 (“[T]hroughout my career, the procedure for calculating the overall weighted-average percentage dumping margin has never changed. Every USDOC anti-dumping calculation program I have examined in the past, and as recently as today, including both standard and case-specific programs, has contained the same overall percentage dumping margin programming language, including the “zeroing” line...”)

A few procedures are executed in all antidumping margin calculations. The standard computer programs do not provide any options for these procedures. There are no “switches” to “turn off” these portions of the computer programming as they are universal and executed in every margin calculation, regardless of the product, the country, or foreign respondent. One of these universal procedures is the calculation of the overall weighted-average dumping margin.<sup>174</sup>

166. Examining similar evidence presented in *US – Zeroing (Japan)*, the Panel in that case likewise concluded that the Zeroing Procedures (as applicable in original investigations and all forms of administrative reviews, including periodic reviews), “reflects a deliberate policy” and that the evidence shows not only that the USDOC “invariably applies zeroing but also that USDOC has repeatedly described its zeroing methodology in terms of a long-standing policy that it considers to be consistent with its statutory obligations.”<sup>175</sup> As summarized with approval by the Appellate Body, the Panel in *US - Zeroing (Japan)* found that the evidence before it:

shows that what is at issue goes beyond the simple repetition of the application of a certain methodology to specific cases.” According to the Panel, “[t]he manner in which [the] USDOC’s use of zeroing has been characterized in statements by [the] USDOC [and] other United States’ agencies and courts ... confirms that [the] USDOC’s consistent application of zeroing reflects a deliberate policy.” For the Panel, the USDOC “has repeatedly stated that ‘[it does] not allow’ export sales at prices above normal value to offset dumping margins on other export sales, has referred to its ‘practice’ or ‘methodology’ of not providing for offsets for non-dumped sales, has pointed out that the United States Court of Appeals for the Federal Circuit has ruled that the ‘zeroing practice’ ... is a reasonable interpretation of the law, that the US Congress was aware of [the] USDOC’s methodology when it adopted the Uruguay Round Agreements Act, and that not granting an offset for non-dumped sales ‘has consistently been an integral part of the [USDOC]’s [W-W] analysis’.” The Panel added that “the United States Department of Justice has stated that the USDOC ‘has consistently applied its practice of treating non-dumped sales as sales with a margin of zero since the implementation of the [Uruguay Round Agreements Act]’ and has referred to [the] USDOC’s ‘long-standing methodology’ and to ‘the zeroing practice, which has been followed for at least 20 years’ and which ‘predated the passage of the latest major amendment of the Anti-dumping law’.” Finally, the Panel noted that the “United States Court of International Trade has stated that ‘[the USDOC’s] zeroing

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<sup>174</sup> Owenby Statement, para. 15.

<sup>175</sup> Panel Report, *US – Zeroing (Japan)*, paras. 7.52, 7.54.

methodology in its calculation of dumping margins is grounded in long-standing practice’.”<sup>176</sup>

167. On this basis, the Appellate Body affirmed the Panel’s conclusion in *US – Zeroing (Japan)* that “a single rule or norm of general and prospective application that provides for disregarding negative comparison results exists,”<sup>177</sup> and that “the ‘zeroing procedures’ under different comparison methodologies, and in different stages of anti-dumping proceedings, do not correspond to separate rules or norms, but simply reflect different manifestations of a single rule or norm.”<sup>178</sup>
168. As noted, the measure at issue here is the same and the evidence presented is very similar, and in several cases identical, in content and scope to the evidence presented by the complainants in *US – Zeroing (EC I)* and *US – Zeroing (Japan)*. In light of the foregoing, it is clear that the USDOC incorporates its Zeroing Procedures into its dumping margin calculations in a consistent, deliberate, and predictable manner. Indeed there is no evidence that the United States has ever failed to apply zeroing in past cases, or would ever fail to apply zeroing in future cases. Accordingly, Mexico has demonstrated that the Zeroing Procedures challenged herein have both general and prospective application regardless of the comparison methodologies used or the stage of the dumping proceeding in which applied.

#### 4. Conclusion

169. The evidence presented by Mexico establishes that (1) the Zeroing Procedures are an unwritten rule or norm that is attributable to the United States; (2) the specific content of the Zeroing Procedures is precisely identified; and (3) the Zeroing Procedures have general and prospective application. The Zeroing Procedures followed by the USDOC therefore constitute a measure of general and prospective application that can be, and hereby is, challenged “as such.”

## VI. THE CONCEPTS OF “DUMPING” AND “MARGINS OF DUMPING”

170. As discussed below, there are several key legal principles concerning the concepts of “dumping” and “margins of dumping” provided for in the text of the *Anti-Dumping Agreement* and the GATT 1994, and these principles apply to all anti-dumping proceedings, including original investigations and periodic reviews. Mexico’s claim that the Zeroing Procedures are inconsistent with the relevant agreements, is largely derived from these core principles.

### A. “Margins Of Dumping” May Only Be Calculated For the Product as a Whole and Not for Individual Transactions or Models

171. First, “dumping” and “margins of dumping” are concepts provided for under the relevant agreements that relate solely, and exclusively, to the “product” under consideration taken “as a whole.” While, as discussed below, it may be permissible (even obligatory in certain circumstances) to make intermediate price comparisons at levels below the product as a whole (such as by model or transaction), the Appellate Body has repeatedly confirmed that the relevant

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<sup>176</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 85 (footnotes omitted).

<sup>177</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 86.

<sup>178</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 88.



- agreements recognize “dumping” and “margins of dumping” only, and exclusively, with respect to the product under consideration taken as a whole.
172. The starting point for this analysis is in the GATT 1994. “Dumping” is defined in Article VI:1 of the GATT 1994 as existing when a “product” of one country is introduced into the commerce of another country at less than the normal value of the “product.” Consistent with this definition, Article VI:2 further provides for the levying of anti-dumping duties in respect of a “dumped product” in order to offset or prevent the injurious effect of dumping.
173. This definition of dumping in reference to a “product” is carried over into the *Anti-Dumping Agreement* by Article 2.1, which, by virtue of its introductory clause (“[f]or purposes of this Agreement”), expressly applies this definition to the *entire* Agreement. Thus, as the Appellate Body in *US – Zeroing (Japan)* noted, “the terms ‘dumping’, as well as ‘dumped imports’, have the same meaning in all provisions of the Agreement and for all types of anti-dumping proceedings, including original investigations, new shipper reviews, and periodic reviews. In each case, they relate to a *product* because it is the product that is introduced into the commerce of another country at less than its normal value in that country.”<sup>179</sup>
174. Article VI:2 defines “margin of dumping” as the difference between the normal value and the export prices and establishes the link between “dumping” and “margin of dumping.” The margin of dumping reflects the magnitude of dumping. It is also one of the factors to be taken into account to determine whether dumping causes or threatens injury.<sup>180</sup> Article VI:2 lays down that “[i]n order to offset dumping, a Member may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product.” Thus, the “margin of dumping” also is defined in relation to a “product.”
175. Consistent with these principles, the Appellate Body has on many occasions found that the terms “dumping” and “margins of dumping” cannot apply only for a type, model or category of the particular product under consideration. A close examination of those rulings reveals a carefully reasoned and integrated interpretation of the text of the agreements based on customary rules of interpretation, that has been consistently applied and developed in the Appellate Body’s jurisprudence.
176. For example, in *EC – Bed Linen*, the first Appellate Body report to deal extensively with the issue of zeroing, the Appellate Body explained with respect to the definition of “dumping” contained in Article 2.1:
- From the wording of this provision, it is clear to us that the *Anti-Dumping Agreement* concerns the dumping of a *product*, and that, therefore, the margins of dumping to which Article 2.4.2 refers are the margins of dumping for a *product*.<sup>181</sup>
177. The Appellate Body in *EC – Bed Linen* went on to consider that the European Communities had, for purposes of the investigation then under consideration, defined the “product” under investigation as “cotton-type bed linen.” The Appellate Body concluded that “[h]aving defined

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<sup>179</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 109.

<sup>180</sup> Anti-Dumping Agreement, Art. 3.4.

<sup>181</sup> Appellate Body Report, *EC – Bed Linen*, para. 51.



the *product* as it did, the European Communities was bound to treat that *product* consistently thereafter in accordance with that definition.”<sup>182</sup> Thus, consistent with the definition of “dumping” as set forth in Article 2.1, the Appellate Body in *EC- Bed Linens* found that intermediate price comparisons for “models” of the product under consideration are not “margins of dumping.” The Appellate Body concluded: “Whatever the method used to calculate the margins of dumping, in our view, these margins must be, and can only be, established for the *product* under investigation as a whole.”<sup>183</sup>

178. The same reasoning was applied in *US – Softwood Lumber V*, the next WTO dispute settlement proceeding to address zeroing extensively,<sup>184</sup> and the first to address the Zeroing Procedures followed by the USDOC. As in *EC – Bed Linen*, the Appellate Body started its analysis with an examination of the definitions of margins of dumping as set forth in Article VI of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement*, noting the reference in both to dumping of a “product.” The Appellate Body found that:

It is clear from the texts of these provisions that dumping is defined in relation to a product as a whole as defined by the investigating authority. Moreover, we note that the opening phrase of Article 2.1—“[f]or the purpose of this Agreement”—indicates that the definition of “dumping” as contained in Article 2.1 *applies to the entire Agreement*, which includes, of course, Article 2.4.2. “Dumping”, within the meaning of the *Anti-Dumping Agreement*, can therefore be found to exist only for the product under investigation as a whole, and cannot be found to exist only for a type, model, or category of that product.<sup>185</sup>

179. The Appellate Body in *US – Softwood Lumber V* likewise found that the term “margins of dumping,” as defined by Article VI:2 of the GATT 1994, second sentence, relates the concept to the *product* under investigation. As with dumping, “‘margins of dumping’ can be found only for the product under investigation as a whole, and cannot be found to exist for a product type, model, or category of that product.”<sup>186</sup> In this regard, the Appellate Body recognized that multiple averaging is permissible, but noted clearly, and unequivocally, that:

In our view, the results of the multiple comparisons at the subgroup level are, however, not “margins of dumping” within the meaning of Article 2.4.2. Rather, those results reflect only

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<sup>182</sup> Appellate Body Report, *EC – Bed Linen*, para. 53.

<sup>183</sup> Appellate Body Report, *EC – Bed Linen*, para. 53 (emphasis added).

<sup>184</sup> The Zeroing Procedures were also considered to some extent in *US – Corrosion-Resistant Steel Sunset Reviews (Japan)*. In that case, the Appellate Body reversed a panel report that had found no violation of the *Anti-Dumping Agreement* as a result of using margins of dumping from previous administrative reviews (which had relied on zeroing) to determine the likely margins of dumping in a sunset review. The Appellate Body determined that a finding of no violation was inappropriate, but did not reach the question whether the Zeroing Procedures themselves were inconsistent with the relevant agreements, due to a lack of evidence in that record. See *id.*, paras. 133-38.

<sup>185</sup> Appellate Body Report, *US – Softwood Lumber V*, para. 93 (emphasis added).

<sup>186</sup> Appellate Body Report, *US – Softwood Lumber V*, para. 96.

intermediate calculations made by an investigating authority in the context of establishing margins of dumping for the product under investigation. Thus, it is only on the basis of aggregating *all* these “intermediate values” that an investigating authority can establish margins of dumping for the product under investigation as a whole.<sup>187</sup>

180. In the next case to address the Zeroing Procedures, *US – Zeroing (EC I)*, the Appellate Body agreed with the conclusions of the Appellate Body in both *US – Softwood Lumber V* and *EC – Bed Linen* that, under the *Anti-Dumping Agreement* and Article VI of the GATT 1994, “‘dumping’ and ‘margins of dumping’ must be established for the product under investigation as a whole.”<sup>188</sup> In particular, the Appellate Body stated that:

if the investigating authority establishes the margin of dumping on the basis of multiple comparisons made at an intermediate stage, it is required to aggregate the results of all of the multiple comparisons, *including those where the export price exceeds the normal value*. If the investigating authority chooses to undertake multiple comparisons at an intermediate stage, it is not allowed to take into account the results of only some multiple comparisons, while disregarding others.<sup>189</sup>

181. Finally, in *US – Zeroing (Japan)*, the Appellate Body continued this line of authority, finding:

A product under investigation may be defined by an investigating authority. But “dumping” and “margins of dumping” can be found to exist only in relation to that product as defined by that authority. They cannot be found to exist for only a type, model, or category of that product. Nor, under any comparison methodology, can “dumping” and “margins of dumping” be found to exist at the *level* of an individual transaction. Thus, when an investigating authority calculates a margin of dumping on the basis of multiple comparisons of normal value and export price, the results of such intermediate comparisons are not, in themselves, margins of dumping. Rather, they are merely “inputs that are [to be] aggregated in order to establish the margin of dumping of the product under investigation for each exporter or producer.”<sup>190</sup>

182. Mexico agrees with, and endorses, the reasoning consistently, and carefully, applied by the Appellate Body from *EC – Bed Linen* to *US – Zeroing (Japan)*. As explained by the Appellate Body in those cases, the specific textual language of Articles VI:1 and VI:2 of the GATT 1994, and the text of Article 2.1 of the *Anti-Dumping Agreement*, read in the context of other provisions

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<sup>187</sup> Appellate Body Report, *US – Softwood Lumber V*, para. 97.

<sup>188</sup> Appellate Body Report, *US – Zeroing (EC I)*, para. 126.

<sup>189</sup> Appellate Body Report, *US – Zeroing (EC I)*, para. 127 (emphasis added).

<sup>190</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 115.

of the relevant agreements (what the Appellate Body in *US – Zeroing (Japan)* refers to as the “design and architecture of the *Anti-Dumping Agreement*”<sup>191</sup>), establish 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. Accordingly, if the USDOC establishes a margin of dumping on the basis of multiple comparisons made at an intermediate stage, it *must* also aggregate the results of *all* of the multiple comparisons, including those where the export price is greater than normal value. It is not permissible under the terms of the relevant agreements to take into account the results of only some multiple comparisons while disregarding others. Mexico’s (and the Appellate Body’s) reasoning in this regard is properly based on the text of the agreements and is fully consonant with the governing standard of review, including the applicable provisions of the *Vienna Convention*. Moreover, as the Appellate Body most recently found in *US – Zeroing (Japan)*, this principle applies in *all* procedural contexts and with respect to *all* comparison methodologies used.

**B. Margins of Dumping May be Calculated Only with Respect to Individual Exporters or Foreign Producers**

183. The second fundamental legal principle this Panel must take into consideration in evaluating Mexico’s claims is that “dumping” and “margins of dumping” are determinations that are permitted to be made only with respect to individual exporters or foreign producers – and not with respect to individual importers or individual import transactions. Once again, this basic legal principle is grounded in the text, and context, of the relevant agreements and has been consistently identified and endorsed by the Appellate Body in its extensive zeroing jurisprudence.
184. This principle was first most fully explained by the Appellate Body with reference to the Zeroing Procedures in *US – Zeroing (EC I)*. In that case, the Appellate Body dismissed an argument set forth by the United States that, in duty assessment proceedings, it is permissible to interpret the term “margins of dumping” as applying on a transaction- or importer-specific basis, concluding instead that “under Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, margins of dumping are established for foreign producers or exporters.”<sup>192</sup>
185. The Appellate Body in *US – Zeroing (EC I)* began its analysis with the observation that the text of Article 6.10 of the *Anti-Dumping Agreement* provides relevant context for the interpretation of the term “margin of dumping” in Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994. Noting that the text of Article 6.10 requires the investigating authorities “as a rule” to determine “an individual margin of dumping for each known exporter or producer concerned of the product under investigation,” the Appellate Body correctly concluded that the first sentence of Article 6.10 establishes that “margins of dumping for a product must be established for exporters or foreign producers.”<sup>193</sup>
186. In reaching this conclusion, the Appellate Body also relied upon a series of previous Appellate Body decisions. First, the Appellate Body noted that in *Mexico – Anti-Dumping Measures on Rice*, the Appellate Body “confirmed that the term ‘margin of dumping’ in the *Anti-Dumping Agreement* in general refers to the margins of dumping for exporters or foreign producers,” an

<sup>191</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 114.

<sup>192</sup> Appellate Body Report, *US – Zeroing (EC I)*, para. 129.

<sup>193</sup> Appellate Body Report, *US – Zeroing (EC I)*, para. 128. (The Appellate Body further correctly noted that nothing in the text of Article 6.10 limits its application to original investigations.)

observation that was made “in relation to the interpretation of the term ‘margin of dumping’ in Article 5.8 of the *Anti-Dumping Agreement*.”<sup>194</sup>

187. Second, the Appellate Body recalled that in *US – Hot-Rolled Steel* the term “margin of dumping” in the context of Article 2.4.2 of the *Anti-Dumping Agreement* was found to mean “the individual margin of dumping determined for each of the investigated exporters and producers of the product under investigation, for that particular product.”<sup>195</sup>
188. Third, the Appellate Body noted the finding in *US – Corrosion-Resistant Steel Sunset Review* that the calculation methodologies used to determine margins of dumping in the context of sunset reviews under Article 11.3 of the *Anti-Dumping Agreement* must conform to Article 2.4 and that, besides Article 2.4, “there are ‘no other provisions in the *Anti-Dumping Agreement* according to which Members may calculate dumping margins.’”<sup>196</sup> Because, according to *US – Hot-Rolled Steel*, the term “margin of dumping” under Article 2.4.2 refers to margins of dumping for exporters and foreign producers, the *US – Corrosion-Resistant Steel Sunset Review* finding necessarily implies “that the margins of dumping that might be established in a sunset review under Article 11.3 are margins of dumping for exporters or foreign producers.”<sup>197</sup>
189. In conclusion, the Appellate Body in *US – Zeroing (EC I)* found that, in light of the foregoing:

[e]stablishing margins of dumping for exporters or foreign producers is consistent with the notion of dumping, which is designed to counteract the foreign producer’s or exporter’s pricing behaviour. Indeed, it is the exporter, not the importer, that engages in practices that result in situations of dumping. For all these reasons, under Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, margins of dumping are established for foreign producers or exporters.<sup>198</sup>

190. Consistent with these prior Appellate Body findings, the Appellate Body in *US – Zeroing (Japan)* most recently concluded that:

the *Anti-Dumping Agreement* prescribes that dumping determinations be made in respect of each exporter or foreign producer examined. This is because dumping is the result of the pricing behaviour of individual exporters or foreign producers. Margins of dumping are established accordingly for each exporter or foreign producer on the basis of a comparison between normal value and export prices, both of which relate to the pricing behaviour of that exporter or foreign producer. In order to assess properly the pricing behaviour of an individual

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<sup>194</sup> Appellate Body Report, *US – Zeroing (EC I)*, para. 129 (footnote omitted).

<sup>195</sup> Appellate Body Report, *US – Zeroing (EC I)*, para. 129 (footnote omitted).

<sup>196</sup> Appellate Body Report, *US – Zeroing (EC I)*, para. 129 (footnote omitted) (citing Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127).

<sup>197</sup> Appellate Body Report, *US – Zeroing (EC I)*, para. 129.

<sup>198</sup> Appellate Body Report, *US – Zeroing (EC I)*, para. 129.

exporter or foreign producer, and to determine whether the exporter or foreign producer is in fact dumping the product under investigation and, if so, by which margin, it is obviously necessary to take into account the prices of all of the export transactions of that exporter or foreign producer.<sup>199</sup>

191. In reaching this conclusion, the Appellate Body in *US – Zeroing (Japan)*, like its predecessors, drew upon the text of other provisions of the *Anti-Dumping Agreement*, likewise recognizing that dumping is a concept relating to the behavior of exporters and producers, including Article 6.10 (discussed above). In addition the Appellate Body drew contextual support from the text of Article 9.4, which refers to the treatment of exporters and producers not examined individually and which provides that the margins of dumping assigned to such entities shall not exceed “the weighted average margin of dumping established with respect to the selected exporters.”<sup>200</sup> The Appellate Body also drew contextual support from Article 9.5, which indicates that the purpose of new shipper reviews is to determine “individual margins of dumping for any exporters or producers in the exporting country in question who have not exported the product” and refers to a “determination of dumping in respect of such producers and exporters.”<sup>201</sup>
192. For the reasons stated, Mexico submits that the text of the relevant agreements define “dumping” and “margins of dumping” not only solely with respect to the product at issue taken “as a whole,” but also solely with respect to the *individual exporters or foreign producer in question*. In the following paragraph, Mexico applies these principles to the measure at issue in this case.

## VII. THE ZEROING PROCEDURES IN ORIGINAL INVESTIGATIONS

### A. As Such Claims

193. Mexico submits that the U.S. Zeroing Procedures that are used in original investigations, as described above in Section III.B.2. of this submission, are “as such” in violation of Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4 and 2.4.2 of the *Anti-Dumping Agreement*.
194. At the outset Mexico wishes to make clear that its “as such” challenge to the Zeroing Procedures used in original investigations is not restricted to the context where comparisons are made on an average-to-average basis. As set forth below, and as the Appellate Body has already found, the Zeroing Procedures constitute a single norm or rule that applies in all specific comparison methodologies and investigation phases.<sup>202</sup> Accordingly, Mexico challenges the zeroing procedure used in original investigations “as such”, whether the comparison methodology used is the average-to-average methodology (as currently preferred under the USDOC’s regulations and heretofore almost universally applied) or under other comparison methodologies such as transaction-to-transaction (as applied in the determination disputed in *US – Softwood Lumber V (Article 21.5 – Canada)*), or average-to-transaction.

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<sup>199</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 111.

<sup>200</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 112.

<sup>201</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 112.

<sup>202</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 88.



**1. Inconsistency with Article VI:1 and VI:2 of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement**

195. As fully discussed above in Section VI.A., it is well established in the relevant WTO jurisprudence that “dumping” and “margins of dumping” as defined in Articles VI:1 and VI:2 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement* are concepts that are strictly defined in relation to the “product” under consideration.<sup>203</sup> The terms “dumping” and “dumping margins” in the *Anti-Dumping Agreement* therefore “apply to the product under investigation *as a whole* and do not apply to sub-group levels.”<sup>204</sup> These definitions apply throughout the Agreement in all procedural phases (including original investigations) and with respect to all comparison methodologies (including comparisons made on an average-to-average, transaction-to-transaction, and average-to-transaction basis).<sup>205</sup>
196. As described above in Section III, the USDOC normally calculates margins of dumping in original investigations by applying the average-to-average comparison methodology in which multiple intermediate comparisons are made between export price and normal value for individual models. Similar, intermediate comparisons may alternatively be made under the USDOC regulations and practice between individual export and normal value transactions (applying the transaction-to-transaction comparison methodology) or between average normal values and individual export transactions (applying the average-to-transaction comparison methodology).<sup>206</sup> Regardless of the comparison methodology, pursuant to the challenged Zeroing Procedures, in calculating the overall margin of dumping for the producer or exporter under consideration, the USDOC aggregates the intermediate comparison results and, in so doing, disregards (or treats as zero) any intermediate comparison results where the export price exceeds the normal value.<sup>207</sup>
197. The Zeroing Procedures, as used in original investigations, are manifestly inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement* because the USDOC includes the comparison results for only *part* of the product under consideration – specifically, those transactions involved in intermediate comparison results yielding “positive” differences (where the normal value exceeds the export price). As the Appellate Body has found, “when an investigating authority calculates a margin of dumping on the basis of multiple comparisons of normal value and export price, the results of such intermediate comparisons are *not*, in themselves, margins of dumping.”<sup>208</sup> Instead, the results of such calculations “are merely ‘inputs that are [to be] aggregated in order to establish the margin

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<sup>203</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 110.

<sup>204</sup> Appellate Body Report, *US – Softwood Lumber V*, para. 102.

<sup>205</sup> See, e.g., Appellate Body Report, *US – Softwood Lumber V*, para. 93; Appellate Body Report, *US – Zeroing (Japan)*, para. 115.

<sup>206</sup> See 19 C.F.R. § 351.414(b)(2) and (c)(1). See Exhibit MEX-3.

<sup>207</sup> In *US – Softwood Lumber V (Article 21.5 – Canada)*, Canada successfully challenged the USDOC’s use of zeroing in the transaction-to-transaction comparison methodology. See Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 124, 146. In addition, in *US – Zeroing (Japan)*, the Appellate Body upheld the Panel’s decision to allow Japan to challenge the USDOC’s use of zeroing in the average to transaction methodology, even though such methodology had never been applied by the USDOC in an original investigation. Appellate Body Report, *US – Zeroing (Japan)*, paras. 87-88.

<sup>208</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 115 (emphasis added).



of dumping of the product under investigation for each exporter or producer.”<sup>209</sup> All such “inputs” must be accounted for, and treated equally, in determining the margin of dumping for the exporter or producer of the product as a whole. The Zeroing Procedures used in original investigations fail to do this and are therefore as such inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement*.

## 2. Inconsistency with Article 2.4.2 of the *Anti-Dumping Agreement*

198. As the Appellate Body has repeatedly found, the Zeroing Procedures used in original investigations are inconsistent, as such, with the first sentence of Article 2.4.2 of the *Anti-Dumping Agreement*.
199. Mexico notes that the United States failed to contest the claim of inconsistency with the first sentence of Article 2.4.2 (at least insofar as the Zeroing Procedures were applied in the specific determinations contested in those cases) before the Appellate Body in *US – Zeroing (EC I)*, or before the panels in *US – Zeroing (Japan)*, or, just recently, *US – Zeroing (Ecuador)*. Indeed, the USDOC recently published notice of its intention to eliminate the Zeroing Procedures from original investigations in the limited context where the intermediate price comparisons are made on an average-to-average basis.<sup>210</sup> However, as discussed above in Section III.B.2., the USDOC has yet to issue an actual determination in which the Zeroing Procedures were not applied. Moreover, the USDOC has expressed no intention of eliminating the Zeroing Procedures from original investigations where price comparisons are made on a basis other than average-to-average comparisons.
200. Mexico submits that the use of zeroing in original investigations, regardless of the comparison methodology that is employed, is inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*, because the Zeroing Procedures cause the investigating authority to systematically ignore, or treat as zero, the results of price comparisons where the export price exceeds normal value in the determination of the aggregate margin of dumping for the exporter or producer under consideration. This results in a margin of dumping that does not reflect the product under consideration taken as a whole.
201. Article 2.4.2 of the *Anti-Dumping Agreement* provides, in full:

Subject to the provisions governing fair comparison in paragraph 4, 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 or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ

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<sup>209</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 115 (quoting Appellate Body Report, *Softwood Lumber V (Article 21.5 – Canada)*, para. 87).

<sup>210</sup> See *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margins in Antidumping Investigations*, 72 FR 3783 (Dep’t Commerce)(26 January 2007)(change in effective date of final modification). See Exhibit MEX-11.

significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.

202. Mexico recalls the discussion above in Section VI.A., in which it is explained that the concepts of “dumping” and “margins of dumping” apply only with respect to the product under consideration taken as a whole and not to sub-groupings of that product. Accordingly, once an investigating authority decides, as it may, to establish averaging groups (such as product “models” or control numbers), the investigating authority must take into account the results of *all* comparisons so as to establish margins of dumping for the product as a whole. The Appellate Body stated in *US – Softwood Lumber V* specifically with respect to “model zeroing” applied by the USDOC in original investigations:

We fail to see how an investigating authority could properly establish margins of dumping for the product under investigation as a whole without aggregating *all* of the “results” of the multiple comparisons for *all* product types. There is no textual basis under Article 2.4.2 that would justify taking into account the “results” of only some multiple comparisons in the process of calculating margins of dumping, while disregarding other “results”. If an investigating authority has chosen to undertake multiple comparisons, the investigating authority necessarily has to take into account the results of *all* those comparisons in order to establish margins of dumping for the product as a whole under Article 2.4.2.<sup>211</sup>

203. While the Appellate Body in *EC – Bed Linen* and *US – Softwood Lumber V* reached these conclusions with respect to zeroing in original investigations specifically involving “model zeroing” (average-to-average comparisons), that finding has since been extended by the Appellate Body to comparisons made in original investigations on a transaction-to-transaction basis in *US – Softwood Lumber V (Article 21.5 – Canada)* and *US – Zeroing (Japan)*.
204. In the former case, the Appellate Body noted that the reference in the first sentence of Article 2.4.2 to “a comparison” in the singular suggested an overall calculation exercise involving aggregation of the multiple transaction-to-transaction comparisons.<sup>212</sup> The Appellate Body concluded therefore that “[t]he transaction-specific results are mere steps in the comparison process” and the “individual transaction comparisons are not the final results of the calculation, but, rather, are inputs for the overall calculation exercise.”<sup>213</sup> Thus, the Appellate Body concluded that the text of Article 2.4.2 indicates that the calculation of a margin of dumping using the transaction-to-transaction methodology (like the comparison of models in an average-to-average comparison setting) is a “multi-step exercise in which the results of transaction-specific comparisons are inputs that are [to be] aggregated in order to establish the margin of dumping of

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<sup>211</sup> Appellate Body Report, *US – Softwood Lumber V*, para. 98.

<sup>212</sup> Appellate Body Report, *US – Softwood Lumber V (Article 21.5 - Canada)*, para. 87.

<sup>213</sup> Appellate Body Report, *US – Softwood Lumber V (Article 21.5 - Canada)*, para. 87.

- the product under investigation for each exporter or producer.”<sup>214</sup> The Appellate Body found that, in aggregating the results of transaction-specific comparisons, “an investigating authority must consider the results of all of the comparisons and may not disregard the results of comparisons in which export prices are above normal value.”<sup>215</sup> The Appellate Body concluded therefore that the Zeroing Procedures followed in the determination made on the basis of the transaction-to-transaction comparison methodology in *US – Softwood Lumber V (Article 21.5 – Canada)* was inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*.
205. Considering essentially the same legal question in the context of an “as such” challenge to the Zeroing Procedures followed in original investigations using the transaction-to-transaction comparison methodology, the Appellate Body in *US – Zeroing (Japan)* found “no reason to depart from the Appellate Body’s reasoning” in *US – Softwood Lumber V (Article 21.5 – Canada)*, explaining that this finding “is in consonance with the Appellate Body’s approach in the earlier case of *US – Softwood Lumber V* and is consistent with the fundamental disciplines that apply under the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994...”<sup>216</sup> The Appellate Body further found no reason to distinguish this conclusion from the one reached in prior decisions considering average-to-average comparisons. “If anything,” the Appellate Body noted, “zeroing under the [transaction-to-transaction] comparison methodology would inflate the margin of dumping to an even greater extent as compared to model zeroing under the W-W comparison methodology. This is because zeroing under the [transaction-to-transaction] comparison methodology disregards the result of each comparison involving a transaction in which the export price exceeds the normal value, whereas under the [average-to-average] comparison methodology, zeroing occurs, as noted above, only across the sub-groups in the process of aggregation.”<sup>217</sup>
206. The Appellate Body also rejected other arguments presented by the United States concerning this measure. For example, the Appellate Body saw no significance in the fact that the phrase “all comparable transactions” is absent from the context of the transaction-to-transaction comparison methodology, finding that the phrase “is not pertinent to the [transaction-to-transaction] comparison methodology” because all export transactions are necessarily taken into account under that comparison methodology.<sup>218</sup> The Appellate Body also rejected the United States’ “mathematical equivalency” theory, according to which the results of comparisons made on an average-to-average basis without zeroing would allegedly be equivalent to the result obtained by making comparisons on a average-to-transaction basis under the second sentence of Article 2.4.2, thereby allegedly rendering the latter provision *inutile*. Following the reasoning adopted by the Appellate Body in *US – Softwood Lumber V (Article 21.5 - Canada)*, the Appellate Body rejected this argument for several reasons, including the fact that a provision is not rendered *inutile* simply because, in a specific set of circumstances, its application would produce results that are equivalent to those obtained from the application of comparison methodology set out in another part of that provision.<sup>219</sup> Similarly, the Appellate Body found that the mathematical equivalency

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<sup>214</sup> Appellate Body Report, *US – Softwood Lumber V (Article 21.5 - Canada)*, para. 87.

<sup>215</sup> Appellate Body Report, *US – Softwood Lumber V (Article 21.5 - Canada)*, para. 122.

<sup>216</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 121.

<sup>217</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 123.

<sup>218</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 124.

<sup>219</sup> See Appellate Body Report, *US – Zeroing (Japan)*, para. 133.

argument is based on certain assumptions that may not hold good in all situations. The second sentence of Article 2.4.2 is an “exception” that cannot alone determine the interpretation of the two methodologies contained in the first sentence. In addition, the Appellate Body rejected the Panel’s assumption that the universe of export transactions to which the two comparison methodologies apply is necessarily the same. The Appellate Body noted that the “individual export transactions” referenced in the second sentence of Article 2.4.2. refer to transactions that fall within the relevant pricing “pattern” at issue and that this universe would “necessarily be more limited than the universe of export transactions to which the symmetrical comparison methodologies in the first sentence of Article 2.4.2 would apply.”<sup>220</sup> Thus, mathematical equivalency was lacking between all comparison methodologies at issue.

207. It bears noting that the Appellate Body in *US – Zeroing (Japan)*, also pointed out the inconsistency of the Zeroing Procedures with the injury analysis required under Articles 3.1 and 3.5 of the *Anti-Dumping Agreement*, where the investigating authority must consider the volume of dumped imports and their causal relationship to injury. In this regard, the Appellate Body noted that:

[i]f, as a consequence of zeroing, the results of certain comparisons are disregarded only for purposes of calculating margins of dumping, but taken into consideration for determining injury, this would mean that the same transactions are treated as “non-dumped” for one purpose, and as “dumped” for another purpose. This is not in consonance with the need for consistent treatment of a product in an anti-dumping investigation.<sup>221</sup>

208. Based on the facts and arguments set forth in the preceding paragraphs, Mexico submits that the Zeroing Procedures, as they relate to original investigations and regardless of the comparison methodology used, are, as such, inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*. The Appellate Body has repeatedly reached the same conclusion and the United States appears no longer to contest these findings.

### **3. Inconsistency With Article 2.4, First Sentence of the *Anti-Dumping Agreement***

209. The first sentence of Article 2.4 of the *Anti-Dumping Agreement* establishes an obligation to make a “fair comparison” between the export price and the normal value in calculating margins of dumping. It is well established that this “fair comparison” language “creates an independent obligation,” the scope of which is not limited to the general subject matter addressed in paragraph 4 (*i.e.*, price comparability).<sup>222</sup> Furthermore, “the legal rule set out in the first sentence of Article 2.4 is expressed in terms of a general and abstract standard,” which, according to the Appellate Body, implies that the fair comparison requirement “is also applicable to proceedings governed by Article 9.3” of the *Anti-Dumping Agreement*.<sup>223</sup>

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<sup>220</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 135.

<sup>221</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 128.

<sup>222</sup> *See, e.g.*, Appellate Body Report, *US – Zeroing (EC I)*, para. 146.

<sup>223</sup> Appellate Body Report, *US – Zeroing (EC I)*, para. 146.

210. As established above, margins of dumping must be calculated for the product as a whole. However, any comparison between normal value and export price that fails to take into account all export transactions self-evidently does not result in the calculation of a margin of dumping for the product as a whole. Accordingly, such comparisons (*e.g.*, those that involve model zeroing) made when calculating a “margin of dumping” for each exporter are not “fair” within the meaning of the first sentence of Article 2.4.
211. The Appellate Body reached precisely this conclusion in *US – Zeroing (Japan)* with respect to the Zeroing Procedures used in original investigations on the basis of transaction-to-transaction comparisons finding that (with reference to the Appellate Body’s previous ruling in *US – Softwood Lumber V (Article 21.5 – Canada)*:

The Appellate Body has previously made it clear that the use of zeroing under the [transaction-to-transaction] comparison methodology distorts the prices of certain export transactions because the “prices of [certain] export transactions [made] are artificially reduced. In this way the “use of zeroing under the [transaction-to-transaction] comparison methodology artificially inflates the magnitude of dumping, resulting in higher margins of dumping and making a positive determination of dumping more likely.” The Appellate Body has further stated that “[t]his way of calculating cannot be described as impartial, even-handed, or unbiased.” As the Appellate Body has previously found, under the first sentence of Article 2.4.2, “an investigating authority must consider the results of all the comparisons and may not disregard the results of comparisons in which export prices are above normal value.” Therefore we concluded that zeroing in [transaction-to-transaction] comparisons in original investigations is inconsistent with the fair comparison requirement to Article 2.4.<sup>224</sup>

212. The findings in *EC – Bed Linen* and *US – Corrosion-Resistant Steel Sunset Review*, likewise confirm the fact that the “fair comparison” requirement of Article 2.4, which is equally applicable in initial investigations and administrative reviews, is sufficient in itself to condemn the Zeroing Procedures.<sup>225</sup> For example, in *EC – Bed Linen*, the Appellate Body found that:

a comparison between export price and normal value that does not take fully into account the prices of *all* comparable export transactions – such as the practice of “zeroing” at issue in this

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<sup>224</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 146 (citations omitted).

<sup>225</sup> Mexico notes that the Appellate Body in *US – Zeroing (EC I)* declared “moot, and of no legal effect” the finding of the Panel below that simple zeroing, as applied in administrative reviews, is inconsistent with the “fair comparison” requirement set forth in the first sentence of Article 2.4. However, the Appellate Body did so only on the grounds that a finding with respect to Article 2.4 was unnecessary in light of its finding that simple zeroing, as applied in administrative reviews, is inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.



dispute – is *not* a “fair comparison” between export price and normal value, as required by Article 2.4 and by Article 2.4.2.<sup>226</sup>

213. In *US – Corrosion Resistant-Steel Sunset Review*, the Appellate Body also concluded that there is an “inherent bias” in the Zeroing Procedures:

When investigating authorities use a zeroing methodology such as that examined in *EC – Bed Linen* to calculate a dumping margin, whether in an original investigation *or otherwise*, that methodology will tend to inflate the margins calculated. Apart from inflating the margins, such a methodology could, in some instances, turn a negative margin of dumping into a positive margin of dumping. As the Panel itself recognized in the present dispute, “zeroing ... may lead to an affirmative determination that dumping exists where no dumping would have been established in the absence of zeroing.” Thus, the *inherent bias* in a zeroing methodology of this kind may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping.<sup>227</sup>

214. This Panel should take note that by explicitly stating that Zeroing Procedures “in an original proceeding *or otherwise*,” are inconsistent with the relevant agreements, the Appellate Body made clear that its findings were not limited to margins of dumping found to exist in original investigations.
215. The examples presented in Ms. Owenby’s statement (Exhibit MEX-1) demonstrate, as a matter of mathematics, that the Zeroing Procedures applied in original investigations necessarily inflate margins of dumping in all cases where there are negative price comparisons. This is further demonstrated in the as applied determination in *Stainless Steel from Mexico*, in which the USDOC Zeroing Procedures inflated the margin of dumping for Mexinox, the sole foreign producer and exporter participating in the investigation, from 30.69 percent to 30.85 percent,<sup>228</sup> thereby increasing the cash deposit requirements for that company and increasing the likelihood of an affirmative final material injury determination by the U.S. International Trade Commission.
216. Considering the above, because the use of the Zeroing Procedures in original investigations (whether in the context of average-to-average or average-to-transaction comparisons) violates Article 2.4.2 of the *Anti-Dumping Agreement*, this methodology clearly is not a “fair comparison” within the meaning of the first sentence of Article 2.4. Moreover, Mexico submits that the Zeroing Procedures applied in original investigations are also as such inconsistent with the first sentence of Article 2.4 of the *Anti-Dumping Agreement* for the same reasons that the Appellate Body in *US – Zeroing (Japan)* found the measure to be inconsistent with that provision, namely because the “prices of [certain] export transactions [made] are artificially reduced,” because the Zeroing Procedures “artificially [inflate] the magnitude of dumping, resulting in higher margins

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<sup>226</sup> Appellate Body Report, *EC – Bed Linen*, para. 55.

<sup>227</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135 (emphasis added, footnote omitted).

<sup>228</sup> See Exhibit MEX-5.A.



of dumping and making a positive determination of dumping more likely,” and because “[t]his way of calculating cannot be described as impartial, even-handed, or unbiased.”<sup>229</sup>

**4. Inconsistency with Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement**

217. Article XVI:4 of the WTO Agreement provides that a Member shall “ensure ... the conformity of its laws, regulations and administrative procedures with its obligations in the annexed Agreements.” Included in the annexed agreements are the *Anti-Dumping Agreement* and the GATT 1994.

218. Article 18.4 of the *Anti-Dumping Agreement* provides that:

Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply for the Member in question.

219. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body provided the following definition of the phrase “laws, regulations and administrative procedures”:

Taken as a whole, the phrase ... seems to us to encompass the entire body of generally applicable rules, norms and standards adopted by Members in connection with the conduct of anti-dumping proceedings. If some of these types of measures could not, as such, be subject to dispute settlement under the *Anti-Dumping Agreement*, it would frustrate the obligation of “conformity” set forth in Article 18.4.<sup>230</sup>

220. In the same decision, the Appellate Body further stated that:

each element in the phrase “laws, regulations and administrative procedures” must be determined for purposes of WTO law and not simply by reference to the label given to various instruments under the domestic law of each WTO Member. This determination must be based on the content and substance of the instrument, and not merely on its form or nomenclature. Otherwise, the obligations set forth in Article 18.4 would vary from Member to Member depending on each Member’s domestic law and practice.<sup>231</sup>

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<sup>229</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 146 (citing Appellate Body Report, *US – Softwood Lumber V (Article 21.5 - Canada)*, para. 142).

<sup>230</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 87 (footnote omitted).

<sup>231</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 87, n. 87.

221. In light of this definition, the Zeroing Procedures invariably employed by the USDOC in original investigations constitutes an “administrative procedure” within the meaning of Article 18.4. Because, as set forth above, the Zeroing Procedures used in original investigations violates the obligations set forth in various provisions of WTO agreements, it is “as such” inconsistent with Article XVI:4 of the WTO Agreement and Article 18.4 of the *Anti-Dumping Agreement*.

**B. As Applied Claims**

222. Having established that the Zeroing Procedures used in original investigations are “as such” inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4.2 and 2.4 of the *Anti-Dumping Agreement*, Mexico now turns to its “as applied” claims. As set forth below, Mexico claims that the Zeroing Procedures as applied in the original anti-dumping investigation of *Stainless Steel from Mexico* as pertaining to the Mexican producer and exporter, Mexinox, likewise, and of consequence, violate the same provisions of the relevant agreements.
223. Mexico recalls from its discussion in Section III above, that the USDOC calculated margins of dumping for the sole Mexican respondent, Mexinox, in the original investigation of *Stainless Steel from Mexico*, by applying “model zeroing.” In particular, the USDOC first made intermediate comparisons on a model-specific basis between export prices and normal value. The USDOC then aggregated these intermediate comparison results to calculate the overall margin of dumping. In doing so, the USDOC disregarded or treated as zero, all comparison results where the export price exceeded the normal value.
224. Mexico further recalls that the evidence presented in Section III demonstrates that the cash deposit margin calculated for Mexinox using the Zeroing Procedures was 30.85 percent, whereas the actual margin of dumping for Mexinox for the product as a whole was 30.69 percent. Thus, Mexinox’s margin was inflated.

**1. Inconsistency with Articles VI:1 and VI:2 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement***

225. For the reasons discussed above, zeroing in original investigations where comparisons are made on an average-to-average basis is as such inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement*.
226. As a consequence, the USDOC’s use of “model zeroing” in the determination of dumping for Mexinox in the original investigation of *Stainless Steel from Mexico* was inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement*.

**2. Inconsistency with Article 2.4.2 of the *Anti-Dumping Agreement***

227. For the reasons discussed above, zeroing in original investigations where comparisons are made on an average-to-average basis through “model zeroing” is as such inconsistent with the first sentence of Article 2.4.2 of the *Anti-Dumping Agreement*.
228. As a consequence, the USDOC’s use of “model zeroing” in the determination of dumping for Mexinox in the original investigation of *Stainless Steel from Mexico* was as applied inconsistent with the first sentence of Article 2.4.2 of the *Anti-Dumping Agreement*.

### 3. Inconsistency with Article 2.4.2, First sentence of the *Anti-Dumping Agreement*

229. For the reasons discussed above, zeroing in original investigations where comparisons are made on an average-to-average basis through “model zeroing” is as such inconsistent with the first sentence of Article 2.4 of the *Anti-Dumping Agreement*.
230. As a consequence, the USDOC’s use of “model zeroing” in the determination of dumping for Mexinox in the original investigation of *Stainless Steel from Mexico* was as applied inconsistent with the first sentence of Article 2.4 of the *Anti-Dumping Agreement*.

### 4. Inconsistency with XVI:4 of the WTO Agreement and Article 18.4 of the *Anti-Dumping Agreement*

231. For the reasons discussed above, zeroing in original investigations where comparisons are made on an average-to-average basis through “model zeroing” is as such inconsistent with XVI:4 of the WTO Agreement and Article 18.4 of the *Anti-Dumping Agreement*.
232. As a consequence, the USDOC’s use of “model zeroing” in the determination of dumping for Mexinox in the original investigation of *Stainless Steel from Mexico* was inconsistent with XVI:4 of the WTO Agreement and Article 18.4 of the *Anti-Dumping Agreement*.

## VIII. THE ZEROING PROCEDURES IN PERIODIC REVIEWS

### A. As Such Claims

233. For the reasons set forth below, Mexico submits that the USDOC’s Zeroing Procedures followed in periodic reviews are “as such” inconsistent with Articles VI:1 and VI:2 of the GATT 1994, as well as Articles 2.1, 2.4, and 9.3 of the *Anti-Dumping Agreement*.

#### (a) The Zeroing Procedures Used in Periodic Reviews Violate Articles 2.1 and 9.3 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994 Because the Margins Calculated Exceed the Exporter or Foreign Producer’s Margin of Dumping for the Product as a Whole

234. As fully discussed above in Section VI.A., it is well established in the relevant WTO jurisprudence that “dumping” and “margins of dumping” as defined in Articles VI:1 and VI:2 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement* are concepts that are strictly defined in relation to the “product” under consideration.<sup>232</sup> The terms “dumping” and “dumping margins” in the *Anti-Dumping Agreement* therefore “apply to the product under investigation *as a whole* and do not apply to sub-group levels.”<sup>233</sup> These definitions apply throughout the Agreement in all procedural phases (including original investigations and periodic reviews) and with respect to all comparison methodologies (including comparisons made on an average-to-average, transaction-to-transaction, and average-to-transaction basis).<sup>234</sup>

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<sup>232</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 110.

<sup>233</sup> Appellate Body Report, *US – Softwood Lumber V*, para. 102.

<sup>234</sup> See, e.g., Appellate Body Report, *US – Softwood Lumber V*, para. 93; Appellate Body Report, *US – Zeroing (Japan)*, para. 115.

235. As articulated most recently by the Appellate Body in *US – Zeroing (Japan)* (considering the Zeroing Procedures used by the USDOC in periodic reviews):

As we have stated, “dumping” and “dumping margins” under the *Anti-Dumping Agreement* are defined in relation to the product under investigation. Thus, “dumping” and “margins of dumping” can be found only to exist only at the level of the “product”: they cannot be found to exist at the level of a type, model, or category of product under consideration; nor can they be found to exist at the level of an individual transaction. Rather, “if a margin of dumping is calculated on the basis of multiple comparisons made at an intermediate stage, it is only on the basis of aggregating all these intermediate results that an investigating authority can establish margins of dumping for the product as a whole.”<sup>235</sup>

236. Article VI:2 of the GATT 1994 provides that “a contracting party may levy on any dumped product an anti-dumping duty no greater in amount than the margin of dumping in respect of such product.” Article 9.3 of the *Anti-Dumping Agreement* builds on this provision by clarifying with respect to collection of dumping duties that “the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.” Accordingly, under Article 9.3 of the *Anti-Dumping Agreement*, the total amount of anti-dumping duties collected in relation to a particular exporter or producer may not exceed the “margin of dumping” for the product as a whole determined for that producer or exporter calculated consistent with Article 2 of the *Anti-Dumping Agreement*.

237. Based on the above, to measure the consistency of the USDOC Zeroing Procedures used in periodic reviews with Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement*, requires the Panel to “compare the anti-dumping duties collected on all entries of the subject product from a given exporter or foreign producer with that exporter’s or foreign producer’s margin of dumping for the product as a whole.”<sup>236</sup> In other words:

[T]he margin of dumping established for an exporter or foreign producer operates as a *ceiling* for the total amount of anti-dumping duties that can be levied on the entries of the subject product (from that exporter) covered by the duty assessment proceeding.<sup>237</sup>

238. The Zeroing Procedures used by the USDOC in periodic reviews challenged by Mexico do not permit calculation of the margin of dumping for the product as a whole. As documented previously in this submission, the USDOC uses a methodology in periodic reviews in which price comparisons are first carried out on an intermediate basis (normally on the basis of individual-to-average price comparisons, but possibly on other comparison bases). The results of these

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<sup>235</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 151. See also Appellate Body Report, *US – Zeroing (EC)*, paras. 126, 132; Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 87, 104; Appellate Body Report, *US – Softwood Lumber V*, para. 93.

<sup>236</sup> Appellate Body Report, *US – Zeroing (EC I)*, para. 132.

<sup>237</sup> Appellate Body Report, *US – Zeroing (EC I)*, para. 130.

intermediate price comparisons are then aggregated to calculate the numerator in the overall margin of dumping for determining the new cash deposit and assessment rates. However, in accordance with the challenged Zeroing Procedures, if, for a given individual transaction, the export price exceeds the contemporaneous average normal value, the USDOC, at the aggregation stage, disregards the result of this intermediate comparison. As further discussed in Section III above, the new cash deposit rate is calculated by dividing this numerator by the total value of the export sales under consideration and the importer-specific assessment rate is calculated by segregating the total positive differences of the intermediate price comparisons between normal value and export price and dividing these amounts by the importer-specific total Customs declared value of the imports in the relevant period.

239. These Zeroing Procedures are manifestly inconsistent with Articles VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement* for several reasons. First, as documented above in Section III, the Zeroing Procedures used in periodic reviews improperly treat intermediate price comparison results where the normal value exceeds the export price as “dumped” and intermediate price comparison results where the export price exceeds normal value as “not dumped.” Likewise the quantum of the positive difference where normal value is higher than export price in these intermediate comparisons is considered by the USDOC as “margins of dumping,” while “non-dumped” negative price comparison results are ignored. However, as noted above, intermediate price comparisons *cannot* by themselves be “dumped” or “not dumped.”<sup>238</sup>
240. Second, as noted above, in order for the “margin of dumping” for the exporter or producer to reflect the product as a whole, the calculation must include the results of *all* of the price comparisons under consideration. It is not permissible, and it is inconsistent with this obligation for the investigating authorities to exclude specific transactions or categories of transactions from that calculation.<sup>239</sup> As the Appellate Body stated in *US – Zeroing (EC I)*: “if the investigating

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<sup>238</sup> See Appellate Body Report, *US – Zeroing (EC I)*, para. 133. See also Appellate Body Report, *US – Zeroing (Japan)*, para. 151 (footnotes omitted):

“dumping” and “dumping margins” under the *Anti-Dumping Agreement* are defined in relation to the product under investigation. Thus, “dumping” and “margins of dumping” can be found to exist only at the level of a “product”: they cannot be found to exist at the level of a type, model, or category of a product under consideration; nor can they be found to exist at the level of an individual transaction. Rather, “if a margin of dumping is calculated on the basis of multiple comparisons made at an intermediate stage, it is only on the basis of aggregating all these intermediate results that an investigating authority can establish margins of dumping for the product as a whole. We therefore disagree with the Panel’s approach, which is premised on the view that the terms “dumping” or “margins of dumping” can have different meanings under different provisions of the *Anti-Dumping Agreement*.”

<sup>239</sup> Appellate Body Report, *US – Zeroing (EC-I)*, para. 126 (quoting Appellate Body Report, *US – Softwood Lumber V*, para. 98 (“If an investigating authority has chosen to undertake multiple comparisons, the investigating authority necessarily has to take into account the results of *all* these comparisons in order to establish margins of dumping for the product as a whole under Article 2.4.2”)’ The Appellate Body in *US – Zeroing (EC-I)*, acknowledged that this finding of the Appellate Body in *US – Softwood Lumber V* was made in the context of average-to-average comparisons in original investigations but correctly noted that the terms “dumping” and

authority establishes the margins of dumping on the basis of multiple comparisons made at an intermediate stage, it is required to aggregate the results of all of the multiple comparisons, including those where the export price exceeds the normal value.”<sup>240</sup> By systematically disregarding intermediate price comparison results where the export price exceeds the normal value, the margin of dumping determined by the USDOC using the Zeroing Procedures in periodic reviews only *partially* reflects the transactions under consideration and therefore fails to reflect the product “as a whole.”

241. Third, and as a consequence of the above, by systematically excluding from the margin calculation only those intermediate comparison results where the export price exceeds the normal value, the Zeroing Procedures also unavoidably inflate the margin of dumping calculated for the exporter or producer above the exporter or producer’s true margin of dumping for the product as a whole. This fact is demonstrated by the hypothetical examples discussed in the declaration from Ms. Owenby, and is further demonstrated the analysis of the six “as applied” periodic review determinations in *Stainless Steel from Mexico*, where the Zeroing Procedures have (thus far) resulted in assessment claims by the USDOC against Mexinox that are \$22.5 million in excess of that exporter’s actual margin of dumping for the product.
242. Accordingly, in every case where negative comparisons exist, the amount of duties assessed by the USDOC using the Zeroing Procedures inevitably exceeds the foreign producer’s or exporter’s margin of dumping for the product under consideration under Article 2. This directly violates the express terms of Article VI:2 and Article 9.3 limiting such assessments to the exporter’s or producer’s “margin of dumping” for the “product” as a whole. Thus, the Zeroing Procedures used in periodic reviews invariably result in collections above the “ceiling” established for such collections under Article 2 and are therefore inconsistent with Article 9.3.<sup>241</sup>
243. For the foregoing reasons, it is clear that the Zeroing Procedures used in periodic reviews violate Articles 9.3 and 2.1 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994 by resulting margin calculations in excess of the foreign producer’s or exporter’s margin of dumping for the product as a whole in accordance with Article 2.

## **2. Inconsistency With Article 2.4, First Sentence of the *Anti-Dumping Agreement***

244. Mexico recalls that the first sentence of Article 2.4 requires the administering authority to make a “fair comparison” between the export price and normal value, that the scope of this obligation is not exhausted by the general subject matter expressly addressed by paragraph 4 (that is to say, price comparability), and that this provision creates an independent and over-arching obligation that applies to all comparison methodologies employed in all types of proceedings under the Agreement. *See* Section VII.A.2., above.
245. The Zeroing Procedures used by the USDOC in periodic reviews, which are identical to the Zeroing Procedures that were before the Panel and Appellate Body in *US – Zeroing (Japan)*, result in calculation of dumping and margins of dumping that do not reflect all of the transactions

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“margins of dumping” that were being interpreted apply throughout the Agreement and that the Appellate Body based its determination on Article 2.1 of the *Anti-Dumping Agreement*, not just the first sentence of Article 2.4.2. *Id.*

<sup>240</sup> Appellate Body Report, *US – Zeroing (EC-1)*, para. 127.

<sup>241</sup> *See* Appellate Body Report, *US – Zeroing (EC-1)*, para. 133; Appellate Body Report, *US – Zeroing (Japan)*, para. 155.



involving the product under consideration as a whole. Where there are any negative intermediate comparison results, the calculation will always exceed the margin of dumping for the individual exporter or producer as established under Article 2 of the *Anti-Dumping Agreement*. The factual evidence supporting this conclusion with respect to the measure challenged by Mexico is set forth in Section III, of this submission. That evidence demonstrates that the USDOC, by applying the Zeroing Procedures in the contested periodic review determinations of *Stainless Steel from Mexico* has (so far) sought to assess duties \$22.5 million in excess of the actual margin of dumping for the product.

246. As the Appellate Body explained in the *US – Zeroing (Japan)* case:

If anti-dumping duties are assessed on the basis of a methodology involving comparisons between the export price and the normal value in a manner which results in anti-dumping duties being collected from importers in excess of the amount of the margin of dumping of the exporter or foreign producer, then this methodology cannot be viewed as involving a “fair comparison” within the meaning of first sentence of Article 2.4. This is so because such an assessment would result in duty collection from importers in excess of the margin of dumping established in accordance with Article 2, as we have explained previously.<sup>242</sup>

247. For the reasons stated, and consistent with the principles articulated by the Appellate Body, Mexico respectfully requests the Panel to find that the Zeroing Procedures used in periodic reviews is “as such” a violation of Article 2.4 of the *Anti-Dumping Agreement*, regardless of the comparison methodology applied.

### **3. Inconsistency with Article XVI:4 of the WTO Agreement and Article 18.4 of the *Anti-Dumping Agreement***

248. For much the same reasons described above in Section VII.A.4., with respect to the Zeroing Procedures used in original investigations, Mexico submits that the Zeroing Procedures used in periodic reviews is a measure that is, as such, inconsistent with Article XVI:4 of the WTO Agreement and Article 18.4 of the *Anti-Dumping Agreement*.

249. Article XVI:4 of the WTO Agreement provides that a Member shall “ensure ... the conformity of its laws, regulations and administrative procedures with its obligations in the annexed Agreements.” Included in the annexed agreements are the *Anti-Dumping Agreement* and the GATT 1994.

250. Article 18.4 of the *Anti-Dumping Agreement* provides that:

Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the

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<sup>242</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 168.

provisions of this Agreement as they may apply for the Member in question.

251. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body provided the following definition of the phrase “laws, regulations and administrative procedures”:

Taken as a whole, the phrase ... seems to us to encompass the entire body of generally applicable rules, norms and standards adopted by Members in connection with the conduct of anti-dumping proceedings. If some of these types of measures could not, as such, be subject to dispute settlement under the *Anti-Dumping Agreement*, it would frustrate the obligation of “conformity” set forth in Article 18.4.<sup>243</sup>

252. In the same decision, the Appellate Body further stated that:

each element in the phrase “laws, regulations and administrative procedures” must be determined for purposes of WTO law and not simply by reference to the label given to various instruments under the domestic law of each WTO Member. This determination must be based on the content and substance of the instrument, and not merely on its form or nomenclature. Otherwise, the obligations set forth in Article 18.4 would vary from Member to Member depending on each Member’s domestic law and practice.<sup>244</sup>

253. In light of this definition, the Zeroing Procedures employed uniformly by the USDOC in periodic reviews constitutes an “administrative procedure” within the meaning of Article 18.4. Because, as set forth above, the Zeroing Procedures used in periodic reviews violate the obligations set forth in various provisions of WTO agreements, they are “as such” inconsistent with Article XVI:4 of the WTO Agreement and Article 18.4 of the *Anti-Dumping Agreement*.

## **B. As Applied Claims**

254. Having established that the Zeroing Procedures used in periodic reviews are “as such” inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 9.3, 2.1, and 2.4 of the *Anti-Dumping Agreement*, Mexico now turns to its “as applied” claims with respect to periodic reviews.
255. As set forth below, Mexico claims that the Zeroing Procedures as applied in the six listed periodic reviews of *Stainless Steel from Mexico* as pertaining to the Mexican producer and exporter, Mexinox, likewise violate Articles VI:1 and VI:2 of the GATT 1994 and Articles 9.3, 2.1, and 2.4 of the *Anti-Dumping Agreement*.
256. Mexico recalls its discussion in Section III above that the USDOC calculated margins of dumping for the sole Mexican respondent, Mexinox, in each of the six periodic reviews of *Stainless Steel*

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<sup>243</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 87 (footnote omitted).

<sup>244</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 87, n. 87.

from Mexico conducted to date, by applying “simple zeroing.” In particular, in each case, the USDOC first made intermediate comparisons between individual export prices and average normal values. The USDOC then, in each case, aggregated these comparison results to calculate the overall margin of dumping. In doing so, the USDOC systematically disregarded or treated as zero, all comparison results where the export price exceeded the normal value. The USDOC calculated an assessment rate in each of those cases by dividing the numerator by the total value of the imports declared to Customs and calculated the revised cash deposit rate in each case by dividing the numerator by the total value of the export prices used in all intermediate comparisons.

**1. Inconsistency with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1 and 9.3 of the Anti-Dumping Agreement**

257. For the reasons discussed above, zeroing in periodic reviews where comparisons are made on an individual transaction-to-average basis through “simple zeroing” is as such inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1 and 9.3 of the *Anti-Dumping Agreement*.
258. As a consequence, the USDOC’s use of “simple zeroing” in the determination of dumping for Mexinox in each of the five listed periodic reviews of *Stainless Steel from Mexico* was inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1 and 9.3 of the *Anti-Dumping Agreement*.

**2. Inconsistency with Article 2.4, First Sentence of the Anti-Dumping Agreement**

259. For the reasons discussed above, zeroing in periodic reviews where comparisons are made on an average-to-transaction basis violates the “fair comparison” requirement and is as such inconsistent with the first sentence of Article 2.4 of the *Anti-Dumping Agreement*.
260. Mexico further recalls the evidence discussed above demonstrating that the USDOC, by applying the Zeroing Procedures in the contested periodic review determinations of *Stainless Steel from Mexico* has (so far) assessed approximately \$22.5 million more than the exporter’s actual margin of dumping for the product.
261. As a consequence, the USDOC’s use of “simple zeroing” in the determination of dumping for Mexinox in each of the six listed periodic reviews of *Stainless Steel from Mexico* was inconsistent with Article 2.4 of the *Anti-Dumping Agreement*.

**3. Inconsistency with XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement**

262. For the reasons discussed above, zeroing in periodic reviews where comparisons are made on an average-to-transaction basis is as such inconsistent with XVI:4 of the WTO Agreement and Article 18.4 of the *Anti-Dumping Agreement*.
263. As a consequence, the USDOC’s use of zeroing in the determination of dumping for Mexinox in each of the six listed periodic reviews of *Stainless Steel from Mexico* was inconsistent with XVI:4 of the WTO Agreement and Article 18.4 of the *Anti-Dumping Agreement*.

## IX. CONCLUSION

264. For the reasons stated above, Mexico respectfully requests that the Panel make findings that:

- (1) the U.S. Zeroing Procedures applied in original investigations are, as such, inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4, 2.4.2, and 18.4 of the *Anti-Dumping Agreement*, and Article XVI:4 of the WTO Agreement, regardless of the comparison methodology used;
- (2) the U.S. Zeroing Procedures applied in the original investigation of *Stainless Steel Sheet and Strip in Coils from Mexico* are, as applied, inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4, 2.4.2, and 18.4 of the *Anti-Dumping Agreement*; and Article XVI:4 of the WTO Agreement;
- (3) the U.S. Zeroing Procedures applied in periodic reviews are, as such, inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4, 9.3, and 18.4 of the *Anti-Dumping Agreement*, and Article XVI:4 of the WTO Agreement, regardless of the comparison methodology used;
- (4) the U.S. Zeroing Procedures as applied in the five listed periodic reviews of *Stainless Steel Sheet and Strip in Coils from Mexico* are, as applied, inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4, 9.3, and 18.4 of the *Anti-Dumping Agreement*, and Article XVI:4 of the WTO Agreement,;

265. Article 19.1 of the DSU provides that where a Panel concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. Article 19.1 also provides that in addition to its recommendations, the panel may suggest ways in which the Member concerned could implement the recommendations. In Mexico's view, it is essential that the Panel suggest that the United States withdraw all the inconsistent measures.

266. Mexico notes that there have been many instances in which panels have exercised their discretion to make a suggestion regarding implementation. To cite a few examples:

- in the case *Argentina – Poultry Anti-Dumping Duties*, the panel suggested that Argentina repeal the measure imposing definitive antidumping measures on poultry from Brazil<sup>245</sup>;
- in *US – Offset Act (Byrd Amendment)*, the panel called for the repeal of the WTO-inconsistent U.S. statute<sup>246</sup>;
- in *US – Cotton Yarn*, the panel called for the prompt removal of the import restriction<sup>247</sup>;
- in the dispute *Guatemala – Cement II*, the panel recommended the revocation of the antidumping measure,<sup>248</sup> and

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<sup>245</sup> Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 8.7.

<sup>246</sup> Panel Report, *US – Offset Act (Byrd Amendment)*, para. 8.6.

<sup>247</sup> Panel Report, *US – Cotton Yarn*, para. 8.5.

- in *US – Lead Bars*, the panel called for a revision of U.S. administrative practices.<sup>249</sup>

267. This is a non-exhaustive list. Previous panels have recognized that suggestions under DSU Article 19.1 would be appropriate to help promote the resolution of the dispute, particularly where – as in the present case – the violations of the responding party are fundamental and pervasive.

268. Based on Article 19.1 of the DSU, Mexico respectfully requests that the Panel:

- recommend that the United States bring its measures into conformity with its WTO obligations; and
- suggest the United States to implement the recommendation by eliminating both “as such” and “as applied” the Zeroing Procedures in all antidumping procedural contexts.

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<sup>248</sup> Panel Report, *Guatemala – Cement II*, para. 9.6.

<sup>249</sup> Panel Report, *US – Lead Bars*, para. 8.2.