

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

***Report of the Panel***



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<i>India – Autos</i>	Panel Report, <i>India – Measures Affecting the Automotive Sector</i> ("India – Autos"), WT/DS146/R, WT/DS175/R and Corr.1, adopted 5 April 2002, DSR 2002:V, 1827
<i>Dominican Republic – Import and Sale of Cigarettes</i>	Panel Report, <i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> ("Dominican Republic – Import and Sale of Cigarettes"), WT/DS302/R, adopted 19 May 2005, as modified by Appellate Body Report, WT/DS302/AB/R
<i>EC – Approval and Marketing of Biotech Products</i>	Panel Report, <i>European Communities – Measures Affecting the Approval and Marketing of Biotech Products</i> ("EC – Approval and Marketing of Biotech Products"), WT/DS291/R, WT/DS292/R, WT/DS293/R, Corr.1 and Add.1, 2, 3, 4, 5, 6, 7, 8 and 9, adopted 21 November 2006
<i>US – Hot-Rolled Steel</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> ("US – Hot-Rolled Steel"), WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697
<i>US – Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> ("US – Gasoline"), WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3
<i>US – Zeroing (Japan)</i>	Panel Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews</i> ("US – Zeroing (Japan)"), WT/DS322/R, adopted 23 January 2007, as modified by Appellate Body Report, WT/DS322/AB/R
<i>US – Shrimp (Article 21.5 – Malaysia)</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia</i> ("US – Shrimp (Article 21.5 – Malaysia)"), WT/DS58/AB/RW, adopted 21 November 2001
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<i>US – Shrimp (Ecuador)</i>	Panel Report, <i>United States – Anti-Dumping Measures on Shrimp from Ecuador</i> ("US – Shrimp (Ecuador)"), WT/DS335/R, adopted 20 February 2007
<i>US – Certain EC Products</i>	Appellate Body Report, <i>United States – Import Measures on Certain Products from the European Communities</i> ("US – Certain EC Products"), WT/DS165/AB/R, adopted 10 January 2001, DSR 2001:I, 373
<i>US – Zeroing (Japan)</i>	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews</i> ("US – Zeroing (Japan)"), WT/DS322/AB/R, adopted 23 January 2007

<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> ("US – Wool Shirts and Blouses"), WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323
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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> ("US – Oil Country Tubular Goods Sunset Reviews"), WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, 3257
<i>EC – Chicken Cuts</i>	Appellate Body Report, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts</i> ("EC – Chicken Cuts"), WT/DS269/AB/R, WT/DS286/AB/R, and Corr.1, adopted 27 September 2005



## I. INTRODUCTION

1.1 On 26 May 2006, the Government of Mexico ("Mexico") requested consultations with the Government of the United States of America ("United States" or "US") pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), Article XXII of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), and Article 17 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement" or "Agreement"), regarding the laws, regulations, administrative practices and methodologies for calculating dumping margins.<sup>1</sup> Consultations were held on 15 June 2006, but failed to resolve the dispute.

1.2 On 12 October 2006, Mexico requested the Dispute Settlement Body ("DSB") to establish a panel pursuant to Articles 4 and 6 of the DSU, Article XXIII of the GATT 1994 and Article 17 of the Anti-Dumping Agreement.

1.3 At its meeting on 26 October 2006, the DSB established a panel pursuant to the request of Mexico in document WT/DS344/4, in accordance with Article 6 of the DSU.

1.4 The Panel's terms of reference are the following:

"To examine, in the light of the relevant provisions of the covered agreements cited by Mexico in document WT/DS344/4, the matter referred to the DSB by Mexico in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

1.5 On 15 December 2006, Mexico requested the Director-General to determine the composition of the Panel, pursuant to paragraph 7 of Article 8 of the DSU. This paragraph provides:

"If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request."

1.6 On 20 December 2006, the Director-General accordingly composed the Panel as follows:

Chairperson: Mr. Alberto Juan Dumont

Members: Mr. Bruce Cullen  
Ms Leora Blumberg

1.7 Chile, China, the European Communities, Japan and Thailand have reserved their rights to participate in the panel proceedings as third parties.

1.8 The Panel met with the parties on 22-23 May 2007 and on 17 July 2007. It met with the third parties on 23 May 2007.

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<sup>1</sup> WT/DS344/1.

## II. FACTUAL ASPECTS

2.1 At issue in this dispute is what Mexico describes as the "Zeroing Procedures" under US law, which, according to Mexico, require the United States Department of Commerce ("USDOC") to calculate margins of dumping in investigations and periodic reviews in a manner that does not fully reflect export prices that are above the normal value. According to Mexico, this takes place through the non-inclusion in the numerator of the weighted average dumping margin calculations of the results of comparisons where the export price exceeds the normal value, when such results are aggregated in the calculation of the margins of dumping for the product under consideration as a whole. More specifically, Mexico takes issue with the "Zeroing Procedures" in connection with investigations where the weighted average normal value is compared with the weighted average export price (referred to by Mexico as "model zeroing in investigations"), and the periodic reviews where the weighted average normal value is compared with individual export transactions (referred to by Mexico as "simple zeroing in periodic reviews").

2.2 In addition to its two "as such" claims, Mexico also challenges the application by the USDOC of the "Zeroing Procedures" in the investigation and five periodic reviews on *Stainless Steel Sheet and Strip in Coils from Mexico*. The list of the anti-dumping measures subject to Mexico's "as applied" claims is as follows:

### Investigation

*Stainless Steel Sheet and Strip in Coils from Mexico*, 64 FR 30790 (USDOC) (8 June 1999), subsequently amended as *Stainless Steel Sheet and Strip in Coils from Mexico*, 64 FR 40560 (USDOC) (27 July 1999)

### Periodic Reviews

*Stainless Steel Sheet and Strip in Coils from Mexico*, 67 FR 6490 (USDOC) (12 February 2002), subsequently amended as *Stainless Steel Sheet and Strip in Coils from Mexico*, 67 FR 15542 (USDOC) (2 April 2002)

*Stainless Steel Sheet and Strip in Coils from Mexico*, 68 FR 6889 (USDOC) (11 February 2003), subsequently amended as *Stainless Steel Sheet and Strip in Coils from Mexico*, 68 FR 13686 (USDOC) (20 March 2003)

*Stainless Steel Sheet and Strip in Coils from Mexico*, 69 FR 6259 (USDOC) (10 February 2004)

*Stainless Steel Sheet and Strip in Coils from Mexico*, 70 FR 3677 (USDOC) (26 January 2005)

*Stainless Steel Sheet and Strip in Coils from Mexico*, 70 FR 73444 (USDOC) (12 December 2005)

## III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1 Mexico requests the Panel to find that:

- (1) Model zeroing, as applied in the investigation on *Stainless Steel Sheet and Strip in Coils from Mexico*, is 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;

- (2) Model zeroing in investigations is, 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;
- (3) Simple zeroing in periodic reviews is, as such, inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4, 9.3, and 18.4 of the Anti-Dumping Agreement, and Article XVI:4 of the WTO Agreement; and
- (4) Simple zeroing, as applied in the five listed periodic reviews of *Stainless Steel Sheet and Strip in Coils from Mexico*, is 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.<sup>2</sup>

3.2 The United States requests the Panel to dismiss Mexico's two "as such" claims because, in the view of the United States, there exists under US law no such measure as the "Zeroing Procedures". In the alternative, the United States requests the Panel to reject Mexico's "as such" claim regarding simple zeroing in periodic reviews because Mexico has failed to demonstrate that the Anti-Dumping Agreement disallows zeroing in periodic reviews. For the same reason, the United States also requests the Panel to reject Mexico's "as applied" claim regarding simple zeroing in the five periodic reviews at issue. With regard to Mexico's "as applied" claim regarding the use of model zeroing in the anti-dumping investigation on *Stainless Steel Sheet and Strip in Coils from Mexico*, the United States acknowledges that the USDOC did use model zeroing in the investigation at issue. The United States also recalls the reasoning of the Appellate Body in *US – Softwood Lumber V* that such use was inconsistent with Article 2.4.2 of the Agreement and acknowledges that this reasoning is equally applicable to Mexico's "as applied" claim at issue.<sup>3</sup>

#### **IV. ARGUMENTS OF THE PARTIES**

4.1 The arguments of the parties are set out in their written submissions and oral statements to the Panel and their answers to questions. The parties' submissions and oral statements or executive summaries thereof, are attached to this report as annexes (see List of Annexes, pages iii and iv).<sup>4</sup>

#### **V. ARGUMENTS OF THE THIRD PARTIES**

5.1 Chile, China, the European Communities, Japan and Thailand reserved their rights to participate in these panel proceedings as third parties. Neither China nor Thailand provided a written submission, and Chile did not submit an oral statement to the Panel. The arguments of the European Communities and Japan are set out in their written submissions and oral statements, the arguments of Chile are set out in its written submission, and the arguments of China and Thailand are set out in their oral statements to the Panel. The third parties' submissions and oral statements, or executive summaries thereof, are attached to this report as annexes (see List of Annexes, pages iii and iv).

#### **VI. INTERIM REVIEW**

6.1 On 5 October 2007, we submitted the interim report to the parties. On 26 October 2007, the United States submitted a written request for the review of precise aspects of the interim report. Mexico did not make such a request. It did, however, direct the Panel's attention to a typographical

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<sup>2</sup> Response of Mexico to Question 2 from the Panel Following the First Meeting.

<sup>3</sup> First Written Submission of the United States, para. 104; Response of the United States to Question 12 from the Panel Following the First Meeting.

<sup>4</sup> The English and Spanish versions of Mexico's executive summaries are reproduced as submitted by Mexico in their original language.

error in the interim report. On 9 November 2007, Mexico submitted comments on the United States' comments on the interim report. The United States did not submit further comments since Mexico had not submitted comments on the interim report.

6.2 We have outlined our treatment of the parties' requests below. In addition to the changes explained below, where necessary, we also have made technical revisions to our report and corrected typographical errors brought to our attention by the parties.

A. REQUEST OF THE UNITED STATES

6.3 First, the United States requests that paragraphs 3.2, 7.15 and 7.43 of our report be amended in order to better reflect the United States' arguments regarding Mexico's claim on model zeroing. Mexico has not made any comment regarding the United States' request. We have amended paragraphs 3.2, 7.15 and 7.43 in order to accommodate the United States' concern.

6.4 Second, the United States requests that the last sentence of paragraph 7.30 be deleted. The United States finds this sentence unnecessary to the Panel's analysis in the remainder of the paragraph. The United States contends that this sentence implies that only measures of "general and prospective" application may be successfully challenged "as such" in WTO dispute settlement. The United States notes, however, that this issue is not presented in this dispute. Furthermore, the United States is of the view that the scope of an "as such" claim may not be so limited. The United States argues that a measure that does not mandate WTO-inconsistent behaviour can not be successfully challenged "as such" in WTO dispute settlement. According to the United States, Article 3.2 of the DSU does not stand for the proposition that ensuring "predictability and security" to the multilateral trading system is an objective of the WTO dispute settlement system. Rather, Article 3.2 provides that the dispute settlement system is a central element in providing "security and predictability" and that this is to be done by preserving the rights and obligations of Members and by clarifying the provisions of the WTO agreements.

6.5 Mexico disagrees with the United States' comment and asserts that it amounts to re-arguing the case, which can not be done at the interim review stage. Mexico argues that the United States' argument regarding the types of measures that may be subjected to WTO dispute settlement does not constitute a comment regarding a precise aspect of the interim report. Mexico also disagrees with the second aspect of the United States' comment regarding paragraph 7.30 and contends that Article 3.2 of the DSU makes clear that "security and predictability" to the multilateral trading system is indeed an object of the DSU.

6.6 We agree with the United States' contention that this dispute does not require us to decide what types of measures may be challenged "as such" in WTO dispute settlement. The last sentence of paragraph 7.30 of our report, therefore, does not reflect an assessment of this issue. In the same vein, our statement in the same paragraph regarding the term "security and predictability" referred to in Article 3.2 of the DSU, is not intended to ascribe a precise meaning to this term. None of these two statements are part of our legal reasoning with regard to Mexico's claims. We therefore decline to amend paragraph 7.30.

6.7 Third, the United States submits that the relevant part of paragraph 7.38 below does not reflect the United States' position as to the accuracy of the expert opinion, submitted by Mexico to the Panel, regarding the application of *Model Zeroing Procedures* under US law. The United States requests that the Panel delete the sentence starting with "In response to questioning..." from this paragraph. Mexico disagrees with the United States and argues that the sentence at issue contains a fair description of the United States' comments regarding the expert opinion on the application of *Model Zeroing Procedures* under US law.

6.8 We have deleted the sentence in paragraph 7.38 referred to by the United States and made other changes to the paragraph in order to reflect the United States' position in a more comprehensible fashion.

6.9 Fourth, the United States requests that we explain, in paragraph 7.40 of our report, the provisions of US law pursuant to which the USDOC announced in the Federal Register that it would no longer make average-to-average comparisons in investigations without taking into consideration all comparable export transactions. To this end, the United States proposes adding a footnote to paragraph 7.40. Mexico opposes the United States' request. According to Mexico, the USDOC's notice described a practice that was not limited in scope or period of application. Regardless of the domestic law requirements pursuant to which it was announced, therefore, the notice at issue described a measure of general and prospective application.

6.10 In order to provide further factual clarification regarding the notice published in the Federal Register, we have added footnote 39 to paragraph 7.40. We have also made certain technical changes to the text of this paragraph at the request of the United States.

6.11 Fifth, the United States requests that we amend certain parts of paragraph 7.45 in order to better describe our finding and to ensure its consistency with other related findings that we have made. Mexico objects on the grounds that the changes suggested by the United States would alter the meaning of the Panel's findings. According to Mexico, the United States' comments imply that the duty imposed in an investigation may be changed over time and that it may not have continuing effect. We have amended paragraph 7.45, taking into consideration the views expressed by both parties.

6.12 Sixth, the United States notes our statement in paragraph 7.117 below to the effect that the concept of "product as a whole" has been developed by the Appellate Body. The United States argues that this concept was used for the first time by the European Communities in the *EC – Bed Linen* case and wants this to be mentioned in a footnote to paragraph 7.117. Mexico objects to the United States' request on the grounds that it amounts to re-arguing the United States' case and that it is not related to interim review. Furthermore, Mexico contends that whether a party to a previous dispute also used the term "product as a whole" in its argumentation is not relevant to the issue of whether the term "product" may be interpreted as referring to something narrower than the product under consideration as a whole for purposes of these proceedings.

6.13 Our statement that the notion of "product as a whole" has been developed by the Appellate Body is *obiter dictum* and thus has no bearing on our evaluation of Mexico's claims in these proceedings. We therefore do not find important to mention when and in which context this concept was first used in WTO dispute settlement. We have, however, made a modification to paragraph 7.117 so as to note that this concept was developed in WTO dispute settlement generally, without mentioning by whom.

6.14 Seventh, the United States takes issue with our reference to the object and purpose of specific treaty provisions in paragraphs 7.119 and 7.148 below. The United States asserts that according to Article 31(1) of the Vienna Convention on the Law of Treaties ("Vienna Convention"), it is the object and purpose of the treaty, not specific provisions thereof, that has to be taken into consideration in the interpretation of the treaty. The United States agrees with our interpretation based on the text of the treaty and therefore argues that we do not need to refer to object and purpose. If, however, we choose to make such a reference, the United States argues that we have to clarify that what we refer to is the object and purpose of the treaty, not specific provisions thereof. Mexico disagrees with the United States and argues that Article 31(1) of the Vienna Convention does not preclude the interpreter from taking into account the object and purpose of specific provisions of a treaty.

6.15 Article 31(1) of the Vienna Convention reads:

"ARTICLE 31

*General rule of interpretation*

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."<sup>5</sup> (emphasis added)

6.16 We note that the term "object and purpose" in Article 31(1) is preceded by "its" whereas the term "context" is preceded by "their". Thus, we consider that Article 31(1) refers to the object and purpose of the treaty as a whole, rather than specific provisions thereof. Had drafters intended to refer to the object and purpose of specific provisions, they would have used "their", not "its", before "object and purpose", as in the case of the word "context".<sup>6</sup> We have therefore amended paragraphs 7.119 and 7.148 of our report accordingly.

6.17 Eighth, the United States requests the Panel to amend the third sentence of paragraph 7.122 in order to clarify that this sentence reflects Mexico's arguments. Mexico objects to the United States' request and contends that the mentioned sentence correctly reflects Mexico's views as contained in paragraph 62 of its second written submission to the Panel. We note that it is clear that the sentence referred to by the United States conveys Mexico's views regarding the object and purpose of the treaty provisions cited therein. Furthermore, footnote 92 to the preceding sentence indicates where Mexico presented the argument at issue. We therefore decline to make any changes to paragraph 7.122.

## VII. FINDINGS

### A. RELEVANT PRINCIPLES REGARDING STANDARD OF REVIEW, TREATY INTERPRETATION AND BURDEN OF PROOF

#### 1. Standard of Review

7.1 Article 11 of the DSU provides the standard of review for WTO panels in general. Article 11 imposes upon panels a comprehensive obligation to make an "objective assessment of the matter", an obligation which embraces all aspects of a panel's examination of the "matter", both factual and legal.<sup>7</sup>

7.2 Article 17.6 of the Anti-Dumping Agreement sets forth the special standard of review applicable to disputes under the Anti-Dumping Agreement:

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<sup>5</sup> (1969) 8 *International Legal Materials* 679.

<sup>6</sup> We consider, however, that this does not preclude the interpreter from taking into account the object and purpose of specific treaty provisions, where warranted. In this regard, we find support in the Appellate Body's statement that "[t]o the extent that one can speak of the 'object and purpose of a treaty provision', it will be informed by, and will be in consonance with, the object and purpose of the entire treaty of which it is but a component". Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts* ("EC – Chicken Cuts"), WT/DS269/AB/R, WT/DS286/AB/R, and Corr.1, adopted 27 September 2005, para. 238.

<sup>7</sup> Article 11 of the DSU provides in part:

"The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements."

- "(i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;
- (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations."

Thus, taken together Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement establish the standard of review we must apply with respect to both the factual and the legal aspects of the present dispute.

## 2. Rules of Treaty Interpretation

7.3 Article 3.2 of the DSU provides that the dispute settlement system serves to clarify the provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". It is generally accepted that these customary rules are reflected in Articles 31-32 of the *Vienna Convention on the Law of Treaties* ("*Vienna Convention*"). Article 31(1) of the *Vienna Convention* provides:

"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

7.4 In the context of disputes under the Anti-Dumping Agreement, the Appellate Body has stated that:

"The *first* sentence of Article 17.6(ii), echoing closely Article 3.2 of the DSU, states that *panels* 'shall' interpret the provisions of the *AD Agreement* 'in accordance with customary rules of interpretation of public international law'. Such customary rules are embodied in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* ('*Vienna Convention*'). Clearly, this aspect of Article 17.6(ii) involves no 'conflict' with the DSU but, rather, confirms that the usual rules of treaty interpretation under the DSU also apply to the *AD Agreement*. ...

The *second* sentence of Article 17.6(ii) ... *presupposes* that application of the rules of treaty interpretation in Articles 31 and 32 of the *Vienna Convention* could give rise to, at least, two interpretations of some provisions of the *AD Agreement*, which, under that Convention, would both be '*permissible* interpretations'. In that event, a measure is deemed to be in conformity with the *AD Agreement* "if it rests upon one of those permissible interpretations."<sup>8</sup> (emphasis in original)

7.5 Thus, under the Anti-Dumping Agreement, we have to follow the same rules of treaty interpretation as in any other dispute. Furthermore, Article 17.6(ii) provides explicitly that if we find

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<sup>8</sup> Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* ("US – Hot-Rolled Steel"), WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697, paras. 57 and 59.

more than one permissible interpretation of a provision of the Anti-Dumping Agreement, we have to uphold a measure that rests on one of those interpretations.

### 3. Burden of Proof

7.6 The general principles applicable to burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of the WTO Agreement by another Member assert and prove its claim.<sup>9</sup> Mexico as the complaining party must therefore make a *prima facie* case of violation of the relevant provisions of the relevant WTO agreements, which the respondent must refute. A *prima facie* case must be based on evidence and legal argument put forward by the complaining party in relation to each of the elements of the claim.<sup>10</sup> We also note that it is generally for each party asserting a fact, whether complainant or respondent, to provide proof thereof.<sup>11</sup> In this respect, therefore, it is also for the United States to provide evidence for the facts which it asserts. We also recall that a *prima facie* case is one which, in the absence of effective refutation by the other party, requires a panel, as a matter of law, to rule in favour of the party presenting the *prima facie* case.

#### B. TERMINOLOGY USED TO DESCRIBE THE MEASURES AT ISSUE

7.7 The term "zeroing" refers to the calculation of a weighted average margin of dumping in a manner that does not fully reflect export prices that are above the normal value. Mexico takes issue with two different types of "zeroing": "model zeroing in investigations" and "simple zeroing in periodic reviews". According to Mexico's description, "model zeroing in investigations" occurs where the investigating authorities compare the weighted average normal value and the weighted average export price for each model of the product under consideration and treat as zero the results of model-specific comparisons where the weighted average export price exceeds the weighted average normal value, when such comparisons are aggregated for purposes of calculating the margin of dumping for the product under consideration as a whole in an anti-dumping investigation.<sup>12</sup> "Simple zeroing in periodic reviews" is used by Mexico to refer to a method whereby the authorities compare individual export transactions against monthly weighted average normal values and do not fully take into account the results of comparisons where the export price exceeds the monthly weighted average normal value when such results are aggregated in order to calculate the margin of dumping for the product under consideration as a whole in a periodic review.<sup>13</sup>

7.8 The United States submits that these terms used by Mexico to describe the measures at issue in these proceedings are not found under US law and asks the Panel not to make any inferences from them.<sup>14</sup>

7.9 We note that the terms "zeroing", "model zeroing in investigations" or "simple zeroing in periodic reviews" are not found under US law. Nor are they mentioned anywhere in the Anti-Dumping Agreement. We also note, however, that a number of WTO panels and the Appellate Body have, in the past, used the same or similar terms in order to describe the measure before them. We also find it useful to use the same terminology in our analysis in this report. We would like to emphasize, however, that our use of these terms is for ease of reference only and shall not be interpreted as an assessment of their WTO-compatibility.

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<sup>9</sup> Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India* ("US – Wool Shirts and Blouses"), WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323 at 337.

<sup>10</sup> Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* ("US – Gambling"), WT/DS285/AB/R, adopted 20 April 2005, para. 140.

<sup>11</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, *supra*, note 9, para. 337.

<sup>12</sup> First Written Submission of Mexico, para. 15.

<sup>13</sup> First Written Submission of Mexico, para. 21.

<sup>14</sup> First Written Submission of the United States, footnote 38.



C. TERMS OF REFERENCE

7.10 Mexico, in its First Written Submission, identified the measure at issue as the "Zeroing Procedures" applied by the United States in all procedural contexts and in relation to all types of methods of comparison between the normal value and the export price. That is, Mexico challenged one single measure, the "Zeroing Procedures", manifested in different contexts.<sup>15</sup> The United States in its First Written Submission argued that Mexico had not identified the "Zeroing Procedures" as a single measure in its request for consultations and its request for the establishment of a panel. According to the United States, Mexico had identified two measures in connection with its "as such" claims in its request for establishment: "model zeroing in investigations" and "simple zeroing in periodic reviews". The United States therefore asked the Panel to disregard Mexico's "as such" claim regarding the "Zeroing Procedures" in all contexts and with regard to all kinds of comparisons between the normal value and the export price, and limit these proceedings to the two "as such" claims specifically raised in Mexico's panel request. In response to questioning on this issue, Mexico acknowledged that as far as its "as such" claims were concerned, the scope of its panel request was limited to "model zeroing in investigations" and "simple zeroing in periodic reviews". Mexico pointed out:

"[A]s clarified in its oral responses to the questions from the Panel, Mexico's claims are limited to the two manifestations of the "Zeroing Procedures" that are described in its request— (1) the use of model zeroing in original investigations; and (2) the use of simple zeroing in periodic reviews."<sup>16</sup> (emphasis added)

7.11 Article 7 of the DSU provides that the terms of reference of a panel are determined by the scope of the complaining party's panel request. Both parties agree that as far as Mexico's "as such" claims are concerned, its panel request is limited to "model zeroing in investigations" and "simple zeroing in periodic reviews". A textual analysis of Mexico's panel request, in our view, confirms this conclusion. The request contains no mention of proceedings other than investigations and periodic reviews and no mention of comparison methodologies other than the weighted average to weighted average ("WA-WA") methodology in investigations and the weighted average to transaction ("WA-T") methodology in periodic reviews. The word "review" is preceded by the word "periodic" in each instance it is used in the request. Hence, it is clear that our terms of reference in these proceedings only contain two "as such" claims by Mexico, *i.e.* "model zeroing in investigations" and "simple zeroing in periodic reviews". We shall, therefore, only address these two "as such" claims by Mexico, because "[a] panel cannot assume jurisdiction that it does not have".<sup>17</sup> We would like to emphasize, however, that our conclusion here concerns solely the jurisdictional issue raised by the United States as to whether the Panel may address Mexico's "as such" claims other than "model zeroing in investigations" and "simple zeroing in periodic reviews". Whether or not the measures pertaining to these two claims actually exist under US law is a separate issue which we address below as part of our substantive assessment of Mexico's claims.

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<sup>15</sup> See, for instance, First Written Submission of Mexico, para. 12.

<sup>16</sup> Response of Mexico to Question 1(a) from the Panel Following the First Meeting.  
Mexico repeated the same point in its Responses to Questions 1(b), 2 and 3 from the Panel Following the First Meeting.

<sup>17</sup> Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* ("India – Patents (US)"), WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9, para. 92.

D. MODEL ZEROING IN INVESTIGATIONS

1. Arguments of Parties

(a) Mexico

7.12 Mexico has raised an "as such" as well as an "as applied" claim regarding model zeroing in investigations. Mexico argues that the rules and procedures relating to model zeroing in investigations are embodied in what Mexico describes as the "Zeroing Procedures" under US law. According to Mexico, in investigations where the US investigating authorities carry out intermediate calculations for the product under consideration, on the basis, among others, of models or transactions, and then aggregate the intermediate calculations to calculate the margin for the product under consideration, they do not fully take into account the results of intermediate calculations where the export price exceeds the normal value. In other words, the US authorities treat negative results as zero. This, in Mexico's view, gives rise to a number of inconsistencies with the United States' WTO obligations.

7.13 First, Mexico argues that model zeroing is inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement because it precludes the calculation of a margin of dumping for the product under consideration as a whole. The ultimate margin only reflects part of the calculations for the product under consideration because negative results in the intermediate calculations are treated as zero. Second, Mexico contends that model zeroing in investigations is inconsistent with Article 2.4.2 of the Anti-Dumping Agreement because it precludes the calculation of a margin of dumping based on a weighted average of prices of all comparable export transactions for the product under consideration as a whole. Third, Mexico submits that model zeroing in investigations is inconsistent with the obligation to carry out a fair comparison between the normal value and the export price as required under Article 2.4 of the Anti-Dumping Agreement because it artificially reduces the prices of certain export transactions. Fourth, Mexico argues that as an "administrative procedure" within the meaning of Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement, model zeroing in investigations is inconsistent with the obligations set forth in these provisions.

7.14 In addition to its "as such" claim regarding model zeroing in investigations, Mexico also contends that model zeroing "as applied" in the anti-dumping investigation on *Stainless Steel Sheet and Strip in Coils from Mexico* is, for the same reasons mentioned in connection with its "as such" claim, inconsistent with the United States' WTO obligations.

(b) United States

7.15 The United States contends that there exists no such measure as the "Zeroing Procedures" under US law and therefore invites the Panel to dismiss Mexico's "as such" claim regarding model zeroing in investigations. Even if the Panel finds that such a measure existed at the time the Panel was established, the United States directs the Panel's attention to the fact that through a policy change that came into effect on 22 February 2007, the USDOC stopped using model zeroing in investigations as from the mentioned date. Regarding Mexico's "as applied" claim, the United States acknowledges that the USDOC applied model zeroing in the anti-dumping investigation on *Stainless Steel Sheet and Strip in Coils from Mexico*. The United States also recognizes that in *US – Softwood Lumber V*, the Appellate Body found the use of model zeroing to be inconsistent with Article 2.4.2 of the Agreement and that the Appellate Body's reasoning in that respect is equally applicable to this claim.<sup>18</sup>

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<sup>18</sup> *Supra*, note 3.

## 2. Arguments of Third Parties

7.16 We note that although Mexico acknowledged, subsequent to its First Written Submission, that the scope of its panel request was limited to "model zeroing in investigations" and "simple zeroing in periodic reviews", some of the third parties also addressed other types of zeroing because they prepared their submissions before Mexico's written acknowledgement regarding the scope of its panel request.

### (a) Chile

7.17 Chile contends that the WTO-inconsistency of the zeroing methodology in investigations has been confirmed by previous Appellate Body decisions and expresses hope that this issue will be resolved on a multilateral level through amendment of the Anti-Dumping Agreement. Continued adjudication between WTO Members on this issue, which is costly and time consuming, should therefore be avoided. Chile submits that zeroing not only inflates the margin of dumping, but also yields a positive determination of dumping where there would have been no dumping absent zeroing. Chile therefore asks the Panel to find that zeroing is inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4 and 9.3 of the Anti-Dumping Agreement.

### (b) China

7.18 Based on the WTO jurisprudence regarding zeroing, China argues that irrespective of the methodology used for the comparison of the normal value and the export price, the use of zeroing in investigations is inconsistent with Articles 2.1, 2.4.2, and 2.4 of the Anti-Dumping Agreement. China is of the view that the Panel should not depart from the Appellate Body's jurisprudence because the arguments presented by the United States in these proceedings do not differ from the arguments raised in prior cases. China therefore invites the Panel to accept Mexico's claims and expects the United States to eliminate the use of zeroing in all anti-dumping proceedings.

### (c) European Communities

7.19 The European Communities' third party submission mainly focuses on the WTO jurisprudence on zeroing and discusses in detail the significance of adopted Appellate Body reports for WTO panels dealing with similar legal issues. More specifically, the European Communities summarizes previous panel and Appellate Body findings on zeroing, with a particular emphasis on the latter, and notes that all the issues raised by Mexico in this case have already been discussed by the Appellate Body and that a relatively consistent line of jurisprudence has emerged. The European Communities then looks into the principle of *stare decisis*, i.e. the binding effect of previous court decisions on subsequent cases. In this regard, the European Communities first analyses the principle in the context of national legal systems and observes that unlike common law jurisdictions where lower courts are required to follow the decisions of higher courts on similar legal issues, in civil law jurisdictions the main task assigned to courts is to apply the written legal texts to the facts presented in a given case. Yet, the European Communities observes, courts in civil law jurisdictions do follow the decisions of higher courts carefully and apply them to similar issues raised before them. Likewise, the European Communities notes that high courts in civil law jurisdictions, such as Italy and France, also follow their own jurisprudence as a matter of judicial policy and practice. Furthermore, the European Communities points out that some judges even follow the decisions made by other courts at the same level.

7.20 As far as the international tribunals are concerned, the European Communities notes that *stare decisis* in principle does not apply in such tribunals and there is no legal norm that requires them to follow previous decisions by higher courts. The European Communities points out, however, that in practice most international tribunals do give certain weight to precedents when dealing with similar

legal issues. In this regard, the European Communities mentions the practice of the European Court of Human Rights, the International Court of Justice, the International Tribunal for the Law of the Sea, the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the International Criminal Court and the International Centre for Settlement of Investment Disputes. The European Communities also notes that when a lower court considers it appropriate to depart from the jurisprudence of its higher court, it generally identifies a cogent reason for such departure.

7.21 On the more specific issue of "precedent in the WTO dispute settlement system", the European Communities notes that there is no rule that requires WTO panels to follow adopted Appellate Body decisions and that such decisions are binding only on the parties to the proceedings and with regard to the dispute at issue. Nonetheless, the European Communities observes that panels in practice do follow Appellate Body decisions when dealing with similar legal issues. Through its decisions, the Appellate Body strives to establish consistency in its case law by citing its previous decisions where appropriate. According to the EC, this serves the need to provide "security and predictability to the multilateral trading system", as set forth in Article 3.2 of the DSU. The European Communities endorses this approach because "the need for security and predictability is also thought to require consistency in WTO case law, including in particular the Appellate Body decisions relating to questions of law and legal interpretations of the covered agreements".<sup>19</sup> Furthermore, the European Communities argues that Appellate Body decisions should be accorded particular authority by panels even though there is no written rule that requires them to do so. The European Communities recalls the pronouncements of the Appellate Body itself on this issue, including in *US – Oil Country Tubular Goods Sunset Reviews* where the Appellate Body opined that panels were expected to follow adopted Appellate Body decisions where the issues are the same. With regard to the dispute at issue, the European Communities considers Mexico's claims to be based on a consistent line of reasoning and findings developed by the Appellate Body. In the European Communities' view, the Appellate Body's jurisprudence on zeroing represents the correct legal analysis. In the interest of ensuring security and predictability for the multilateral trading system, the European Communities submits that this jurisprudence has to be followed by the Panel in this case.

(d) Japan

7.22 Japan generally submits that the "Zeroing Procedures" used by the US investigating authorities constitute a measure of general and prospective application and therefore may be challenged "as such" in WTO dispute settlement proceedings. Japan recalls the Appellate Body findings in previous zeroing cases and argues that these findings should be followed by the Panel in these proceedings. More specifically, Japan contends that the "Zeroing Procedures" challenged by Mexico in this case are the same as those found to be WTO-inconsistent by the Appellate Body in *US – Zeroing (Japan)* and contends that such past rulings should be followed in this case to ensure security and predictability for the international trading system.

7.23 Japan generally agrees with Mexico that the use of zeroing in investigations is inconsistent with Articles 2.1, 2.4.2 and 2.4 of the Anti-Dumping Agreement. Japan specifically supports Mexico with respect to investigations where the T-T methodology is used, but also claims that the same inconsistency arises in the context of the WA-WA and the WA-T methodologies. Japan submits that the definition of dumping in Article VI:1 of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement requires the investigating authorities to make a determination of dumping for the product under consideration as a whole, irrespective of the methodology used for the comparison of the normal value and the export price. If the authorities carry out multiple comparisons, the results of all such intermediate comparisons have to be taken into consideration in determining the margin of

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<sup>19</sup> Written Submission of the European Communities, para. 160.

dumping for the product under consideration as a whole. Finally, Japan asserts that zeroing in investigations is inconsistent with the obligation to carry out a fair comparison between the normal value and the export price as required under Article 2.4 of the Agreement.

(e) Thailand

7.24 Thailand considers the use of zeroing to be inconsistent with the letter and the spirit of Article VI of the GATT 1994 and the Anti-Dumping Agreement. According to Thailand, as the Appellate Body has consistently held in the past zeroing cases, whenever investigating authorities use intermediate price comparisons while calculating the margin of dumping, they should take into account the results of all such comparisons where the export price exceeds the normal value. Thailand therefore invites the Panel to follow this line of reasoning in this case and accept Mexico's claims with regard to model zeroing in investigations, irrespective of the comparison methodology used.

**3. Evaluation by the Panel**

7.25 Mexico has raised an "as such" as well as an "as applied" claim regarding model zeroing in investigations. Below, we analyse each in turn.

(a) Model Zeroing in Investigations "As Such"

7.26 Mexico's "as such" claim on model zeroing in investigations raises the issue of the alleged existence of the measure at issue. Mexico submits that there exists, under US law, such a measure as the "Zeroing Procedures" as manifested in anti-dumping investigations where the normal value and the export price are compared on a WA-WA basis. In other words, Mexico asserts the existence of a measure called the "Zeroing Procedures" relative to model zeroing in investigations. The United States disagrees with Mexico's assertion that such a measure as the "Zeroing Procedures" exists under US law and therefore invites the Panel to dismiss Mexico's "as such" claim regarding model zeroing in investigations.

7.27 Mexico, in certain instances in its submissions, refers to this measure as the *Model Zeroing Procedures*.<sup>20</sup> We find this expression useful because it serves to distinguish the measure at issue in connection with Mexico's "as such" claim on model zeroing in investigations from the measure at issue in connection with Mexico's "as such" claim on simple zeroing in periodic reviews. For ease of reference, therefore, we shall use this expression to refer to the specific measure at issue in connection with the claim at issue.

(i) *Alleged Existence of the Model Zeroing Procedures*

7.28 The first issue that we have to address regarding Mexico's "as such" claim on model zeroing in investigations is whether the measure exists. We note that this inquiry concerns the alleged existence of the *Model Zeroing Procedures* at the time of the establishment of this Panel. Assuming that this measure existed when this Panel was established, the parties disagree whether it was subsequently withdrawn by the United States. The United States asserts that it was, but Mexico disagrees. If we find that the measure existed at the time of the establishment of this Panel, we will also have to address the issue of whether it was subsequently withdrawn. Furthermore, if we find that the measure was indeed withdrawn subsequent to the establishment of this Panel, we will also have to decide whether to make findings and rulings on an expired measure.

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<sup>20</sup> See, for instance, First Written Submission of Mexico, paras. 57 and 61.

Did the *Model Zeroing Procedures* Exist As of the Time of the Establishment of the Panel?

7.29 We are cognizant that we can only address the substance of Mexico's "as such" claim on model zeroing in investigations if there exists, under US law, such a measure as the *Model Zeroing Procedures*. We recall that the principles on the burden of proof applicable in these proceedings (*supra*, para. 7.6) require Mexico to present evidence sufficient to demonstrate the existence of such measure.

7.30 The types of measures that can be subject to the WTO dispute settlement proceedings have not been specified in the DSU. Article 3.3 of the DSU mentions that the WTO dispute settlement mechanism deals with the "measures taken by a Member". This indicates that there has to be a nexus between the measure that is contested and the Member against which the complaint is brought.<sup>21</sup> It does not, however, speak directly to the question of what types of measures may be challenged. We note, however, that this issue is not novel in the WTO dispute settlement system. A reading of the Appellate Body's decisions on this issue reveals that the concept of a "measure" that can be challenged in WTO dispute settlement is to be interpreted broadly. Recently, in *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body reasoned that "[i]n principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings".<sup>22</sup> The Appellate Body further indicated that a measure, for purposes of the WTO dispute settlement proceedings, consists "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".<sup>23</sup> We agree with the Appellate Body's approach regarding the concept of a "measure" for purposes of the WTO dispute settlement proceedings. In our view, not allowing "as such" actions against measures of general and prospective application would undermine the objective of ensuring the "security and predictability to the multilateral trading system" referred to in Article 3.2 of the DSU.

7.31 The United States does not disagree with the notion that the WTO dispute settlement system applies to, among others, acts that set forth norms that have a general and prospective application. It argues, however, that Mexico has not presented evidence sufficient to prove that such a measure exists in this case. We note that the issue of proving the existence of a measure subject to an "as such" claim has been discussed by the Appellate Body on several occasions. In *US – Oil Country Tubular Goods Sunset Reviews*, the United States, the Member complained against in that case, argued that because the Sunset Policy Bulletin was not a legal instrument that was binding for the US authorities, it did not constitute a measure subject to WTO dispute settlement.<sup>24</sup> The Appellate Body disagreed. According to the Appellate Body, the status of the Sunset Policy Bulletin was not relevant to the question of whether it could be challenged in the WTO. What mattered was whether it constituted a measure subject to WTO dispute settlement. The Appellate Body reasoned that the Sunset Policy Bulletin had normative value, that it had general and prospective application and concluded that it constituted a measure subject to the WTO dispute settlement.<sup>25</sup>

7.32 The measure at issue in these proceedings is different from the Sunset Policy Bulletin in that unlike the Sunset Policy Bulletin, the *Model Zeroing Procedures* are not manifested in a written form.

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<sup>21</sup> Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") ("US – Zeroing (EC)")*, WT/DS294/AB/R, adopted 9 May 2006, para. 187.

<sup>22</sup> (footnote omitted) Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan ("US – Corrosion-Resistant Steel Sunset Review")*, WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, 3, para. 81.

<sup>23</sup> (footnote omitted) *Ibid.*, para. 82.

<sup>24</sup> Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina ("US – Oil Country Tubular Goods Sunset Reviews")*, WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, 3257, para. 184.

<sup>25</sup> *Ibid.*, para. 187.

In our view, however, it would be inconsistent with the above-described approach regarding the concept of a "measure" to hold that only written instruments may constitute a measure. We do not, therefore, attribute a decisive role to the form in which the measure is manifested in considering whether the *Model Zeroing Procedures* may be challenged in the WTO. We note that this very issue arose in the recent *US – Zeroing (EC)* case which also involved zeroing and that the Appellate Body made a ruling along these same lines.<sup>26</sup> Nonetheless, the Appellate Body cautioned that a panel must not lightly assume the existence of a rule or norm constituting a measure of general and prospective application, especially when it is not in the form of a written document.<sup>27</sup> The Appellate Body identified certain criteria that a measure should possess in order to be susceptible to a challenge in the WTO dispute settlement proceedings:

"In our view, when bringing a challenge against such a "rule or norm" that constitutes a measure of general and prospective application, a complaining party must clearly establish, through arguments and supporting evidence, at least that the alleged "rule or norm" is attributable to the responding Member; its precise content; and indeed, that it does have general and prospective application. It is only if the complaining party meets this high threshold, and puts forward sufficient evidence with respect to each of these elements, that a panel would be in a position to find that the "rule or norm" may be challenged, as such. This evidence may include proof of the systematic application of the challenged "rule or norm". Particular rigour is required on the part of a panel to support a conclusion as to the existence of a "rule or norm" that is not expressed in the form of a written document. A panel must carefully examine the concrete instrumentalities that evidence the existence of the purported "rule or norm" in order to conclude that such "rule or norm" can be challenged, as such."<sup>28</sup> (footnote omitted, emphasis added)

7.33 In so far as the claim at issue here, we recall that the alleged measure is the *Model Zeroing Procedures*. Turning to the criteria pronounced by the Appellate Body, we note that the measure challenged by Mexico is attributable to the United States. The fact that model zeroing occurs in connection with the margin calculations in anti-dumping investigations carried out by the USDOC clearly indicates this.

7.34 Regarding the precise content of the *Model Zeroing Procedures*, Mexico points to various instruments. Mexico contends that the following constitute evidence that describes the content of the *Model Zeroing Procedures*: (a) the Standard Computer Programme used by the USDOC, (b) the Anti-Dumping Manual, (c) the application of the *Model Zeroing Procedures* in the investigation on *Stainless Steel Sheet and Strip in Coils from Mexico*, (d) further evidence on the consistent application of the *Model Zeroing Procedures* in all investigations previously conducted by the USDOC, and (e) evidence showing continued application of the *Model Zeroing Procedures* in current investigations.

7.35 First, regarding the Standard Computer Programme used for dumping margin calculations by the USDOC, Mexico argues that the Standard Zeroing Line incorporated in this programme implements the *Model Zeroing Procedures* in investigations. That is, the Standard Computer Programme used by the USDOC treats as zero the results of intermediate comparisons yielding negative margins when the comparisons are aggregated for the calculation of the overall margin of dumping for the product as a whole. An expert opinion presented by Mexico confirms this assertion and further explains how model zeroing is carried out in investigations.<sup>29</sup> The expert opinion also

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<sup>26</sup> Appellate Body Report, *US – Zeroing (EC)*, *supra*, note 21, paras. 190-193.

<sup>27</sup> *Ibid.*, para. 196.

<sup>28</sup> *Ibid.*, para. 198.

<sup>29</sup> Exhibit MEX-1, paras. 29-35.

indicates that the USDOC has never changed the zeroing line of this Standard Computer Programme.<sup>30</sup>

7.36 Second, Mexico cites the Anti-Dumping Manual used by the USDOC as further evidence indicating that the USDOC regularly uses the Standard Computer Programme in its margin calculations in investigations. The Manual provides, in relevant parts:

### "III. PROGRAMMING PROCEDURES

The basic elements of the new PC programming procedures for investigations and reviews are validated databases, proper calculation methodologies, the best computer platform, and standard programs. The purpose of the procedures is to improve the accuracy and consistency of computer calculations. Calculation accuracy occurs when a program has been thoroughly checked. Accuracy is a function of both using validated databases in standard programs and checking calculations for computational and substantive correctness. Calculation consistency occurs when every program uses the same standard calculation methodology."<sup>31</sup>

We note that the Manual shows that the USDOC is expected to use the Standard Computer Programme consistently in its margin calculations in investigations.

7.37 Third, Mexico points to the application of the *Model Zeroing Procedures* in the investigation on *Stainless Steel Sheet and Strip in Coils from Mexico*, as proof of the existence of such Procedures. We note that the United States acknowledges that the USDOC did use model zeroing in the investigation on *Stainless Steel Sheet and Strip in Coils from Mexico*.<sup>32</sup>

7.38 Fourth, Mexico asserts that the USDOC has consistently applied the *Model Zeroing Procedures* in past investigations. Mexico substantiates this assertion through an expert opinion, statements made by the United States before the previous WTO panels and the factual findings made by those panels. The expert opinion states that the *Model Zeroing Procedures* have been a consistent element of the USDOC's dumping margin calculation in all proceedings.<sup>33</sup> In response to questioning in this regard, the United States has argued that the expert's description of the application of *Model Zeroing Procedures* under US law was inaccurate in so far as it suggested that the USDOC was bound by the Standard Computer Programme. According to the United States, the expert opinion only describes the basic templates in the computer programme, which the USDOC has discretion to change. The United States also cites instances where the expert herself acknowledges that the USDOC made changes to the computer programmes, albeit in the context of periodic reviews. The United States acknowledges, however, that these changes did not include the zeroing aspects of the programmes.<sup>34</sup> Although the United States asserts that the Assistant Secretary for Import Administration has discretion to change the computer programmes used by the USDOC, including their zeroing aspects, the United States stated that such discretion had never been used until the policy change, dated 22 February 2007, with regard to investigations where the normal value and the export price were compared on a WA-WA basis.<sup>35</sup>

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<sup>30</sup> Exhibit MEX-1, paras. 16-17.

<sup>31</sup> Exhibit MEX-4D, p.8.

<sup>32</sup> *Supra*, note 3.

<sup>33</sup> Exhibit MEX-1, paras. 15-17.

<sup>34</sup> Response of the United States to Question 5 from the Panel Following the First Meeting.

<sup>35</sup> Response of the United States to Question 2 from the Panel following the Second Meeting.



7.39 Finally, Mexico refers to the fact that the *Model Zeroing Procedures* were followed in every investigation conducted after January 2006.<sup>36</sup> While not providing a full list of these investigations, Mexico mentions certain examples where the USDOC defended the use of zeroing in some of these investigations.<sup>37</sup>

7.40 It seems clear to us, on the basis of the foregoing, that Mexico has presented evidence sufficient to demonstrate the precise content of the *Model Zeroing Procedures* "as such" under US law. In our view, the evidence about the precise content of the *Model Zeroing Procedures*, particularly the parts of the Anti-Dumping Manual that we cited above which indicate that the USDOC had to follow the Standard Computer Programme consistently in investigations, also demonstrates that these Procedures had general and prospective application. This shows that the *Model Zeroing Procedures* went beyond mere repetition of a certain methodology to specific cases and had become a "deliberate policy".<sup>38</sup> We observe below (paras. 7.44-7.45), that the USDOC made its policy change entailing the termination of model zeroing in investigations through an official notice in the Federal Register.<sup>39</sup> In our view, this confirms that the *Model Zeroing Procedures* had, until such change, a general and prospective application.

7.41 The United States argues that Mexico has not demonstrated the existence of the *Model Zeroing Procedures* as a measure that could be challenged before a WTO panel. The United States criticizes Mexico's reliance on past panel and Appellate Body findings regarding the existence of the zeroing procedures and argues that "a separate panel's findings are not evidence, but conclusions based on evidence".<sup>40</sup> We note that other WTO panels as well as the Appellate Body have made similar findings in cases that concerned the zeroing methodology applied by the United States in anti-dumping proceedings. Our findings are, however, based on the evidence presented by Mexico in these proceedings, not on the WTO jurisprudence. We therefore disagree with the United States' assertion.

7.42 On the basis of the foregoing considerations, we conclude that Mexico has presented evidence sufficient to demonstrate the existence of the *Model Zeroing Procedures* under US law as of the date of establishment of this Panel.

Were the *Model Zeroing Procedures* Subsequently Repealed by the United States?

7.43 The United States submits that as of 22 February 2007, the USDOC stopped using model zeroing in investigations. Mexico acknowledges that the United States did make such a change in its practice regarding model zeroing in investigations and that it applied its new practice in at least one investigation initiated subsequent to this date.<sup>41</sup> Mexico, however, considers that the United States has not eliminated the practice of model zeroing in investigations because this change in policy only

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<sup>36</sup> Mexico has not explained the significance of January 2006. Our understanding is that the importance of this date in terms of the submission of evidence regarding the continued application of *Model Zeroing Procedures* is because it supersedes the date of the USDOC's determination in the last periodic review on *Stainless Steel Sheet and Strip in Coils from Mexico*, i.e. 12 December 2005. See, First Written Submission of Mexico, para. 136.

<sup>37</sup> First Written Submission of Mexico, paras. 76-78.

<sup>38</sup> See, Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews* ("US – Zeroing (Japan)"), WT/DS322/AB/R, adopted 23 January 2007, para. 85.

<sup>39</sup> The United States submits that the Federal Register notice announcing that the USDOC would no longer make average-to-average comparisons in investigations without taking into consideration all comparable export transactions was issued in connection with the implementation of DSB rulings and recommendations in the *US – Zeroing (EC)* dispute, as required under US law [Section 123(g) of the Uruguay Round Agreements Act (19 U.S.C. § 3533(g))]. Comments of the United States on the interim report of the Panel, para. 6.

<sup>40</sup> First Written Submission of the United States, para. 40.

<sup>41</sup> Response of Mexico to Question 13 from the Panel Following the First Meeting.

affects the investigations ongoing as of, or initiated after, 22 February 2007. Mexico also argues that as long as the impact of model zeroing on existing anti-dumping measures is not removed, the measure cannot be considered to have been eliminated.

7.44 The official notice repealing model zeroing in investigations, published in the US Federal Register, reads in relevant parts:

**"Final Modification Concerning the Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation**

After considering all of the comments submitted, the Department is adopting this final modification concerning the calculation of the weighted-average dumping margin. The Department will no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons."<sup>42</sup>

**"Timetable**

The effective date of this notice is 16 January 2007 ... The Department will apply this final modification in all current and future antidumping investigations as of the effective date."<sup>43</sup>

The effective date of this modification was subsequently changed to 22 February 2007.<sup>44</sup>

7.45 We note that, as Mexico also concedes, the notice makes clear that the practice of model zeroing in investigations was to be eliminated as of 22 February 2007. The United States also submitted evidence that the new method applied in at least one investigation.<sup>45</sup> We also note that the notice unambiguously states that the new policy will have prospective effect only. It will apply to investigations ongoing as of, or initiated after, the effective date of the notice. The issue therefore becomes whether in these circumstances Mexico's assertion that the measure relating to Mexico's "as such" claim regarding model zeroing in investigations has not been eliminated, can be sustained. In our view, it cannot. We recall that we are now considering an "as such" challenge to a rule or norm of general and prospective application. Whether the change in the United States' practice has retrospective effect does not have a bearing on the more general question of whether the measure has been repealed. The fact that the impact of the repealed measure will continue as long as the anti-dumping duty rates previously calculated through the use of model zeroing remain in place does not change the fact that the measure itself is no longer in force, and that it will not be followed in the future investigations. We therefore conclude that the measure at issue, *i.e.* the *Model Zeroing Procedures* under US law, expired on 22 February 2007. The question therefore becomes whether we should make findings and recommendations on this expired measure.

(ii) *Should the Panel Make Findings and Recommendations on an Expired Measure?*

7.46 Above, we found that the measure at issue with respect to Mexico's "as such" claim on model zeroing in investigations, *i.e.* the *Model Zeroing Procedures* under US law, expired on 22 February 2007. Thus, the measure which was in force as of the time of the establishment of the Panel, was, during the Panel proceedings, repealed. This raises the question of whether this Panel should make findings and recommendations on this expired measure.

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<sup>42</sup> Exhibit MEX-10, p. 77722.

<sup>43</sup> Exhibit MEX-10, p. 77725.

<sup>44</sup> Exhibit MEX-11, p. 3783.

<sup>45</sup> Exhibit US-3, p. 9508.

7.47 We asked for parties' views on this issue. While continuing to assert that the measure at issue has not been abandoned by the United States, Mexico argues that, if the Panel is of the view that the measure has been repealed, it should make findings on the measure's WTO consistency, and further asserts that if the Panel finds the measure to be inconsistent, it should also make recommendations. In this context, Mexico also points out that the Panel can, as some panels have done in the past, make qualified recommendations.<sup>46</sup> The United States maintains that the alleged measure does not exist, but acknowledges as a general matter that "if a measure exists at the time a panel is established but expires or is withdrawn during the course of the panel proceedings, it is still within the panel's terms of reference, and the panel may make findings regarding the WTO consistency of the measure".<sup>47</sup> We understand the United States' position to be that if the Panel finds that such a measure as the *Model Zeroing Procedures* existed under US law at the time of the establishment of the Panel and that it was withdrawn in the course of the panel proceedings, the Panel is not precluded from making findings regarding the alleged WTO-inconsistency of such a measure.

7.48 *Model Zeroing Procedures* in investigations "as such" was raised in Mexico's panel request and therefore is within this Panel's terms of reference. Hence, we are not precluded from addressing Mexico's claims with regard to this measure. As we have noted, however, the measure was withdrawn after the commencement of the panel proceedings. There is no specific provision in the DSU that addresses whether a WTO panel may or may not make findings and recommendations on a measure which, while within the panel's terms of reference at the outset of the panel proceedings, subsequently expires. We note, however, that this is not a novel issue in WTO dispute settlement proceedings. This specific issue has arisen in a number of cases, and panels, taking into consideration the particularities of the disputes before them, have used their discretion in deciding whether making findings on an expired measure would be appropriate in each case.<sup>48</sup>

7.49 According to Article 3.7 of the DSU, "[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute". We will in any case have to address the WTO-consistency of model zeroing in investigations because Mexico has also raised an "as applied" claim in this regard. In these circumstances, we find it appropriate to make findings regarding Mexico's claim on model zeroing in investigations "as such" in order to secure a positive solution to the dispute before us.

7.50 As to whether we should also make a recommendation, we fail to see what purpose would be served by a recommendation relating to a measure that no longer exists. We recall in this respect the views expressed by the Appellate Body in *US – Certain EC Products*:

"We note, though, that there is an obvious inconsistency between the finding of the Panel that "the 3 March Measure is no longer in existence" and the subsequent recommendation of the Panel that the DSB request that the United States bring its 3 March Measure into conformity with its WTO obligations. The Panel erred in

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<sup>46</sup> Response of Mexico to Question 1(b) from the Panel Following the Second Meeting.

<sup>47</sup> Response of the United States to Question 1(b) from the Panel Following the Second Meeting.

<sup>48</sup> See for instance, Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry* ("Indonesia – Autos"), WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R and Corr.1, 2, 3 and 4, adopted 23 July 1998, DSR 1998:VI, 2201, para. 14.9; Panel Report, *India – Measures Affecting the Automotive Sector* ("India – Autos"), WT/DS146/R, WT/DS175/R and Corr.1, adopted 5 April 2002, DSR 2002:V, 1827, paras. 7.26-7.29; Panel Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes* ("Dominican Republic – Import and Sale of Cigarettes"), WT/DS302/R, adopted 19 May 2005, as modified by Appellate Body Report, WT/DS302/AB/R, paras. 7.340-7.344; Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products* ("EC – Approval and Marketing of Biotech Products"), WT/DS291/R, WT/DS292/R, WT/DS293/R, Corr.1 and Add.1, 2, 3, 4, 5, 6, 7, 8 and 9, adopted 21 November 2006, paras. 7.1303-7.1312.

recommending that the DSB request the United States to bring into conformity with its WTO obligations a measure which the Panel has found no longer exists."<sup>49</sup>

We shall refrain from making recommendations even if we find this measure to be inconsistent with the United States' WTO obligations since we have found that the United States abandoned the practice of model zeroing in investigations as from 22 February 2007. We now proceed to our substantive analysis of Mexico's "as such" claim on model zeroing in investigations.

(iii) *Is Model Zeroing in Investigations WTO-Inconsistent?*

7.51 The United States concedes that prior to the policy change on 22 February 2007, the USDOC applied model zeroing in anti-dumping investigations. That is, the USDOC considered as zero results of intermediate model-specific comparisons when such results were aggregated in the calculation of the margin of dumping for the product under consideration as a whole. As we noted above, the United States acknowledges that in *US – Softwood Lumber V*, the Appellate Body found the use of zeroing in this context to be inconsistent with Article 2.4.2 of the Agreement and that this reasoning is equally applicable to this claim. Finally, the United States has presented no arguments in response to Mexico's contention that the use of model zeroing in investigations is WTO-inconsistent. In short, and excepting its arguments about the existence of the alleged measure as discussed above, the United States does not appear to contest Mexico's claim on this issue.

7.52 We recall that the rules on the burden of proof applicable in these proceedings (*supra*, para. 7.6) provide that the party claiming a violation of a provision of the WTO Agreement, in this case Mexico, by another Member, must assert and prove its claim. Mexico, therefore, has to present evidence and arguments sufficient to make a *prima facie* case of violation of the relevant provisions of the relevant WTO agreements. Thus, the fact that the United States does not contest Mexico's contention that the use of model zeroing in investigations is WTO-inconsistent does not discharge Mexico of its obligation to make a *prima facie* case. It follows that we shall find for Mexico in connection with its claim on model zeroing in investigations only if Mexico presents a *prima facie* case regarding the incompatibility of model zeroing in investigations with the relevant provisions of the relevant WTO agreements. In our view, our obligation to carry out an "objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements" as set forth in Article 11 of the DSU, lends support to our approach. With this in mind, we turn to the evaluation of the arguments that Mexico has presented in support of this claim.<sup>50</sup>

7.53 Mexico raises four arguments in support of its claim regarding the WTO-inconsistency of model zeroing in investigations. First, it asserts that model zeroing in investigations is inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement because it precludes the calculation of a margin of dumping for the product under consideration as a whole. The ultimate margin only reflects part of the calculations for the product under consideration because negative results in the intermediate calculations are treated as zero. Second, Mexico contends that model zeroing in investigations is inconsistent with Article 2.4.2 of the Anti-Dumping Agreement because it precludes the calculation of a margin of dumping based on a weighted average of prices of all comparable export transactions for the product under consideration as a whole. Third, Mexico submits that model zeroing in investigations is inconsistent with the obligation to carry out a fair

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<sup>49</sup> Appellate Body Report, *United States – Import Measures on Certain Products from the European Communities* ("US – Certain EC Products"), WT/DS165/AB/R, adopted 10 January 2001, DSR 2001:I, 373, para. 81.

<sup>50</sup> We recall that this very issue arose in *US – Shrimp (Ecuador)* and the panel pointed out that it could only find for the complaining Member if that Member made a *prima facie* case on the inconsistency with the relevant provisions of the relevant WTO agreements of model zeroing in investigations. See, Panel Report, *United States – Anti-Dumping Measures on Shrimp from Ecuador* ("US – Shrimp (Ecuador)"), WT/DS335/R, adopted 20 February 2007, para. 7.9. We therefore also find support in this panel decision.

comparison between the normal value and the export price as required under Article 2.4 of the Anti-Dumping Agreement because it artificially reduces the prices of certain export transactions. Fourth, Mexico argues that as an "administrative procedure" within the meaning of Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement, model zeroing in investigations is inconsistent with the obligations set forth in those provisions.

7.54 We find it appropriate to commence our assessment of Mexico's claim with the alleged violation of Article 2.4.2 of the Agreement and then move on to the next alleged violation, if, and to the extent necessary, to resolve the claim.

7.55 We recall that model zeroing in investigations has been found to be inconsistent with the obligation under Article 2.4.2 of the Agreement to compare the weighted-average of the normal value with the weighted-average of the prices of all comparable export transactions in all dispute settlement proceedings in which it was challenged, *i.e.* in the panel decisions in *EC – Bed Linen*, *EC – Tube or Pipe Fittings*, *US – Softwood Lumber V*, *US – Zeroing (Japan)*, *US – Shrimp (Ecuador)* and the Appellate Body decisions in *EC – Bed Linen* and *US – Softwood Lumber V*. We note that Mexico has developed its arguments on model zeroing mainly along the lines of this jurisprudence.<sup>51</sup>

7.56 Article 2.4.2 of the Agreement provides:

*"Article 2*

*Determination of Dumping*

...

2.4.2 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 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." (emphasis added)

7.57 We note that the text of Article 2.4.2 provides that in investigations where the normal value and the export price are compared on a WA-WA basis, the weighted average normal value is to be compared with "a weighted average of prices of all comparable export transactions". Mexico asserts that through model zeroing in investigations, the USDOC ignores, in the calculation of the margin of dumping for the product under consideration as a whole, the results of intermediate comparisons made for different models in which the WA export price exceeds the WA normal value. This, in Mexico's view, is inconsistent with the obligation to take all comparable export transactions into consideration in the calculation of the margin of dumping for the product under consideration as a whole. In its argumentation, Mexico heavily relies on the findings of the Appellate Body in prior zeroing disputes, particularly in *US – Softwood Lumber V*.

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<sup>51</sup> First Written Submission of Mexico, paras. 198-208.

7.58 The Appellate Body in *US – Softwood Lumber V* started by pointing out that Article 2.4.2 permits multiple averaging.<sup>52</sup> That is, the investigating authorities may first break the subject product into models, perform a comparison on the basis of a WA normal value and a WA export price for each such model, and then aggregate these intermediate results in calculating the margin of dumping for the product under consideration as a whole. The Appellate Body agreed with the panel that Article 2.4.2 requires the authorities to take into consideration the average of prices of all comparable export transactions.<sup>53</sup> The Appellate Body observed that the parties disagreed as to whether this obligation was limited to model-specific comparisons or whether it also applied to the aggregation of such comparisons. The Appellate Body was of the view that the resolution of this issue centred on the interpretation of the terms "dumping" and "margins of dumping" in the Anti-Dumping Agreement.<sup>54</sup> The Appellate Body interpreted the definition of the term "dumping" under Article 2.1 to refer to the product under consideration as a whole as defined by the investigating authorities. It then noted that by virtue of the phrase "[f]or the purpose of this Agreement" in Article 2.1, this definition applies to the entire Agreement, including Article 2.4.2. The Appellate Body then concluded that dumping can be found to exist 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>55</sup>

7.59 In the view of the Appellate Body, the obligation set forth in Article 2.4.2 to take into account the weighted average of prices of all comparable export transactions applies not only to the model-specific comparisons, but also to their aggregation for purposes of establishing the margin of dumping for the product under consideration as a whole.<sup>56</sup> Consequently, the results of model-specific comparisons are not margins of dumping within the meaning of Article 2.4.2, but rather constitute intermediate calculations established by the authorities in the context of calculating the margin of dumping for the product under consideration as a whole.<sup>57</sup> It follows that when authorities use multiple averaging in their dumping determinations, Article 2.4.2 requires them to take into account the results of all model-specific comparisons in the calculation of the margin of dumping for the product under consideration as a whole.

7.60 At the outset, we note, and incorporate by reference, our reasoning below (paras. 7.102-7.105) regarding the importance of adopted Appellate Body reports on future panels dealing with similar legal issues. The issue we are addressing, model zeroing in investigations, is the same as the one addressed by the Appellate Body in *US – Softwood Lumber V*. Nonetheless, for the reasons set forth below, we only partially agree with the Appellate Body's reasoning regarding model zeroing in investigations, even though we also come to the same conclusion.

7.61 We note that the Appellate Body's reasoning is mainly based on the phrase "all comparable export transactions" under Article 2.4.2, interpreted in light of the definition of "dumping" under Article 2.1 of the Agreement. The Appellate Body reasoned that the phrase "all comparable export transactions" requires the authorities to take into consideration the weighted average of prices of all comparable export transactions, both in the context of model-specific comparisons and in the aggregation of such model-specific results. We agree with the Appellate Body that the phrase "all comparable export transactions" requires the authorities to take into consideration the weighted average of prices of all comparable export transactions in their dumping determinations in investigations. We consider that the text of Article 2.4.2 stipulates this requirement with sufficient clarity. We share the view of the Appellate Body regarding the interpretation of the phrase "all

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<sup>52</sup> Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada* ("*US – Softwood Lumber V*"), WT/DS264/AB/R, adopted 31 August 2004, DSR 2004:V, 1875, para. 81.

<sup>53</sup> *Ibid.*, para. 86.

<sup>54</sup> *Ibid.*, para. 90.

<sup>55</sup> *Ibid.*, para. 96.

<sup>56</sup> *Ibid.*, para. 98.

<sup>57</sup> *Ibid.*, para. 97.

comparable export transactions" under Article 2.4.2. Model zeroing runs counter to this requirement because it entails the omission of the results of model-specific comparisons where the WA export price exceeds the WA normal value, from the aggregation of model-specific results in the calculation of the margin of dumping. Model zeroing is, therefore, inconsistent with Article 2.4.2. We note, however, that, as discussed below in paras. 7.116-7.123, we do not share the Appellate Body's reasoning on the issue of "product as a whole" and have not relied on that reasoning in our assessment of Mexico's claim.

7.62 On the basis of the foregoing considerations, we conclude that Mexico has met its burden of proof regarding the inconsistency of model zeroing in investigations<sup>58</sup> with Article 2.4.2 of the Agreement. Having found model zeroing in investigations to be inconsistent with Article 2.4.2 of the Agreement, we need not, and do not, address Mexico's claims under Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4 and 18.4 of the Anti-Dumping Agreement and Article XVI:4 of the WTO Agreement in support of the same claim.

(b) Model Zeroing in Investigations "As Applied"

7.63 It is uncontested that the USDOC applied model zeroing in the investigation on *Stainless Steel Sheet and Strip in Coils from Mexico*.<sup>59</sup> Having found model zeroing in investigations to be inconsistent "as such" with the obligation set out under Article 2.4.2 of the Agreement, we also find that the USDOC acted inconsistently with Article 2.4.2 in the investigation on *Stainless Steel Sheet and Strip in Coils from Mexico* by using model zeroing in the referenced investigation. As we have done with regard to Mexico's claim on model zeroing in investigations "as such", here too we decline to address Mexico's claims raised under Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4 and 18.4 of the Anti-Dumping Agreement and Article XVI:4 of the WTO Agreement in support of the same claim.

E. SIMPLE ZEROING IN PERIODIC REVIEWS

1. Arguments of Parties

(a) Mexico

7.64 Mexico has raised an "as such" as well as an "as applied" claim regarding simple zeroing in periodic reviews. Mexico argues that the rules and procedures relating to simple zeroing in periodic reviews are embodied in what Mexico describes as the "Zeroing Procedures" under US law.

7.65 Mexico generally asserts that dumping is an exporter-specific concept and that it can only exist with respect to individual exporters or foreign producers, not importers or individual import transactions. According to Mexico, simple zeroing in periodic reviews is inconsistent with the WTO rules in several regards. First, Mexico submits that simple zeroing in periodic reviews is inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1 and 9.3 of the Anti-Dumping Agreement because it leads to a margin of dumping greater than the margin for the product under consideration as a whole. This is because the US law requires the USDOC to treat as zero the results of intermediate price comparisons where the export price exceeds the normal value when such intermediate determinations are aggregated in order to calculate the margin of dumping for the product under consideration as a whole. Such a determination, in Mexico's view, only partially reflects the export transactions pertaining to the product under consideration as a whole. It therefore

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<sup>58</sup> We recall that in paras. 7.7-7.9 above, we noted the description of the term "model zeroing in investigations" offered by Mexico, and decided to use it in our analysis in this case for ease of reference.

<sup>59</sup> *Supra*, note 3.

artificially inflates the margin of dumping and causes the imposition of an anti-dumping duty above the exporter's true margin.

7.66 Second, Mexico contends that simple zeroing in periodic reviews is inconsistent with the obligation to carry out a fair comparison between the normal value and the export price as required under Article 2.4 of the Agreement because, as articulated by the Appellate Body in *US – Zeroing (Japan)*, a practice that gives rise to a margin of dumping above an exporter's real margin cannot be viewed as involving a fair comparison within the meaning of Article 2.4.

7.67 Third, Mexico asserts that as an "administrative procedure" within the meaning of Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement, simple zeroing in periodic reviews is also inconsistent with the obligations set out in these provisions.

7.68 In addition to its "as such" claims, Mexico also contends that by applying simple zeroing in five periodic reviews of the measure on *Stainless Steel Sheet and Strip in Coils from Mexico*, the USDOC acted inconsistently with the United States' WTO obligations.

(b) United States

7.69 The United States requests the Panel to dismiss Mexico's "as such" claim regarding simple zeroing in periodic reviews because, in the view of the United States, no such measure as the "Zeroing Procedures" exists under US law. In the alternative, the United States requests the Panel to reject Mexico's "as such" claim regarding simple zeroing in periodic reviews because Mexico has failed to demonstrate that the Anti-Dumping Agreement disallows zeroing in periodic reviews. For the same reason, the United States also requests the Panel to reject Mexico's "as applied" claim regarding simple zeroing in the five periodic reviews at issue.

7.70 More specifically, the United States argues that the Anti-Dumping Agreement cannot be interpreted to include a general prohibition on zeroing in all contexts. The exclusive textual basis for finding zeroing to be WTO-inconsistent is Article 2.4.2 of the Agreement, which only prohibits zeroing in the narrow context of investigations where the WA-WA methodology is used. The United States is of the view that it is at least a permissible interpretation of the Agreement that zeroing is allowed outside this particular context. The United States therefore asks the Panel to follow the correct and persuasive reasoning of past panels in this regard and refrain from following the Appellate Body's reasoning which, in the United States' view, fails to give credit to a permissible interpretation of the Agreement, inconsistently with Article 17.6(ii) of the Agreement. The United States submits that an interpretation that extends the prohibition on zeroing beyond the context of investigations where the WA-WA methodology is used would render the remainder of Article 2.4.2 of the Agreement meaningless. More specifically, the United States contends that if zeroing is prohibited in all contexts, the exceptional WA-T methodology provided for in that article would mathematically yield the same result as the WA-WA methodology. Such an approach would be inconsistent with the principle of effective treaty interpretation. The United States also notes that the European Court of First Instance approved zeroing in the context of the WA-T methodology based on this "mathematical equivalence" issue.<sup>60</sup>

7.71 The United States submits that Article VI:1 of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement contain definitional provisions that normally do not impose independent legal obligations on Members while acknowledging that they may play an important role in interpreting other provisions of the Agreement. Furthermore, the United States is of the view that these provisions could be interpreted to allow a definition of dumping on a transaction-specific basis, as opposed to requiring the examination of export transactions at an aggregate level. The United States finds

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<sup>60</sup> Case T-274/02, *Ritek Corp. v. Council of the European Union*, 24 October 2006 (Exhibit US-5).



support for this reading of the definition of dumping in GATT practice as well as the negotiating history of the Uruguay Round Anti-Dumping Agreement. The United States asserts that the phrases "product as a whole" and "multiple comparisons" used by Mexico have been derived by the Appellate Body from the term "all comparable export transactions" in Article 2.4.2 and are not found in the text of the Agreement.

7.72 The United States also disagrees with Mexico's interpretation of Article 9.3 of the Agreement. In the view of the United States, reading this provision as disallowing importer-specific duty assessment would undermine the very purpose of imposing anti-dumping duties which is to remove the injurious effect of dumping. If, as Mexico proposes, Article 9.3 is interpreted to require an exporter-specific margin of dumping, this would allow importers with a high margin to benefit from the importers with lower margins and thus to continue to cause injury to the domestic industry.

7.73 The United States also submits that Mexico's interpretation of Article 9.3 renders the prospective normal value systems inoperative and runs counter to Article 9.4(ii) which clearly allows for such systems. Under the prospective normal value system, an importer's liability is the difference between the export price in a given transaction and the prospective normal value. According to the United States, there is no textual support in the Agreement for the proposition that prices in other export transactions are relevant to the calculation of the liability of an importer under the prospective normal value system.

7.74 The United States asserts that Article 2.4 of the Agreement does not resolve the issue of whether zeroing as such is fair or unfair. According to the United States, Mexico's reasoning under Article 2.4 is built on its reading of the obligation set forth in Article 9.3. If the Panel agrees that it is permissible to read Article 9.3 as allowing an importer-specific determination in duty assessment proceedings, such a determination would not yield a duty that exceeds the margin of dumping and there would be no argument about the unfairness of this assessment within the meaning of Article 2.4.

7.75 The United States contends that Mexico's claims under Articles XVI:4 of the WTO Agreement and 18.4 of the Anti-Dumping Agreement are dependent on its substantive claims and invites the Panel to exercise judicial economy with regard to these claims.

## **2. Arguments of Third Parties**

7.76 We note that although Mexico acknowledged, subsequent to its First Written Submission, that the scope of its panel request was limited to "model zeroing in investigations" and "simple zeroing in periodic reviews", some of the third parties also addressed other types of zeroing because they prepared their submissions before Mexico's written acknowledgement regarding the scope of its panel request.

### **(a) Chile**

7.77 Chile contends that the WTO-inconsistency of the zeroing methodology in periodic reviews has been confirmed by previous Appellate Body decisions and expresses hope that this issue will be resolved on a multilateral level through amendment of the Anti-Dumping Agreement. Continued adjudication between WTO Members on this issue, which is costly and time consuming, should therefore be avoided. Chile submits that zeroing not only inflates the margin of dumping, but also yields a positive determination of dumping where there would have been no dumping absent zeroing. Chile therefore asks the Panel to find that zeroing is inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4 and 9.3 of the Anti-Dumping Agreement.

(b) China

7.78 Based on the WTO jurisprudence regarding zeroing, China argues that the use of zeroing in periodic reviews is inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994. China is of the view that the Panel should not depart from the Appellate Body's jurisprudence because the arguments presented by the United States in these proceedings do not differ from the arguments raised in the context of the past cases. China therefore invites the Panel to accept Mexico's claims and expects the United States to eliminate the use of zeroing in all anti-dumping proceedings.

(c) European Communities

7.79 The arguments of the European Communities addressing the importance of WTO jurisprudence on zeroing, summarized in paras. 7.19-7.21 above, also apply to this claim.

(d) Japan

7.80 Japan generally submits that the "Zeroing Procedures" used by the US investigating authorities constitute a measure of general and prospective application and therefore may be challenged "as such" in WTO dispute settlement proceedings. Japan recalls the Appellate Body findings in previous zeroing cases and argues that these findings should be followed by the Panel in these proceedings. More specifically, Japan contends that the zeroing measures challenged by Mexico in this case are the same as those found to be WTO-inconsistent by the Appellate Body in *US – Zeroing (Japan)* and contends that such past rulings should be followed in this case to ensure the security and predictability of the international trading system.

7.81 Regarding the use of zeroing in periodic reviews, Japan first observes that the chapeau of Article 9.3 contains a cross-reference to Article 2. It follows that the obligation to calculate an aggregate margin of dumping for the product under consideration as a whole also applies in the context of periodic reviews under US law. Japan disagrees with the United States' view that dumping can be defined on a transaction-specific basis. According to Japan, there is a difference between the normative meaning of dumping and the price difference that might occur on a transaction-specific basis. Drawing guidance from Article 6.10 of the Agreement, Japan also argues that in periodic reviews the authorities have to calculate a margin of dumping for exporters, not importers. Japan agrees that anti-dumping duties may be assessed on a transaction-specific basis under Article 9.3 of the Agreement, but adds that such assessment cannot exceed the margin of dumping calculated for the product under consideration as a whole in accordance with Article 2.

7.82 In sum, Japan agrees with Mexico that the use of zeroing in periodic reviews is inconsistent with Article VI:2 of the GATT 1994 and Article 9.3 of the Anti-Dumping Agreement.

(e) Thailand

7.83 Thailand considers the use of zeroing to be inconsistent with the letter and the spirit of Article VI of the GATT 1994 and the Anti-Dumping Agreement. According to Thailand, as the Appellate Body has consistently held in the past zeroing cases, whenever investigating authorities use intermediate price comparisons while calculating the margin of dumping, they should take into account the results of all such comparisons where the export price exceeds the normal value. Thailand therefore invites the Panel to follow this line of reasoning in this case and accept Mexico's claims with regard to simple zeroing in periodic reviews, irrespective of the comparison methodology used.

### 3. Evaluation by the Panel

#### (a) Alleged Existence of the *Simple Zeroing Procedures*

7.84 As we noted above, Mexico argues that the rules and procedures pertaining to simple zeroing in periodic reviews are embodied in what Mexico describes as the "Zeroing Procedures" under US law. The United States, however, denies the existence of such a measure under its law. Mexico's claim, therefore, requires the Panel first to assess the issue of the alleged existence of the "Zeroing Procedures" under US law. Mexico, in certain instances in its submissions, refers to this measure as the *Simple Zeroing Procedures*<sup>61</sup>. This expression, in our view, serves to distinguish the measure at issue here from the first measure subject to Mexico's "as such" claim regarding model zeroing in investigations, discussed above. For ease of reference, therefore, we shall use the expression *Simple Zeroing Procedures* to refer to the specific measure at issue with regard to this claim.

7.85 We note that the evidence put forward by Mexico regarding the alleged existence of the *Simple Zeroing Procedures* under US law, and the United States' counterarguments, are similar to those presented in connection with Mexico's claim regarding model zeroing in investigations. Our analysis below is therefore also along the same lines as set out in paras. 7.29-7.42 above.

7.86 We are cognizant that we can only address the substance of Mexico's "as such" claim regarding simple zeroing in periodic reviews if there exists, under US law, such a measure as the *Simple Zeroing Procedures*. We recall that the principles on the burden of proof applicable in these proceedings (*supra*, para. 7.6) require Mexico to present evidence sufficient to demonstrate the existence of such a measure.

7.87 We recall our reasoning above (*supra*, paras. 7.30-7.32) regarding the types of measures that may be challenged in the WTO dispute settlement proceedings and the criteria that an alleged rule or norm has to possess in order for such a rule or norm to be susceptible to a challenge in the WTO. Based on the same reasoning, we now proceed to our assessment of whether the *Simple Zeroing Procedures*, which according to Mexico exist under US law, meet these criteria.

7.88 Turning to the criteria pronounced by the Appellate Body *US – Zeroing (EC)*<sup>62</sup>, we note that the measure challenged by Mexico is attributable to the United States. The fact that simple zeroing occurs in connection with the margin calculations in periodic reviews carried out by the USDOC clearly indicates this.

7.89 Regarding the precise content of the *Simple Zeroing Procedures*, Mexico points to various instruments. Mexico contends that the following constitutes evidence that describes the content of the *Simple Zeroing Procedures*: (a) the Standard Computer Programme used by the USDOC, (b) the Anti-Dumping Manual, (c) the application of the *Simple Zeroing Procedures* in all the five periodic reviews on *Stainless Steel Sheet and Strip in Coils from Mexico*, (d) further evidence on the consistent application of the *Simple Zeroing Procedures* in all the periodic reviews previously conducted by the USDOC, and (e) evidence showing continued application of the *Simple Zeroing Procedures* in the current periodic reviews.

7.90 First, regarding the Standard Computer Programme used for dumping margin calculations by USDOC, Mexico argues that the Standard Zeroing Line incorporated in this programme implements the *Simple Zeroing Procedures* in periodic reviews. That is, the computer programme used by the USDOC treats as zero the results of intermediate comparisons yielding negative margins when the comparisons are aggregated for the calculation of the overall margin of dumping for the product under

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<sup>61</sup> See, for instance, First Written Submission of Mexico, para. 103.

<sup>62</sup> *Supra*, note 28.

consideration as a whole. An expert opinion presented by Mexico confirms this assertion and further explains how simple zeroing is carried out in periodic reviews.<sup>63</sup> The expert opinion also indicates that the USDOC has never changed the zeroing line of this Standard Computer Programme.<sup>64</sup>

7.91 Second, Mexico cites the Anti-Dumping Manual used by the USDOC as further evidence indicating that the USDOC regularly uses the Standard Computer Programme in its margin calculations in periodic reviews. The Manual provides, in relevant parts:

### "III. PROGRAMMING PROCEDURES

The basic elements of the new PC programming procedures for investigations and reviews are validated databases, proper calculation methodologies, the best computer platform, and standard programs. The purpose of the procedures is to improve the accuracy and consistency of computer calculations. Calculation accuracy occurs when a program has been thoroughly checked. Accuracy is a function of both using validated databases in standard programs and checking calculations for computational and substantive correctness. Calculation consistency occurs when every program uses the same standard calculation methodology."<sup>65</sup>

We note that the Manual shows that the USDOC is expected to use the Standard Computer Programme consistently in its margin calculations in periodic reviews.

7.92 Third, Mexico argues that the USDOC applied the *Simple Zeroing Procedures* at issue in all the five periodic reviews on *Stainless Steel Sheet and Strip in Coils from Mexico*. The United States does not contest this fact.<sup>66</sup>

7.93 Fourth, Mexico asserts that the USDOC has consistently applied the *Simple Zeroing Procedures* in all the past periodic reviews. Mexico substantiates this assertion through an expert opinion, statements made by the United States before the previous WTO panels and the factual findings made by those panels. The expert opinion states that the *Simple Zeroing Procedures* have been a consistent element of the periodic reviews carried out by the United States.<sup>67</sup> In response to questioning in this regard, the United States has not contested the accuracy of this expert's description of the application of the *Simple Zeroing Procedures*. The United States has, however, argued that this description was inaccurate in so far as it suggested that the USDOC was bound by the Standard Computer Programme. According to the United States, the expert opinion only describes the basic templates in the computer programme, which the USDOC has discretion to change. The United States also cites instances where the expert herself acknowledges that the USDOC made changes to the computer programmes used in the five periodic reviews at issue in this case. The United States acknowledges, however, that these changes did not include the zeroing aspects of the programmes.<sup>68</sup> Although the United States asserts that the Assistant Secretary for Import Administration has discretion to change the computer programmes used by the USDOC, including their zeroing aspects, the United States acknowledges that such discretion has never been used in periodic reviews where the WA-T method was used.<sup>69</sup>

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<sup>63</sup> Exhibit MEX-1, paras. 29-35.

<sup>64</sup> Exhibit MEX-1, paras. 16-17.

<sup>65</sup> Exhibit MEX-4D, p.8.

<sup>66</sup> Response of the United States to Question 5 from the Panel Following the First Meeting.

<sup>67</sup> Exhibit MEX-1, paras. 15-17.

<sup>68</sup> Response of the United States to Question 5 from the Panel Following the First Meeting.

<sup>69</sup> Response of the United States to Question 2 from the Panel Following the Second Meeting.

7.94 Finally, Mexico submits that in every periodic review between January 2006<sup>70</sup> and the initiation of the dispute settlement proceedings at issue where the WA-T method was used, the USDOC followed the Standard Computer Programme and zeroed. While not providing a full list of these periodic reviews, Mexico mentions certain examples where the USDOC defended the use of zeroing in proceedings initiated by interested parties. The United States has not contested this assertion. In one of the periodic reviews cited by Mexico, the USDOC rejects the respondents' assertion that the practice of zeroing has to be discontinued:

**"Comment 9: Non-Offsetting for Export Sales that Exceed Normal Value**

Ispat argues that the Department's refusal to offset non-dumped sales is contrary to WTO findings and should not be employed for the final results.

...

**Department's Position**

We have not changed our calculation of the weighted-average dumping margin for the final results.

...

The Federal Circuit has affirmed the Department's methodology as a reasonable interpretation of the statute."<sup>71</sup>

7.95 It seems clear to us, on the basis of the foregoing, that Mexico has presented evidence sufficient to demonstrate the content of the *Simple Zeroing Procedures* under US law. In our view, the evidence about the content of the *Simple Zeroing Procedures*, particularly the parts of the Anti-Dumping Manual that we cited above which indicate that the USDOC has to follow the Standard Computer Programme consistently in periodic reviews, also demonstrates that these Procedures have general and prospective application. This shows that the *Simple Zeroing Procedures* have gone beyond mere repetition of a certain methodology to specific cases and have become a "deliberate policy."<sup>72</sup>

7.96 The United States argues that Mexico has not demonstrated the existence of the *Simple Zeroing Procedures* as a measure that could be challenged before a WTO panel. The United States criticizes Mexico's reliance on past panel and Appellate Body findings regarding the existence of the zeroing procedures and argues that "a separate panel's findings are not evidence, but conclusions based on evidence".<sup>73</sup> We note that other WTO panels as well as the Appellate Body have made similar findings in cases that concerned the zeroing methodology applied by the United States in anti-dumping proceedings. We note, however, that our findings are based on the evidence presented by Mexico in these proceedings, not on the WTO jurisprudence.

7.97 On the basis of the foregoing considerations, we conclude that Mexico has presented evidence sufficient to demonstrate the existence of the *Simple Zeroing Procedures* under US law.

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<sup>70</sup> *Supra*, note 36.

<sup>71</sup> Exhibit MEX-6J, p. 23-24.

<sup>72</sup> See, Appellate Body Report, *US – Zeroing (Japan)*, *supra*, note 38, para. 85.

<sup>73</sup> First Written Submission of the United States, para. 40.

(b) Is Simple Zeroing in Periodic Reviews WTO-Inconsistent?

(i) *Description of the Calculations in Periodic Reviews under US Law*

7.98 The United States has a retrospective duty assessment system. Under the US system, the anti-dumping duty order imposed following an investigation does not necessarily constitute the final liability for the importers importing the subject product into the United States. The importer deposits a security in the form of a cash deposit at the time of importation. Subsequently, the importer<sup>74</sup> may, on an annual basis, ask the USDOC to calculate the importer's final liability for the imports made in the previous year. This is called a "periodic review" or an "administrative review" under US law. If the duty calculated in a periodic review exceeds the original cash deposit, the importer has to pay the difference. When the opposite is the case, the difference is reimbursed with interest. In cases where no final assessment is requested, the initial cash deposit paid at the time of importation is automatically assessed as the final duty. Besides assessing the final liability of importers for imports made during the period of review, the USDOC, in a periodic review, also calculates the cash deposit rate that would apply to imports made following the completion of the periodic review.

7.99 For purposes of calculating margins of dumping in a periodic review, the product under consideration is broken into models and a monthly WA normal value is determined for each model. Each export transaction is compared against the relevant monthly WA normal value. These comparisons are then aggregated. In such aggregation, the results of comparisons where the export price exceeds the WA normal value are treated as zero. A weighted average margin of dumping is calculated for each exporter, which then becomes the cash deposit for the following period. The calculation of the importer-specific assessment rate is also similar. The USDOC segregates, from the figures pertaining to the exporter, the results of the comparisons for each importer and divides it by the total value of imports made by the same importer.<sup>75</sup> In other words, the numerator for the exporter's weighted average dumping margin for the period of review, *i.e.* the future cash deposit rate, is the total of the comparisons where the normal value exceeds the export price and the denominator is the value of all exports from that exporter during the period of review. The numerator for the importer-specific assessment rate reflects the results of comparisons where the normal value exceeds the export price within the universe of the imports made by that particular importer, and the denominator is the total value of all imports by the importer.

7.100 Parties generally agree with the above description of the way the USDOC calculates margins of dumping in periodic reviews.<sup>76</sup>

(ii) *Significance of WTO Jurisprudence*

7.101 We recall that this is not the first case in the WTO in which simple zeroing in periodic reviews has been challenged. The WTO-consistency of simple zeroing in periodic reviews was questioned before the panels in *US – Zeroing (EC)* and *US – Zeroing (Japan)*. In both cases, the panels found this practice not to be inconsistent with the obligations set out in the relevant provisions cited by the complaining parties. We also recall that the Appellate Body reversed the decisions of both panels and found simple zeroing in periodic reviews to be WTO-inconsistent.

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<sup>74</sup> The US law also allows the domestic interested parties, foreign producers or exporters to seek the initiation of a periodic review. See, Response of the United States to Question 3(a) From the Panel Following the Second Meeting.

<sup>75</sup> First Written Submission of Mexico, paras. 79-83.

<sup>76</sup> Responses of Mexico and the United States to Question 3(a) from the Panel Following the Second Meeting.

7.102 We recall that we are not, strictly speaking, bound by previous Appellate Body or panel decisions that have addressed the same issue, *i.e.* simple zeroing in periodic reviews, which is before us in these proceedings. There is no provision in the DSU that requires WTO panels to follow the findings of previous panels or the Appellate Body on the same issues brought before them. In principle, a panel or Appellate Body decision only binds the parties to the relevant dispute. Certain provisions of the DSU, in our view, support this proposition. According to Article 19.2 of the DSU, for example, "[i]n accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements". In the same vein, Article 3.2 of the DSU provides that "[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements".

7.103 We also note, however, the Appellate Body's pronouncement, in *Japan – Alcoholic Beverages II*, regarding the impact of adopted panel reports for future panels dealing with similar issues. The Appellate Body opined:

"Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute. In short, their character and their legal status have not been changed by the coming into force of the *WTO Agreement*."<sup>77</sup> (footnote omitted, emphasis in original)

7.104 The above excerpt indicates that, although adopted panel reports only bind the parties to the dispute that they concern, the Appellate Body expects future panels to take them into account to the extent that the issues before them are similar to those addressed by previous panels. In *US – Shrimp (Article 21.5 – Malaysia)*, the Appellate Body reiterated its findings in *Japan – Alcoholic Beverages II* and held that the same analysis applies to adopted Appellate Body reports.<sup>78</sup> The Appellate Body clearly stated that the panel in the implementation proceedings under Article 21.5 of the DSU in *US – Shrimp (Article 21.5 – Malaysia)* did not err in following the interpretative guidance provided by the Appellate Body in the original proceedings. To the contrary, the Appellate Body expected the panel to do so.<sup>79</sup> More recently in *US – Oil Country Tubular Goods Sunset Reviews*, the Appellate Body opined 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>80</sup>

7.105 This indicates that even though the DSU does not require WTO panels to follow adopted panel or Appellate Body reports, the Appellate Body *de facto* expects them to do so to the extent that the legal issues addressed are similar. We also note, however, that the panel in *US – Zeroing (Japan)*, while recognizing the need to provide security and predictability to the multilateral trading system through the development of a consistent line of jurisprudence on similar legal issues, drew attention to the provisions of Articles 11 and 3.2 of the DSU and implied that the concern over the preservation of a consistent line of jurisprudence should not override a panel's task to carry out an objective examination of the matter before it through an interpretation of the relevant treaty provisions in accordance with the customary

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<sup>77</sup> Appellate Body Report, *Japan – Taxes on Alcoholic Beverages* ("Japan – Alcoholic Beverages II"), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, p. 14.

<sup>78</sup> Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia* ("US – Shrimp (Article 21.5 – Malaysia)"), WT/DS58/AB/RW, adopted 21 November 2001, para. 109.

<sup>79</sup> *Ibid.*, para. 107.

<sup>80</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, *supra*, note 24, para. 188.

rules of interpretation of public international law.<sup>81</sup> We also share the concern raised by the panel in *US – Zeroing (Japan)* regarding WTO panels' obligation to carry out an objective examination of the matter referred to them by the DSB.

7.106 After a careful consideration of the matters discussed above<sup>82</sup>, we have decided that we have no option but to respectfully disagree with the line of reasoning developed by the Appellate Body regarding the WTO-consistency of simple zeroing in periodic reviews. We are cognizant of the fact that in two previous cases, *US – Zeroing (EC)* and *US – Zeroing (Japan)*, the decisions of panels that found simple zeroing in periodic reviews to be WTO-consistent were reversed by the Appellate Body and that our reasoning set out below is very similar to these panel decisions. In light of our obligation under Article 11 of the DSU to carry out an objective examination of the matter referred to us by the DSB, however, we have felt compelled to depart from the Appellate Body's approach for the reasons explained below.

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

Interpretation of the Relevant Treaty Provisions

7.107 Mexico bases its claim on the relevant treaty provisions as interpreted in prior Appellate Body decisions on zeroing. Mexico asserts that dumping is an exporter-specific concept and that it can only exist with respect to individual exporters or foreign producers, not importers or individual import transactions. According to Mexico, the definition of dumping under Articles VI:1 and VI:2 of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement applies to the product under consideration as a whole. Article VI:2 of the GATT 1994 stipulates that an anti-dumping duty may not be greater than the margin of dumping found with respect to the product under consideration. Article 9.3 of the Anti-Dumping Agreement provides that the amount of the anti-dumping duty cannot exceed the margin of dumping established under Article 2 of the Agreement. It follows that an anti-dumping duty calculated for a given producer or exporter may not be greater than the margin of dumping calculated for the product under consideration as a whole. That is, the margin of dumping established for a producer or exporter constitutes a ceiling for the duty that may be imposed on the product exported by that producer or exporter. According to Mexico, simple zeroing in periodic reviews is inconsistent with these principles because it does not fully reflect export prices that are above the normal value, in the calculation of the margin of dumping for the product under consideration as a whole. The results obtained through simple zeroing only partially reflect the export transactions of the product under consideration. Simple zeroing inflates the margin of dumping and as such is inconsistent with Article VI:2 of the GATT 1994 and Article 9.3 of the Anti-Dumping Agreement. Mexico also argues that simple zeroing is inconsistent with the obligation to carry out a fair comparison between the normal value and the export price as required under Article 2.4 of the Agreement.

7.108 The United States contends that the Agreement does not generally prohibit zeroing. According to the United States, the exclusive textual basis for finding zeroing to be WTO-inconsistent is Article 2.4.2 of the Agreement, which only prohibits zeroing in the narrow context of investigations where the WA-WA methodology is used. The United States urges the Panel to take into account the findings of previous panels in this regard which, according to the United States, held that the

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<sup>81</sup> Panel Report, *United States – Measures Relating to Zeroing and Sunset Reviews* ("US – Zeroing (Japan)"), WT/DS322/R, adopted 23 January 2007, as modified by Appellate Body Report, WT/DS322/AB/R, footnote 733.

<sup>82</sup> In our assessment of the importance of WTO jurisprudence, we also took into account the views expressed by third parties, particularly those of the European Communities which concentrated mainly on this issue.



mentioned obligation under Article 2.4.2 does not apply outside the scope of WA-WA comparisons in investigations. The United States invites the Panel to find at least that this reasoning reflects a permissible interpretation of the Agreement. More specifically, the United States asserts that Article VI:1 of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement cannot impose independent obligations because they contain definitional provisions. Furthermore, the United States is of the view that these two provisions may be interpreted to permit a transaction-based definition of dumping. The United States also argues that there is historical support for this proposition. Likewise, the United States contends that the definition of the word "product" does not necessarily refer to the "product as a whole". It follows that the term "margin of dumping" does not necessarily refer to the margin for the product under consideration as a whole. Determining the margin of dumping in periodic reviews without providing offsets for intermediate comparisons where the export price exceeds the normal value is therefore not inconsistent with the United States' WTO obligations. In the view of the United States, Mexico's interpretation of the relevant legal provisions would be inconsistent with Article 9.4(ii) of the Agreement which allows prospective normal value systems. The United States argues that Article 2.4 of the Agreement does not resolve the issue of whether zeroing is unfair. According to the United States, Mexico's claim under Article 2.4 is dependent on its claim under Article VI:2 of the GATT 1994 and Article 2.4.2 of the Anti-Dumping Agreement. It follows that if the Panel finds that the term "margin of dumping" for purposes of a periodic review may be interpreted on a transaction-specific basis, the Panel should also reject Mexico's claim under Article 2.4 because this would invalidate Mexico's argument that simple zeroing in periodic reviews yields a duty in excess of the exporter's real margin of dumping.

7.109 We note that Mexico's arguments, in support of its claim that the use of simple zeroing in periodic reviews is inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1 and 9.3 of the Anti-Dumping Agreement, are premised on the interpretation of these provisions by the Appellate Body, particularly in *US – Zeroing (EC)* and *US – Zeroing (Japan)*. The Appellate Body's line of reasoning is based on two principles. First, under the definition of "dumping" in Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994, "dumping" has to be established for the product under consideration as a whole.<sup>83</sup> According to the Appellate Body, this interpretation also applies to duty assessment proceedings under Article 9.3 since Article 9.3 refers to Article 2. In *US – Zeroing (EC)*, the Appellate Body opined:

"We note that Article 9.3 refers to Article 2. It follows that, under Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, the amount of the assessed anti-dumping duties shall not exceed the margin of dumping as established "for the product as a whole". Therefore, 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>84</sup> (footnote omitted)

7.110 Second, in the view of the Appellate Body, a determination of dumping in all anti-dumping proceedings, including duty assessment proceedings under Article 9.3 of the Agreement, has to be made in respect of each exporter or foreign producer subject to the proceeding. The Appellate Body found contextual support in Article 6.10 for its interpretation of the term "margin of dumping" under Article 9.3:

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<sup>83</sup> Appellate Body Report, *US – Zeroing (EC)*, *supra*, note 21, para. 126.

<sup>84</sup> *Ibid.*, para. 127.

"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. Article 6.10, which is part of the context of Article 9.3, provides that "[t]he authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation". Therefore, under the first sentence of Article 6.10, margins of dumping for a product must be established for exporters or foreign producers. The text of Article 6.10 does not limit the application of this rule to original investigations, and we see no reason why this rule would not be relevant to duty assessment proceedings governed by Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994."<sup>85</sup>

7.111 Furthermore, the Appellate Body indicated that this interpretation is consistent with the definition of the notion of dumping:

"Establishing 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 of 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>86</sup>

7.112 These two principle points of view regarding the calculation of the margins of dumping in periodic reviews leads to the conclusion that:

"[I]n a review proceeding under Article 9.3.1, the authority is required to ensure that the total amount of anti-dumping duties collected from all the importers of that product does not exceed the total amount of dumping found in *all* sales made by the exporter or foreign producer, calculated according to the margin of dumping established for that exporter or foreign producer without zeroing. The same "ceiling" applies in review proceedings under Article 9.3.2, because the introductory clause of Article 9.3 applies equally to prospective and retroactive duty assessment systems."<sup>87</sup>

7.113 In the view of the Appellate Body, therefore, in any anti-dumping proceeding, including periodic reviews under Article 9.3, dumping has to be calculated for the product under consideration as a whole and in respect of the individual exporters or foreign producers subject to such proceeding. Once the authorities define the product under consideration, the scope of that definition also determines the scope of the authorities' dumping determination. Dumping cannot exist in relation to a type, model, or category of the product subject to the proceedings. Nor can dumping be found in relation to individual import transactions. It has to be calculated for each known exporter or foreign producer, as stipulated under Article 6.10 of the Agreement. It follows that when the calculation of dumping entails more than one level of comparisons between the normal value and the export price, the results of the intermediate comparisons are not margins of dumping. They are merely inputs to be taken into account in the determination of the margin of dumping for the product under consideration as a whole for each known exporter or foreign producer.

7.114 When applied to duty assessment proceedings under Article 9.3 of the Agreement, the above-described reasoning leads to the conclusion that the margin of dumping calculated for the product under consideration as a whole - exported by the exporter or foreign producer subject to such

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<sup>85</sup> *Ibid.*, para. 128.

<sup>86</sup> *Ibid.*, para. 129.

<sup>87</sup> Appellate Body Report, *US – Zeroing (Japan)*, *supra*, note 38, para. 156.

proceedings - operates as the ceiling for the anti-dumping duties that may be collected from importers of that product. The chapeau of Article 9.3 provides that "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2". This means that:

""[T]he total amount of anti-dumping duties collected on the entries of a product from a given exporter shall not exceed the margin of dumping established for that exporter", in accordance with Article 2."<sup>88</sup>

Consequently, a scheme that does not take into consideration the results of intermediate comparisons that yield negative dumping in the calculation of the overall margin for the product under consideration as a whole, would be inconsistent with Article 9.3 of the Agreement.

7.115 We respectfully disagree with the Appellate Body's reasoning. We recognize that our analysis inevitably resembles that of the panels in the last two cases that dealt with simple zeroing in periodic reviews, *US – Zeroing (EC)* and *US – Zeroing (Japan)*, and that the Appellate Body reversed those panels' findings that simple zeroing is not inconsistent with Article 9.3 of the Anti-Dumping Agreement. We would like to underline, however, that our analysis is not simply an unthinking repetition of these past panel decisions. Rather, it reflects our own appreciation of the facts and the legal arguments presented by the parties in these proceedings, as is required by our obligation under Article 11 of the DSU to carry out an objective examination of the matter before us.

7.116 We recall that the main premise of the Appellate Body's reasoning pertains to the definition of the concepts of "dumping" and "margins of dumping" used in Article 2.1 of the Agreement and Articles VI:1 and VI:2 of the GATT 1994. According to the Appellate Body, the margin of dumping has to be determined for the product under consideration as a whole. Accordingly, the results of the comparisons made at an intermediate stage before aggregating them in order to calculate the margin of dumping for the product as a whole are not margins of dumping. Likewise, the margin of dumping has to be calculated in respect of the exporter or the foreign producer subject to the anti-dumping proceeding, not the importer importing the product. It follows that dumping cannot be calculated on a transaction-specific basis; it has to be based on all exports of the subject product made in the period of review from the exporter or the foreign producer subject to the proceeding.

7.117 We disagree with these propositions. Mexico argues that the word "product" used in the provisions it cites refers to the "product as a whole". It follows that any determination of dumping has to be based on an aggregation of all export transactions. We note, however, that the expression "product as a whole" does not appear in the text of Article 2.1 of the Agreement or Articles VI:1 and VI:2 of the GATT 1994. It has been developed in WTO dispute settlement. We are not convinced that the treaty provisions cited by Mexico, on which the Appellate Body based its reasoning, necessarily compel a definition of "dumping" based on an aggregation of all export transactions. We note that the panel in *US – Zeroing (Japan)* also asked itself the question of how a requirement to base dumping margin calculations on the aggregation of export transactions may be inferred from the ordinary meaning of the words "product" or "products" under Article 2.1 of the Anti-Dumping Agreement and Articles VI:1 and VI:2 of the GATT 1994.<sup>89</sup> We agree with the following reasoning developed by that panel on this issue:

"We fail to see why the notion that "a product is introduced into the commerce of another country" cannot apply to a particular export sale and would necessarily require an examination of different export sales at an aggregate level. Similarly, the notion of a margin of dumping as the *price difference* that exists when one price is less than another price (or constructed value) can easily be applied to individual

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<sup>88</sup> (footnotes omitted) *Ibid.*, para. 155.

<sup>89</sup> Panel Report, *US – Zeroing (Japan)*, *supra*, note 81, para. 7.105.

transactions and does not require an examination of export transactions at an aggregate level. The terms "export price of a product exported from one country to another" in Article 2.1 of the *AD Agreement* and "the price of the product exported from one country to another" in Article VI:1 of the GATT 1994 can reasonably be interpreted to mean the price of the product in a particular export transaction."<sup>90</sup>

7.118 The Appellate Body disagreed with this view. In paragraphs 108-116 of its decision in *US – Zeroing (Japan)*, the Appellate Body repeated the conclusions that it had formulated in its previous decisions in *US – Softwood Lumber V* and *US – Zeroing (EC)*. It did not, however, provide a convincing response to the question we have highlighted above. That is, the Appellate Body did not explain how the texts of Articles VI:1 and VI:2 of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement necessarily require the interpretation that the words "product" or "products" used in the definition of "dumping" may only be interpreted as referring to the product under consideration as a whole, not to individual export transactions.

7.119 We are troubled by the fact that the principal basis of the Appellate Body's reasoning in the zeroing cases seems to be premised on an interpretation that does not have a solid textual basis in the relevant treaty provisions. We recall the rules on treaty interpretation (*supra*, paras. 7.3-7.5) which we have to follow in these proceedings. We are of the view that a good faith interpretation of the ordinary meaning of the texts of Articles VI:1 and VI:2 of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement, read in their context and in light of the object and purpose of the mentioned agreements, does not exclude an interpretation that allows the concept of dumping to exist on a transaction-specific basis. We recall that according to the standard of review that we have to follow in these proceedings (*supra*, paras. 7.1-7.2), we are precluded from excluding an interpretation which we find permissible, even if there may be other permissible interpretations.

7.120 We also note that the use of the words "product" or "products" in other instances in Article VI and other provisions of the GATT 1994 or the Anti-Dumping Agreement does not necessitate the view that these terms cannot be interpreted as referring to individual export transactions. As the panel in *US – Zeroing (Japan)* noted in paragraph 7.108 of its report, for instance:

"[T]he phrase "importation of any product" used in Article VI:6 and other provisions of the GATT 1994 does not mean that these provisions inherently cannot apply to an individual import transaction. Similarly, when Article VII:3 of the GATT 1994 refers to "the value for customs purposes of any imported product", the mere use of the word "product" cannot reasonably be interpreted to preclude the possibility to apply this term to the value of a product in a particular import transaction. If the word "product" in Article VII:3 does not necessarily require an examination of transactions at an aggregate level, we cannot see why such an examination is nevertheless required by the use of that word in Articles VI:1 and VI:2."<sup>91</sup>

7.121 We note that the Appellate Body did not explain whether the use of the words "product" or "products" in these other contexts, which may very well be interpreted on a transaction-specific basis, had any bearing on its interpretation. This is another reason why we find the Appellate Body's reasoning not to be convincing. The fact that these words may be interpreted in a significantly

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<sup>90</sup> *Ibid.*, para. 7.106.

<sup>91</sup> Footnotes omitted.

We also agree with that panel's view that this reasoning does not necessarily mean that "a Member may on the basis of a finding that some export sales under consideration are dumped (and are causing injury) impose a duty on all subsequent imports of that product without in any way taking into account the relative significance of those dumped sales compared to other, non-dumped sales under consideration". Panel Report, *US – Zeroing (Japan)*, *supra*, note 81, footnote 745.

different way when used elsewhere in Article VI and other provisions of the GATT 1994 or the Anti-Dumping Agreement weakens the proposition that they must necessarily be interpreted to refer to the totality of exports of the product under consideration as a whole, as opposed to individual transactions, when they are used in the context of dumping determinations.

7.122 Mexico contends that because Article VII of the GATT 1994 deals with customs valuation, its purpose and objectives are completely different from those of Article VI. It is therefore normal that these two provisions ascribe different meanings to the word "product".<sup>92</sup> We note, however, that Mexico's argument is based solely on its understanding of the object and purpose of these two provisions and does not have any textual basis. We therefore disagree with Mexico in this regard.

7.123 On the basis of the foregoing, we feel compelled to share the interpretation by the panel in *US – Zeroing (Japan)* of the words "product" and "products" in Article VI of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement:

"[T]he terms "dumping" and "margin of dumping" in Article 2.1 of the *AD Agreement* and Articles VI:1 and VI:2 of the GATT 1994 are defined in relation to "product" and "products" does not warrant the conclusion that these terms, by definition, cannot apply to individual transactions and inherently require an examination of export transactions at an aggregate level in which the same weight is accorded to export prices that are above normal value as to export prices that are below normal value."<sup>93</sup>

7.124 We also disagree with the second element of the Appellate Body's reasoning that generally prohibits zeroing, *i.e.* that dumping has to be calculated with respect to individual exporters or foreign producers. We note that the obligation to pay anti-dumping duties is not incurred on the basis of a comparison of an exporter's total sales, but on the basis of an individual sale between the exporter and its importer. It is therefore a transaction-specific liability. This importer-specific or transaction-specific character of the payment of anti-dumping duties has, therefore, to be taken into consideration in interpreting Article 9.3. Article 9.3 reads in relevant parts:

"Article 9

*Imposition and Collection of Anti-Dumping Duties*

...

9.3 The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.

9.3.1 When the amount of the anti-dumping duty is assessed on a retrospective basis, the determination of the final liability for payment of anti-dumping duties shall take place as soon as possible, normally within 12 months, and in no case more than 18 months, after the date on which a request for a final assessment of the amount of the anti-dumping duty has been made. Any refund shall be made promptly and normally in not more than 90 days following the determination of final liability made pursuant to this sub-paragraph. In any case, where a refund is not made within 90 days, the authorities shall provide an explanation if so requested.

9.3.2 When the amount of the anti-dumping duty is assessed on a prospective basis, provision shall be made for a prompt refund, upon request, of any duty paid in excess

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<sup>92</sup> Second Written Submission of Mexico, para. 62.

<sup>93</sup> Panel Report, *US – Zeroing (Japan)*, *supra*, note 81, para. 7.112.

of the margin of dumping. A refund of any such duty paid in excess of the actual margin of dumping shall normally take place within 12 months, and in no case more than 18 months, after the date on which a request for a refund, duly supported by evidence, has been made by an importer of the product subject to the anti-dumping duty. The refund authorized should normally be made within 90 days of the above-noted decision." (footnote omitted)

7.125 Article 9.3 deals with the imposition and collection of anti-dumping duties. It requires that the amount of the duty not exceed the margin of dumping as established under Article 2. The two sub-paragraphs of Article 9.3 contain more specific obligations regarding the assessment of anti-dumping duties under the retrospective and prospective systems of duty collection. In a retrospective system, which is employed in the United States, payments collected at the time of importation (such as the cash deposit rate in the US system) are not definitive duties. An importer has the right to ask the authorities to calculate its final liability in respect of the importations made in a past period. The authorities then have to calculate the importer's final liability and if there is any excessive payment, refund the corresponding amount to the importer with interest. In a prospective system, however, the payment of the anti-dumping duty at the time of importation is generally considered to be definitive. If the importer believes that the amount of the anti-dumping duty it paid exceeded its margin of dumping, it can ask the authorities for a refund. When such a request is made, the authorities have to calculate the actual margin of dumping and refund anti-dumping duties that exceeded the margin of dumping.

7.126 It is significant to note in this regard that the text of Article 9.3 itself does not contain any obligation to aggregate export transactions in duty assessment proceedings. We note that an importer does not incur liability for the payment of anti-dumping duties on the basis of the totality of exports made by an exporter. In our view, Articles 9.3.1 and 9.3.2 have to be interpreted in light of this specific purpose because the former concerns the calculation of the final liability of individual importers (in the case of a retrospective system), and the latter the refund of duties paid in excess of the margin of dumping of individual importers (in the case of a prospective system). The fact that final duties or refunds in duty assessment proceedings are calculated for individual importers, in our view, leads to the conclusion that Article 9.3 does not exclude an importer and import-specific calculation, and does not necessarily require a calculation on the basis of all sales made by an exporter.

7.127 We disagree with the Appellate Body's view that a determination of dumping in all anti-dumping proceedings, including duty assessment proceedings under Article 9.3 of the Agreement, has to be made in respect of each exporter or foreign producer subject to the proceeding. We also disagree with the view that Article 6.10 lends support to this view. In this regard, we agree with the panel in *US – Zeroing (Japan)* that:

"Article 6 of the *AD Agreement* contains provisions designed to ensure transparency and due process in the conduct of anti-dumping investigations. In that context, Article 6.10 provides that, as a rule, authorities must determine an individual margin of dumping for each known exporter or producer of the product under investigation but also lays down certain rules that must be observed when it is not possible to determine such an individual margin of dumping. Neither the phrase "product under investigation" nor the reference to an individual margin of dumping for an exporter or producer in our view provides any guidance with respect to the precise methodology to be used for the purpose of calculating that margin of dumping. As in Article 2.1 of the *AD Agreement* and Articles VI:1 and VI:2 of the GATT 1994, the use of the word "product" in Article 6.10 does not exclude the possibility of applying the concept of dumping to individual transactions. Even assuming *arguendo* that the notion of an "individual margin of dumping for each known exporter or producer" implies an

obligation to determine a single margin of dumping for each known exporter or producer based on an analysis of the totality of the export transactions under consideration, it does not necessarily follow that in deriving such a single margin an authority must accord the same weight to transactions in which the export price is above the normal value as to transactions in which the export price is below the normal value. Nothing in the text of Article 6.10 indicates that such a margin may not be calculated as an overall weighted average margin of dumping in which the numerator consists of the sum of the amounts by which export prices are less than normal value and the denominator reflects the total value of all export transactions."<sup>94</sup> (footnotes omitted)

7.128 We recall the rules on treaty interpretation (*supra*, paras. 7.3-7.5) which we have to follow in these proceedings. We are of the view that it is at least a permissible interpretation of Article 9.3 of the Agreement that the concept of dumping may be interpreted on an importer-specific basis. We recall that according to the standard of review that we have to follow in these proceedings (*supra*, paras. 7.1-7.2), we are precluded from excluding an interpretation which we find permissible, even if there may be other permissible interpretations. We therefore disagree with Mexico's assertion that the text of Article 9.3 of the Agreement necessarily requires dumping determinations in duty assessment proceedings to be specific to individual exporters or foreign producers.

#### Contextual Support for the Panel's Interpretation of the Relevant Treaty Provisions

7.129 A review of the relevant context provides further support for the proposition that the provisions cited by Mexico, Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1 and 9.3 of the Anti-Dumping Agreement, do not prohibit simple zeroing in periodic reviews.

#### *Existence of the Prospective Normal Value Systems*

7.130 The first contextual support is found in Article 9.4(ii) of the Agreement, which provides in relevant parts:

"9.4 When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed:

...

(ii) where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, the difference between the weighted average normal value of the selected exporters or producers and the export prices of exporters or producers not individually examined[.]"

7.131 Article 9.4(ii) clearly provides for a prospective normal value system. In a prospective normal value system, the importer's liability is determined through the comparison of the price paid by the importer in a given transaction and the prospective normal value. Under this system, prices paid in other export transactions have no bearing on this importer's liability. In other words, the fact that other importers do not dump, or dump at a lower margin, does not affect the liability of an importer who imports at dumped prices. If the determination of liability for anti-dumping duties can be determined on a transaction-specific basis in a prospective normal value system, there is no reason why the same cannot be the case in the context of the retrospective duty assessment system under Article 9.3.2.

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<sup>94</sup> *Ibid.*, para. 7.111.

7.132 The Appellate Body in *US – Zeroing (Japan)* disagreed with this reasoning. According to the Appellate Body, the duty paid in a prospective normal value system does not represent the calculation of a margin of dumping. Nor does it mean that the total amount of the duties paid in such a system can exceed the margin of dumping established for the exporter or foreign producer at issue. The Appellate Body then went on and opined:

"Under a prospective normal value system, exporters may choose to raise their export prices to the level of the prospective normal value in order to avoid liability for payment of anti-dumping duties on each export transaction. However, under Article 9.3.2, the amount of duties collected is subject to review so as to ensure that, pursuant to Article 9.3 of the *Anti-Dumping Agreement*, the amount of the anti-dumping duty collected does not exceed the margin of dumping as established under Article 2. It is open to an importer to request a refund if the duties collected exceed the exporter's margin of dumping. Whether a refund is due or not will depend on the margin of dumping established for that exporter."<sup>95</sup> (footnote omitted)

7.133 Here too, we feel compelled to disagree with the Appellate Body. The Appellate Body suggests that duties collected under a prospective normal value system are subject to a duty assessment proceeding under Article 9.3.2. The Appellate Body's view seems to be that duties collected under a prospective normal value system would be subject to such duty assessment proceeding in the same way as any other anti-dumping duty assessed on a prospective basis. We note that in an anti-dumping investigation, authorities base their dumping determinations on past data and impose the duty on the basis of that data. After the duty is imposed, however, there is always a possibility of an importer paying a duty above its margin of dumping. There is therefore a need for having a mechanism for the refund of duties paid in excess of the margin of dumping of individual importers. Under the current system embodied in the *Anti-Dumping Agreement*, this objective is achieved through the duty assessment proceedings provided for under Article 9.3. Obviously, we do not consider duties collected under a prospective normal value system to be exempt from duty assessment proceedings. That is because in such a system, just as in other systems of duty collection, there may be changes subsequent to the imposition of the duty, which may necessitate a duty assessment proceeding. We note that Article 9.3 does not shed light on how duty assessment proceedings are to be carried out. We would think, however, that a duty assessment proceeding with regard to duties collected on the basis of a prospective normal value system would have to be consistent with the nature of the referenced system. It would have been quite illogical, in our view, if the drafters allowed prospective normal value systems and yet envisaged that duties collected under such a system would be subject to a duty assessment proceeding under Article 9.3 in a manner that would require the authorities to calculate a margin of dumping not on the basis of the data pertaining to the importer seeking the initiation of the proceeding, but based on the aggregated data pertaining to the exporter(s) from whom the importer imports. The prospective normal value system is based on the notion of transaction-based duty collection. The Appellate Body's reasoning that duties collected under such a system are nevertheless subject to duty assessment proceedings just like other duties assessed on a prospective basis is, therefore, far from being convincing.

*Mathematical Equivalence Between the First and the Third Methodologies in the Absence of Zeroing*

7.134 The second contextual support stems from the fact that a general prohibition on zeroing cannot be reconciled with the existence of the third comparison methodology (WA-T) under Article 2.4.2. We recall the relevant parts of Article 2.4.2:

"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

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<sup>95</sup> Appellate Body Report, *US – Zeroing (Japan)*, *supra*, note 38, para. 160.



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

7.135 We note that Article 2.4.2 allows a comparison of WA normal value with individual export transactions only if certain conditions are met: first, the pattern of export prices must differ significantly among different purchasers, regions or time periods. Second, the authorities must explain why such differences cannot be taken into account appropriately through the use of one of the two principal methodologies.

7.136 An interpretation of the relevant treaty provisions that prohibits zeroing in all contexts would, in our view, render the third methodology *inutile* because this methodology would then mathematically yield the same result as the WA-WA methodology. That is, absent zeroing, the third methodology would lead to the same mathematical result as the WA-WA methodology. We recall that the principle of effectiveness requires that "interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility".<sup>96</sup>

7.137 We note that the Appellate Body, in *US – Zeroing (Japan)*, disagreed with this proposition and opined:

"The emphasis in the second sentence of Article 2.4.2 is on a "pattern", namely a "pattern of export prices which differs significantly among different purchasers, regions or time periods". The prices of transactions that fall within this *pattern* must be found to differ significantly from other export prices. We therefore read the phrase "individual export transactions" in that sentence as referring to the transactions that fall within the relevant pricing pattern. This universe of export transactions 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. In order to unmask targeted dumping, an investigating authority may limit the application of the W-T comparison methodology to the prices of export transactions falling within the relevant pattern."<sup>97</sup> (emphasis added)

7.138 The Appellate Body states that the second sentence of Article 2.4.2 implies that the universe of export transactions in the third methodology will necessarily be more limited than those in the first two methodologies. This is because, in order to unmask targeted dumping, the authorities will base their dumping determinations on the subset of the export transactions that fall within the relevant price pattern.

7.139 This approach leaves certain questions unanswered. First, the Appellate Body has not pointed to any textual basis for the proposition that the export transactions to be used in the third methodology would necessarily be more limited than those in the first two methodologies. In light of the text of Article 2.4.2, it is not evident to us that dumping determinations in the third methodology could be limited to the subset of the export transactions that fall within the relevant price pattern. The second sentence of Article 2.4.2 simply mentions that the authorities may, under certain circumstances, compare prices of individual export transactions with the WA normal value. It does not mention in any way whether such comparison may, or has to, be limited to the subset of export transactions that fall within the relevant price pattern. Second, assuming that this proposition does in fact have a

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<sup>96</sup> (footnote omitted) Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* ("US – Gasoline"), WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3, p. 23.

<sup>97</sup> Appellate Body Report, *US – Zeroing (Japan)*, *supra*, note 38, para. 135.

textual basis in the Agreement, the Appellate Body did not explain how the authorities would treat the remaining export transactions. If, for instance, what the Appellate Body meant is that the export transactions that do not fall within the relevant price pattern are to be excluded from dumping determinations, this would mean disregarding them. Given the Appellate Body's strongly expressed view that dumping has to be determined for the product under consideration as a whole and hence all export transactions pertaining to the product under consideration have to be taken into consideration by the authorities, we do not consider that this can be what the Appellate Body meant. Alternatively, if the Appellate Body meant that the authorities would use the WA-WA methodology with respect to the export transactions that do not fall within the relevant price pattern, and combine these results with the results obtained through the WA-T methodology for the prices that fall within the pattern, we note that such an approach would also lead to the same mathematical result as the WA-WA methodology.<sup>98</sup> We therefore do not consider that the Appellate Body's approach invalidates the mathematical equivalence problem.

7.140 Mexico argues "that mathematical equivalency does not exist if intermediate monthly average normal values are used in the average to transaction method and period-long average normal values are used in the average to average method".<sup>99</sup> Mexico submitted calculation tables in order to illustrate this point.<sup>100</sup> Through these tables, Mexico demonstrated that if one uses monthly WA normal value in the third methodology and annual WA normal value in the first, the resulting margins of dumping will be different. We note, and the United States does not dispute, that if WA normal value figures are based on different time periods in connection with the WA-WA and the WA-T methodologies, such calculations will yield different mathematical results. For instance, if annual WA normal value is used in the WA-WA methodology and monthly WA normal value in the WA-T methodology, as Mexico did in its tables, these two calculations will result in different margins of dumping. Mexico argues that this disproves the mathematical equivalence argument presented by the United States. We disagree. Mexico has shown no support in the text of Article 2.4.2 for the proposition that the normal value figures used under the WA-WA and the WA-T methodologies may, or have to, be based on different time periods. If they are based on the same time periods, then the mathematical equivalence holds. In this regard, we agree with the panel in *US – Zeroing (Japan)* that "[t]here exists no substantive difference between "a weighted average normal value" in the first sentence of Article 2.4.2 and "a normal value established on a weighted average basis" in the second sentence of that provision".<sup>101</sup> We also note that the justification for the use of the asymmetrical third methodology under Article 2.4.2 is the significant difference between the pattern of export prices, not the normal value. Hence, Article 2.4.2 does not, in our view, lend support to Mexico's proposition that the time frame for the determination of the WA normal values under the first and the third methodologies may be different.<sup>102</sup>

7.141 Mexico argues that because the terminology used in the first and the second sentences of Article 2.4.2 to describe the WA normal values to be used under the first and the third methodologies is not identical, the use of WA monthly normal values under the third methodology is not prohibited. According to Mexico, "[h]ad the drafters intended these phrases to have precisely the same meaning, they would have been expected to use the identical language or provided cross-references between the sentences".<sup>103</sup> While Mexico is right that the phrases used in Article 2.4.2 to refer to the WA normal

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<sup>98</sup> Through Table 2 in Exhibit US-2, the United States has shown that using the WA-T and the WA-WA methodologies in combination under the second sentence of Article 2.4.2 would yield the same mathematical result as using the WA-WA methodology for the totality of the calculations. Mexico has not objected to the calculations submitted in this table.

<sup>99</sup> Oral Statement of Mexico at the Second Meeting, para. 27.

<sup>100</sup> Exhibit MEX-12.

<sup>101</sup> Panel Report, *US – Zeroing (Japan)*, *supra*, note 81, para. 7.129.

<sup>102</sup> *Ibid.*

<sup>103</sup> Mexico's Comments on the United States' Response to Question 3 from the Panel Following the Second Meeting.

values in the context of the first and the third methodologies are not identical, this does not, in our view, suffice to assert that they refer to different normal values that may be based on different time frames. Mexico has not explained how exactly the text of Article 2.4.2 supports such an interpretation. It is, in our view, at least one of the permissible interpretations of Article 2.4.2 that, contrary to Mexico's point of view, this provision does not justify the establishment of the WA normal values in the context of the first and the third methodologies on the basis of different time periods. We therefore disagree with Mexico's argument, taking into consideration the principles on the treaty interpretation that we follow in this case (*supra*, paras. 7.3-7.5).

7.142 Mexico notes that the methodology used in the calculation tables submitted by Mexico based on a comparison of WA monthly normal values with individual export transactions is the same methodology prescribed in US Regulations for investigations where targeted dumping is identified and the third comparison methodology is used.<sup>104</sup> The United States does not dispute this fact.<sup>105</sup> We understand Mexico to argue that because the US Regulations allow for the use of monthly WA normal values in the use of the third methodology, the United States cannot logically argue in these proceedings that Article 2.4.2 of the Agreement disallows such an approach. We recall that we are not called upon to assess the consistency of the mentioned US regulatory provisions with the WTO rules. The claim that we are addressing concerns the use of simple zeroing in periodic reviews. We therefore need not, and do not, express any views about the WTO-consistency of the regulatory provisions under US law regarding the use of WA monthly normal values in investigations where targeted dumping is identified. What the US law prescribes regarding the use of WA monthly normal values in connection with the third methodology under the second sentence of Article 2.4.2 is irrelevant to our assessment of whether Article 2.4.2 allows such an approach.

7.143 Based on the foregoing considerations, we reject Mexico's claim that simple zeroing in periodic reviews is inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1 and 9.3 of the Anti-Dumping Agreement. As we mentioned in paras. 7.119 and 7.128 above, our conclusion in this regard rests upon a permissible interpretation of the relevant treaty provisions invoked by Mexico, which, according to our standard of review (*supra*, paras. 7.1-7.2), we cannot disregard even if there may be other permissible interpretations of such provisions.

(iv) *Alleged Violations of Article 2.4 of the Anti-Dumping Agreement*

7.144 Mexico's arguments in support of its claim that the use of simple zeroing in periodic reviews is inconsistent with Article 2.4 of the Anti-Dumping Agreement are premised on the interpretation of this provision developed by the Appellate Body, mainly in *US – Zeroing (Japan)*. Mexico asserts that Article 2.4 requires the authorities to carry out a fair comparison between the normal value and export price while comparing them for purposes of calculating a margin of dumping. Mexico recalls that any determination of dumping has to be made for the product under consideration as a whole. The *Simple Zeroing Procedures* under US law, however, "result in calculation of dumping and margins of dumping that do not reflect all of the transactions involving the product under consideration as a whole".<sup>106</sup> A comparison that fails to take into account certain export transactions cannot result in a determination of dumping for the product under consideration as a whole and cannot be considered as a "fair comparison" within the meaning of Article 2.4. In Mexico's view, zeroing is inherently biased

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<sup>104</sup> Oral Statement of Mexico at the Second Meeting, para. 35.

<sup>105</sup> The United States submits, and Mexico does not contest, that although the US Regulations provide for the use of monthly WA normal values in investigations where targeted dumping is found, these provisions have never been used by the USDOC. Response of the United States to Question 5 from the Panel Following the Second Meeting. We do not, however, find this fact to be relevant to our assessment of Mexico's argument regarding the issue of mathematical equivalence.

<sup>106</sup> First Written Submission of Mexico, para. 245.

and hence in violation of the fair comparison requirement of Article 2.4 because it artificially inflates the margin of dumping by ignoring certain export transactions.

7.145 We note that Mexico's claim under Article 2.4 is premised on the assumption that Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1 and 9.3 of the Anti-Dumping Agreement prohibit simple zeroing in periodic reviews. Mexico argues that these provisions require the authorities in a periodic review to calculate an individual margin of dumping for each exporter or foreign producer concerned and to base such calculations on an aggregation of all export transactions by each individual exporter or foreign producer. It follows that failing to base dumping determinations in a periodic review on an aggregation of all export transactions from individual exporters or foreign producers artificially inflates such margins and therefore is inherently unfair. We disagreed with this assumption above (*supra*, para. 7.123), while addressing Mexico's claim regarding the alleged inconsistency of simple zeroing in periodic reviews with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1 and 9.3 of the Anti-Dumping Agreement. That is, we disagreed with Mexico's assertion that these provisions require investigating authorities in a periodic review to base their dumping determinations on an aggregation of all export transactions from each exporter. We therefore also reject Mexico's claim that simple zeroing in periodic reviews is inherently inconsistent with the obligation to carry out a fair comparison between the normal value and the export price as stipulated under Article 2.4 of the Anti-Dumping Agreement.

(v) *Potential Consequences of a General Prohibition on Zeroing*

7.146 Finally, we note that accepting Mexico's interpretation of Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4 and 9.3 of the Anti-Dumping Agreement as prohibiting simple zeroing in periodic reviews would lead to undesirable results. If, while calculating in a periodic review the amount of the duty to be paid by a given importer, the authorities have to take into account the export prices paid by other importers importing from the same exporter or foreign producer, this would have unfair consequences in the market. In this situation, importers with high margins of dumping would be favoured at the expense of importers who do not dump or who dump at a lower margin. In such situations, importers importing at dumped prices would pay less than their true margin of dumping because of other importers refraining from importing at dumped prices. We agree with the United States that "[t]his kind of competitive disincentive to engage in fair trade could not have been intended by the drafters of the Antidumping Agreement and should not be accepted ... as consistent with a correct interpretation of Article 9.3".<sup>107</sup> In addition, we note that such an approach would unnecessarily expand the scope of periodic reviews because the exporters would have to submit information pertaining to all of their export transactions rather than those pertaining to the importer requesting the review. This would, in our view, also cause administrative inconvenience because the investigating authorities would have to analyze all that information and be unable to complete the review in a timely manner. Such a heavy burden could also encourage non-cooperation on the part of the exporters.

7.147 Furthermore, imposing on the investigating authorities an obligation to take into consideration the prices of non-dumped imports while calculating the amount of the liability in a periodic review would, in our view, also preclude the achievement of the function of anti-dumping duties, *i.e.* removing the injurious effect of dumping. The fact that some imports are made at non-dumped prices would not, in our view, change the fact that the domestic industry in the importing country is injured by dumped imports. In other words, the injury suffered by the domestic industry because of dumped imports would not be removed by imports at non-dumped prices. Finally, as we noted in more detail in para. 7.133 above, we recall that a general prohibition on zeroing would render the administration of prospective normal value systems impractical.

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<sup>107</sup> Oral Statement of the United States at the Second Meeting, para. 18.

7.148 We do not consider such anomalies to be the intention of the drafters. These potential concerns over a general prohibition on zeroing, in our view, lend support to our interpretation of the relevant treaty provisions provided above.

(c) Conclusion

7.149 We have found simple zeroing in periodic reviews<sup>108</sup> "as such" not to be inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 9.3 and 2.4 of the Anti-Dumping Agreement. We therefore also reject Mexico's "as applied" claim regarding the five periodic reviews on *Stainless Steel Sheet and Strip in Coils from Mexico* carried out by the USDOC.

7.150 Having rejected Mexico's main claims regarding simple zeroing in periodic reviews under Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 9.3 and 2.4 of the Anti-Dumping Agreement, we decline to make findings on Mexico's dependent claims under Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement.

## VIII. CONCLUSIONS AND RECOMMENDATIONS

8.1 On the basis of the above findings, we conclude that:

- (a) Model zeroing in investigations "as such" is inconsistent with Article 2.4.2 of the Anti-Dumping Agreement,
- (b) The USDOC acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement in the investigation on *Stainless Steel Sheet and Strip in Coils from Mexico* by using model zeroing,
- (c) Simple zeroing in periodic reviews is "as such" not inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 9.3 and 2.4 of the Anti-Dumping Agreement,
- (d) The USDOC did not act inconsistently with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 9.3 and 2.4 of the Anti-Dumping Agreement by using simple zeroing in the five periodic reviews on *Stainless Steel Sheet and Strip in Coils from Mexico*.

8.2 We have applied judicial economy with regard to:

- (a) Mexico's claims under Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4 and 18.4 of the Anti-Dumping Agreement and Article XVI:4 of the WTO Agreement regarding model zeroing in investigations,
- (b) Mexico's claims under Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement regarding simple zeroing in periodic reviews.

8.3 We recommend that the DSB request the United States to bring its measure mentioned in paragraph 8.1(b) above into conformity with its obligations under the WTO Agreement. We have made no recommendation regarding model zeroing in investigations "as such" because, as mentioned

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<sup>108</sup> We recall that in paras. 7.7-7.9 above, we noted the description of the term "simple zeroing in periodic reviews" offered by Mexico, and decided to use it in our analysis in this case for ease of reference.

in para. 7.50 above, we have found that the USDOC stopped using it during these dispute settlement proceedings.

8.4 Mexico asks the Panel to suggest that the United States implement the DSB recommendations and rulings in this dispute in respect of its "as such" claims by eliminating *Model Zeroing Procedures* and *Simple Zeroing Procedures*. In addition, Mexico asks the Panel to suggest that the United States eliminate zeroing from the five periodic review results subject to these proceedings. Mexico does not seek a suggestion with regard to the investigation on *Stainless Steel Sheet and Strip in Coils from Mexico* by requesting the revocation of the anti-dumping duty.<sup>109</sup> The United States notes that a suggestion is not essential to the resolution of a dispute in the WTO dispute settlement system. According to the United States, a Member is free to choose the means to implement the DSB recommendations and rulings. In a case like this where the same measure is subject to other implementation processes, making a suggestion may cause complications over such processes. The United States therefore asks the Panel to reject Mexico's request for a suggestion.

8.5 We note that by virtue of Article 19.1 of the DSU, a panel has discretion to ("may") suggest ways in which a Member could implement the recommendation that the Member concerned bring the measure into conformity with the covered agreement in question. Having made no recommendations to the DSB on Mexico's claims with respect to which Mexico seeks a suggestion, however, we cannot, and do not, make any suggestion under Article 19.1 of the DSU in these proceedings.

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<sup>109</sup> Response of Mexico to Question 16 from the Panel Following the First Meeting.