ANNEX B

THIRD PARTIES WRITTEN SUBMISSIONS OR EXECUTIVE SUMMARIES THEREOF

ANNEX B-1

THIRD PARTY WRITTEN SUBMISSION OF CHILE

1. Chile would like to thank the Panel for the opportunity to present its views in this dispute, in which it reserves its third party rights owing to its systemic interest in the application of the so-called zeroing methodology in its various forms.

2. Mexico questions the zeroing procedures "as such" as well as their application by the United States Department of Commerce (USDOC) in the specific case of *Stainless Steel from Mexico*, both in the original investigation and in five periodic reviews. We shall be commenting only on the application "as such" of the zeroing procedures, both in original investigations and in reviews, as we are not familiar enough with the factual details of the specific case to comment on the practical application of the procedures.

3. Bearing this in mind, Chile would like to note that prior Appellate Body rulings have confirmed that this methodology, used both in dumping investigations and in subsequent administrative reviews, is inconsistent with multilateral disciplines. Chile agrees with those conclusions. Moreover, in *US – Zeroing (Japan)*, the Appellate Body made two determinations: firstly, that the zeroing methodology was inconsistent "as such" with the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement") and with Article VI of the General Agreement on Tariffs and Trade 1994 (GATT 1994); and secondly, that the zeroing methodology was inconsistent with the WTO both in the calculation of dumping (on a transaction-to-transaction basis) in original investigations as well as in periodic reviews.

4. The application of the zeroing methodology carries with it a definite possibility of exacerbating dumping margins or even fabricating them where they do not exist.

5. We welcome the USDOC's decision to terminate this practice in the calculation of dumping on a weighted average basis in original investigations. However, we regret that this decision is not comprehensive, and although the United States has yet to comply with the recommendations and rulings of the DSB in the above-mentioned dispute, Chile hopes that a definitive solution will be reached - which clearly calls for a reform that excludes the use of the methodology at issue at all stages of anti-dumping investigations.

6. As long as there is no comprehensive and definitive solution to this practice which violates the Anti-Dumping Agreement and the GATT 1947, there will be new challenges like the one raised by Mexico, and probably new decisions condemning its use. It is not very helpful to insist on using a methodology which has been identified as contrary to international rules.

7. Without prejudice to the above, Chile considers a bilateral solution to be limited by its very scope, and it involves costs for the parties and for the system. To initiate proceedings in the WTO knowing full well from repeated precedents what the result will be is a tiresome and costly process. Consequently, any definitive solution will have to be multilateral, involving an express confirmation in the Anti-Dumping Agreement of the prohibition of the use of this methodology both in investigations and in subsequent reviews under all types of price comparison.

8. In conclusion, Chile respectfully requests the Panel to give full consideration to the Panel and the Appellate Body conclusions in this respect, and in particular to the logic behind those conclusions. This would necessarily lead this Panel to conclude that the zeroing procedures as such, as challenged by Mexico, are contrary to Article VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4 and 9.3 of the Anti-Dumping Agreement. Chile hopes that this will happen, but also hopes that the United States will comply with the relevant prior recommendations and rulings, since only prompt and full compliance will ensure the predictability and certainty of the WTO dispute settlement system. Not to mention – as former US Trade Representative Robert Zoellick once pointed out – that such compliance would place the United States in a better position to request the other countries to respect trade rules.

ANNEX B-2

EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF THE EUROPEAN COMMUNITIES

I. INTRODUCTION

1. The dispute brought by Mexico against the US is the latest in a long series of complaints regarding "zeroing" practices and methodology in anti-dumping cases. The EC's written submission starts from Mexico's assertion that the issues raised in this particular panel proceeding have been brought up frequently before, and that Mexico's claims are supported by a consistent body of WTO case law, including in particular by Appellate Body reports. The EC has not been in a position to comment in writing on the US' position on these assertions, as for scheduling reasons it drafted its written submission before receipt of the US' first written submission. The EC reserves its right to comment further in its oral statement, taking into account the US' first written submission.

2. Assuming however, that Mexico is correct in its assertions, there is an important systemic question that arises in the EC's view: are panels obliged to follow previous decisions rendered on identical questions, in particular those contained in adopted Appellate Body reports? In its written submission the EC, based on a summary of Mexico's case, proceeds with a review of the previous case law of the WTO on "zeroing", paying particular attention to the reasoning and findings contained in the relevant Appellate Body reports. The EC then looks into the precedential value of these previous decisions, through a two-pronged analysis. First, it analyses the policy and practices observed by other adjudicatory bodies, both at the national and international level. This is followed by an examination of the functions of the WTO dispute settlement system, the role of the Appellate Body therein and a discussion of the WTO case law on the value of precedent.

3. The EC concludes that the reasoning and findings of the Appellate Body are to be regarded as the correct position in law and that in the interest of ensuring security and predictability of the multilateral trading system, this Panel should follow the reasoning and findings contained in the relevant Appellate Body reports.

II. SUMMARY OF MEXICO'S CASE

4. Mexico argues that the "zeroing procedures" used by the US in an original anti-dumping investigation of *Stainless Steel from Mexico* are "as such" and "as applied" inconsistent with several provisions of the GATT and the Anti-Dumping Agreement. Mexico further argues that the "zeroing procedures" used by the US in five periodic reviews are "as such" and "as applied" inconsistent with the GATT and the Anti-Dumping Agreement.

III. OVERVIEW OF RELEVANT APPELLATE BODY FINDINGS IN PREVIOUS ZEROING CASES

5. The EC agrees with Mexico that "zeroing" has been contested several times in WTO dispute settlement proceedings, and addressed in a series of adopted panel and Appellate Body reports. In its written submission the EC reviews in some detail the salient reasoning and findings of the Appellate Body ("AB") in each of these reports.

6. In *EC - Bed Linen* the AB found the EC's use of "model zeroing" in original investigations to be inconsistent with several provisions of the Anti-Dumping Agreement. It held, *inter alia*, that Art. 2.1 read in the light of Art. 2.4.2 of the Anti-Dumping Agreement makes clear that the margins of dumping to which Art. 2.4.2 refers are the margins of dumping for the product as a whole; that in determining a dumping margin for a product, Art. 2.4.2 refers to a comparison of "all" comparable transactions and that a comparison between export prices and normal value that does not take into account all transactions does not constitute a "fair comparison" between export price and normal value, as required by Articles 2.4 and 2.4.2 of the Anti-Dumping Agreement.

7. In *US - Softwood Lumber V* the US appealed the finding that by not taking into account all comparable export transactions in its zeroing practice in the original anti-dumping investigation at issue, it violated Article 2.4.2 of the Anti-Dumping Agreement. On appeal, the AB confirmed its earlier ruling in *EC - Bed Linen* emphasizing that under Article 2.4.2. of the Anti-Dumping Agreement "dumping" and "margins of dumping" can only be established for the product under investigation as a whole. The AB also considered and explicitly rejected a number of arguments that have been made since by the US in other zeroing cases on a recurrent basis: that other dumping margin methodologies provided for in Article 2.4.2 (*e.g.*, the transaction-to-transaction comparison) provide "important context" for the permissibility of "zeroing" under the average-to-average methodology in the original investigation at issue; the alleged historical background of Art. 2.4.2; that the AB need not follow its findings in other cases, in particular *EC – Bed Linen*, and the standard of review set out in Art. 17.6(ii) of the Anti-Dumping Agreement.

8. In *US – Zeroing (EC1)* the AB was asked to review the panel's findings on the application by the US of "zeroing" methodology in anti-dumping proceedings, including original investigations, and assessment or review proceedings. The EC had challenged US legal instruments, procedures, methodologies and practice related to these types of "zeroing," on both an "as such" and "as applied" basis. On appeal the AB confirmed that the zeroing methodology employed by the US in original antidumping investigations ("model zeroing" using average-to-average comparison) was inconsistent Art. 2.4.2 of the Anti-Dumping Agreement. In addition, the AB held that the zeroing methodology applied by the US in the administrative review process ("simple zeroing" using the average-to-transaction method) was inconsistent with Article 9.3 of the Antidumping Agreement and GATT Article VI:2. The AB referred explicitly to its prior rulings in *EC – Bed Linen and US – Softwood Lumber V*. It held that the margin of dumping established for an exporter or foreign producer operates as "a ceiling" for the total amount of anti-dumping duties that can be levied on the entries of the subject product (from that exporter) covered by the duty assessment proceeding. At the same time, the AB addressed and rejected again the US argument of the standard of review set out in Anti-Dumping Agreement Article 17.6(ii).

9. The US also appealed the panel's conclusion that the zeroing methodology at issue could be challenged as a "measure" "as such". The AB considered this matter in some detail, referring to earlier case law on the concept of "measure". As for zeroing methodology as a measure, it noted that there is no threshold requirement. It set out a particular standard for such challenges against a "rule or norm" constituting a measure of general and prospective application. On this basis it concluded that the zeroing methodology, as it relates to original investigations, in which the average-to-average comparison method is used, can be challenged, as such.

10. In *US – Softwood Lumber V (Art. 21.5-Canada)*, the AB was asked to review a revised anti-dumping duty determination by the US ("Section 129 Determination"). In this determination, instead of the average-to-average method, the US based the revised duty rates on a comparison of normal value and export prices on a transaction-to-transaction basis, again adopting zeroing methodology.

11. The AB rejected the panel's finding that the US determination in the Section 129 proceeding was not inconsistent with Articles 2.4.2 and 2.4 of the Anti-Dumping Agreement. It analysed

Article 2.4.2 in detail, concluding that zeroing in the transaction-to-transaction methodology does not conform to the requirement of Article 2.4.2. It noted explicitly that this interpretation was consistent with its previous rulings on "zeroing" related to the average-to- average comparison methodology under this provision. The AB also rejected arguments based on the "mathematical equivalence" argument, for a number of reasons, considering *inter alia*, the concerns of the panel and the US over the weighted average-to-transaction methodology to be overstated.

12. The AB then considered and rejected again contextual arguments made by the US based on other provisions of the Anti-Dumping Agreement and GATT; US arguments based on historical materials and the US argument on the standard of review of Article 17.6(ii) of the Anti-Dumping Agreement. Finally, the AB stated that the use of zeroing under the transaction-to-transaction methodology in the Section 129 Determination, was also inconsistent with the "fair comparison" requirement in Article 2.4.

13. In *US – Zeroing (Japan)*, Japan challenged zeroing methodologies and procedures applied by the US in original investigations, periodic reviews, new shipper reviews, changed circumstances reviews and sunset reviews as a "measure" "as such". Japan also challenged these measures on an "as applied" basis in a number of anti-dumping proceedings with respect to products from Japan, specifically, in one original investigation, various periodic reviews, and two sunset reviews. The panel concluded that the "zeroing procedures" are a "measure" that can be challenged "as such" and found that, in maintaining model zeroing procedures in the context of original investigations, the US acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement. However, the panel rejected all other challenges by Japan.

14. On appeal the Appellate Body comprehensively reversed the panel's report to the extent that the latter had rejected Japan's claims. Firstly, the AB confirmed its earlier findings that the "zeroing procedures" at issue constitute a measure which can be challenged as such under different comparison methodologies and in different stages of anti-dumping procedures. It reversed the panel's finding that the US does not violate Articles 2.4.2 and 2.4 of the Anti-Dumping Agreement by maintaining the zeroing procedures when calculating dumping margins on the basis of transaction-to-transaction comparisons in original investigations. The AB referred to "fundamental principles" involved in the concepts of "dumping" and "margins of dumping"; confirmed its earlier case law on these concepts as well as its earlier rulings on "zeroing" as such in original investigations involving the transaction-to-transaction and average-to-average methods. The Appellate Body again rejected contextual arguments made by the US. The AB also took firm exception to the fact that the panel had come to conclusions on the basis of reasoning relating to Art. 2.4.2 of the Anti-Dumping Agreement, which the Appellate had rejected earlier. Moreover, the AB again rejected arguments and findings that went counter to its earlier rulings that zeroing procedures in original investigations violate the fair comparison requirement.

15. The AB also reversed the panel's finding that the US does not violate Articles 9.3 and 9.5 of the Anti-Dumping Agreement and GATT Article VI:2 by maintaining the zeroing procedures in periodic reviews and new shipper reviews, referring to its earlier case law. Further, the AB reversed the panel's finding that zeroing in the context of periodic reviews and new shipper reviews is not, as such, inconsistent with Article 2.4. Also in relation to these investigations, it held that the fair comparison requirement was breached. Further, the Appellate Body reversed the panel's finding that zeroing as applied by the US in the 11 periodic reviews at issue in this appeal was not inconsistent with Articles 2.1, 2.4, 9.1, and 9.3 of the Anti-Dumping Agreement and GATT Articles VI:1 and VI:2. Also on this point the AB referred to earlier rulings. Finally, the AB reversed the panel's finding that the US acted consistently with Articles 2 and 11 of the Anti-Dumping Agreement when, in the sunset reviews at issue, it relied on margins of dumping that had been calculated using zeroing in previous anti-dumping proceedings. It found instead that the US violated Article 11.3 of the Anti-Dumping Agreement. Again, the AB referred to its earlier decisions in relation to this point.

IV. PRECEDENTIAL VALUE OF THESE APPELLATE BODY FINDINGS

16. The conventional wisdom is that there is no *stare decisis* in the WTO dispute settlement system, and that panel and Appellate Body reports are considered binding only on the immediate parties to the dispute. *Stare decisis* is characteristic for national legal systems of the common law tradition. In international law generally, this doctrine of binding precedent is not formally accepted. Consequently, insofar as it does not formally acknowledge *stare decisis*, the WTO dispute settlement system is not unique among international adjudicatory bodies.

17. However, there are important considerations that qualify the principles outlined above. All legal systems, whether national or international, and regardless of formal adherence to *stare decisis*, have an interest in ensuring continuity of the jurisprudence. Further, in all legal systems decisions rendered by hierarchically superior courts or tribunals are generally followed by subsidiary bodies.

18. As to the first consideration, whether as a matter of doctrine or practice, all legal systems place a high value on consistency, certainty and predictability of the jurisprudence of their adjudicatory bodies, particularly as regards decisions rendered by the highest courts. In common law systems change of precedent is done relatively rarely and with great aforethought and discussion. The highest courts in civil law systems, despite formally rejecting the doctrine of binding precedent, also follow their previous decisions as a matter of judicial policy and practice. Further, the policy and practice of international courts and tribunals demonstrate that the need for ensuring consistency and predictability of the jurisprudence also prevails in the international arena.

19. Consequently, formal rejection of the doctrine of *stare decisis* should not be confused with the interest that adjudicatory systems have in maintaining continuity in the case law. Departures from previous decisions are carefully considered and require the identification of cogent reasons for doing so. Even where adjudicatory bodies are not formally bound by their previous decisions, they will nevertheless consider themselves bound by the law as authoritatively expressed in a decision. Further, the general rule that a judicial or arbitral decision only binds the immediate parties does not prevent that decision from being treated in a later case as the correct legal position.

20. The second consideration relates to whether lower courts or tribunals need to follow decisions rendered by hierarchically superior bodies. Also on this question the practice and principles observed in other dispute settlement systems is noteworthy. In common law jurisdictions the primary function of an appellate court is to give predictability and stability to the field of law it judges. This is done in large part by *stare decisis* which obliges subsidiary bodies to follow the rulings of higher courts in their jurisdiction. But in civil law jurisdictions as well, lower courts tend to follow decisions of higher courts, even in the absence of an explicit legal rule to that effect. In the international arena adjudicatory systems with a hierarchical structure are less common. However, where there is an appellate structure, the prevailing rule seems to be again that decisions of the hierarchically higher body are followed by the subsidiary body, at the very least insofar as points of law are concerned. This does not mean that there would be no scope whatsoever for subsidiary bodies to develop the case law. It does mean however, that departure from decisions taken by higher courts on issues of law must be carefully considered and based on cogent reasons.

21. The EC submits that the above considerations also apply in the WTO dispute settlement system. A paramount function of this system is to create and maintain a uniform body of rules. This is clearly reflected in Art. 3(2) DSU, according to which, *inter alia*, the dispute settlement system aims at providing "security and predictability to the multilateral trading system". The Appellate Body occupies a superior position in the hierarchy of this system (Art. 17.4; 17.6 and 17.13 DSU). The primary function of the Appellate Body is to provide predictability and stability to the multilateral trading system through its decisions on issues of law covered in panel reports and legal interpretations developed by panels.

22. It is not disputed that Appellate Body reports do not have precedential effect or automatic applicability, qua reports, beyond the immediate parties. However, it is unquestionable that when interpreting the covered agreements, the Appellate Body aims at ensuring consistency in its case law (see: AB's reasoning and findings in *US – Softwood Lumber V* (paras. 109-112) referring to AB's previous reasoning and findings in *Japan – Alcoholic Beverages II* (at 108) and *US – Shrimp (Article 21.5 – Malaysia)* (para.109)).

23. Are WTO panels obliged to follow Appellate Body decisions? The Appellate Body itself has stated that a panel that takes account of the reasoning in an adopted Appellate Body report commits no "error" (*US – Shrimp (Article 21.5 – Malaysia)* (para. 109)). But it does not follow, *a contrario*, that panels would be free to depart from Appellate Body reports on issues of law and legal interpretations. The Appellate Body has explicitly stated panel reports – and equally adopted Appellate Body reports – "create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute" (*Japan – Alcoholic Beverages II* (at 108-109)). Further, the Appellate Body has explicitly ruled that panels are bound by the legal analysis of the Appellate Body "especially where the issues are the same" (*US – Oil Country Tubular Goods Sunset Reviews* (para.188)). The EC submits that as the Appellate Body is the hierarchically superior body, tasked with deciding on issues of law and legal interpretations, its rulings must be regarded as commanding particular authority for panels as authoritative pronouncements on the law.

V. CONCLUSIONS

24. Mexico asserts that none of the issues raised in this panel proceeding are new. The EC agrees that Mexico's claims appear to be supported in law by a consistent body of reasoning and findings, contained in all reports issued by the Appellate Body since the *EC - Bed Linen* case on zeroing in anti-dumping cases. The reasoning and findings of the Appellate Body are, in the EC's view, to be regarded as the correct position in law. In the interest of ensuring security and predictability of the multilateral trading system, the EC submits that this Panel should follow the reasoning and findings contained in these Appellate Body reports.

ANNEX B-3

EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF JAPAN

I. INTRODUCTION

1. The Appellate Body ruled clearly in the past disputes that zeroing procedures may be challenged "as such" and are incompatible with Articles VI:2 of the GATT 1994 and Articles 2.4, 2.4.2, 9.3, 9.5 and 11.3 of the AD Agreement. Particularly, it found that zeroing is prohibited in *all circumstances whenever calculating the "margins of dumping"*, that is, regardless of the specific phase or comparison methods. For the security and predictability of the multilateral trading system, Japan urges the Panel to follow the prior rulings of the Appellate Body and approve Mexico's claims that the zeroing measures are inconsistent "as such" with Articles 2.1, 2.4, 2.4.2 and 9.3 of the AD Agreement.

II. ZEROING PROCEDURES ARE A MEASURE "WHICH CAN BE CHALLENGED AS SUCH"

2. In recent anti-dumping disputes, the Appellate Body held that the word "measure" has a broad meaning; an alleged "measure" will be assessed in WTO law irrespective of its legal character in domestic law; and, significantly, a "measure" need not be binding or mandatory in domestic law. In *US – Corrosion-Resistant Steel*, the Appellate Body noted that the measures examined by the past GATT/WTO panels include those consisting of "*acts setting forth rules or norms that are intended to have general and prospective application"*.

3. The USDOC, in calculating overall margins of dumping, *always disregards and treats as zero* the result of intermediate price comparisons where the export price exceeds the normal value in all anti-dumping procedures regardless of the types of comparison (a *weighted average- to–weighted average* ("W-W"), a *transaction–to–transaction* ("T-T") or a *weighted average–to–transaction* ("W-T") comparison) that it adopts. Such methodology of margin calculation is exactly what is called "zeroing" which should be regarded as a single measure that can be challenged "as such" under the WTO law.

III. ZEROING USED IN INVESTIGATIONS IS INCONSISTENT "AS SUCH" WITH ARTICLES 2.1, 2.4.2 AND 2.4 OF THE AD AGREEMENT

A. THE CONCEPT OF "DUMPING" AND "MARGINS OF DUMPING"

4. Japan supports the Mexico's contention that zeroing is prohibited "as such" in investigations using a T-T comparison. The Appellate Body held, in *US – Softwood Lumber V (Article 21.5 – Canada)*, that zeroing is prohibited on the "as applied" basis by Articles 2.1, 2.4.2 and 2.4 in original investigations using a T-T comparison.

5. Article 2 of the AD Agreement sets forth the "agreed disciplines" for determining "dumping" and "margins of dumping". Japan further notes that Article 2.1 defines "dumping" as follows: "For the purpose of this Agreement, *a product* is to be considered as being *dumped*" (emphasis added.) This definition reiterates the definition of "dumping" in Article VI:1 of the GATT 1994. Article VI:2

also defines the term "margin of dumping" by reference to the "product". Based on the texts of Articles 2.1 and VI, "dumping" and "margins of dumping" must be established for the product under investigation as a whole. This definition of "dumping" and "margins of dumping" applies throughout the AD Agreement for purposes of all anti-dumping proceedings. Based on this analysis, in *US – Zeroing (EC)* and *US – Softwood Lumber V*, the Appellate Body held that "*dumping is defined in relation to a product as a whole*".

6. On the basis of this interpretation of Article 2.1 and Article VI:1, the Appellate Body further found that "if the investigating authority establishes the margin of dumping on the basis of multiple comparisons made at an intermediate stage, it is required to aggregate the results of all of the multiple comparisons, including those where the export price exceeds the normal value". This requirement under Article 2.1 to aggregate multiple comparison results in calculating a margin of dumping for the "product" as a whole should be followed, when an authority conducts multiple model-specific W-W comparisons, multiple transactions-specific W-T comparisons and multiple transaction-specific T-T comparisons.

B. DETERMINATION OF MARGINS OF DUMPING BASED ON T-TO-T COMPARISONS IN ORIGINAL INVESTIGATIONS

7. The United states rebuts that "all comparable export transactions" language in the text of Article 2.4.2 of the AD Agreement is the textual basis for an obligation to provide offsets and therefore this language in Article 2.4.2 applies only to antidumping investigations and only when authorities use the W-W comparison pursuant to Article 2.4.2. This interpretation is apparently false.

8. As clarified in *US – Softwood Lumber V (Article 21.5 – Canada)*, the reference in the first sentence of Article 2.4.2 to "a comparison" in the singular and to "export prices" in the plural suggests the need for an overall calculation exercise involving aggregation of multiple transactions. The text of Article 2.4.2 indicates that the calculation of a dumping margin using the T-T comparison methodology is a multi-step exercise in which the results of transaction-specific comparisons are inputs that are to be aggregated in order to establish the dumping margin of the product under investigation for each exporter or producer.

9. Japan does not consider that the absence of the phrase "all comparable export transactions" in the context of the T-T comparison suggests that zeroing should be permissible under that methodology. Under T-T comparison, unlike W-W, all export transactions are taken into account individually and matched with the most appropriate transactions in the domestic market.

C. CONTEXTUAL ARGUMENTS RELATING TO THE SECOND SENTENCE OF ARTICLE 2.4.2 OF THE AD AGREEMENT

10. The United States further rebuts that the general zeroing prohibition would, yielding identical results between the W-W and W-T comparison, render the targeted dumping exception in Article 2.4.2 a complete nullity (the "mathematical equivalence" argument).

11. However, in *US - Softwood Lumber V(Article 21.5-Canada)*, the Appellate Body decisively rejected this argument, by noting that, without actual application ever by the Unites States of the W-T comparison method, the "mathematical equivalence" argument "rests on untested hypothesis". It also noted that, given the exceptional nature of the method authorized in the second sentence of Article 2.4.2, that sentence "alone cannot determine the interpretation of the two methodologies provided in the first sentence…", and that "there is considerable uncertainty regarding how precisely the third methodology should be applied", because it has never been invoked. Finally, the Appellate

Body affirmed that "mathematical equivalence" does not necessarily arise when using W-T and W-W comparisons without zeroing.

12. Accordingly, the second sentence of Article 2.4.2 does not provide contextual support for a finding that zeroing is permissible under T-T comparison methodology.

D. ARTICLE 2.4 OF THE AD AGREEMENT

13. The use of zeroing under T-T comparison methodology artificially inflates the magnitude of dumping, resulting in higher margins of dumping and making a positive determination of dumping more likely. Therefore the United States acts inconsistently with Article 2.4 of the AD Agreement.

IV. THE ZEROING PROCEDURES IN PERIODIC REVIEWS

14. The United States contends that in periodic reviews, the term "margins of dumping" in Article 9.3 of the AD Agreement can be interpreted to apply on a transaction–specific basis and that therefore the provision of this Article permits the determination of transaction specific margins in periodic reviews.

15. The *chapeau* of Article 9.3 of the AD Agreement, which governs periodic reviews, states "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2". Based on this requirement as well as the ones under Article VI:2 of the GATT 1994 and Article 9.1 of the AD Agreement, the margin of dumping established for an exporter or foreign producer operates as a *ceiling* for the total amount of anti-dumping duties that can be levied on the entries of the subject product (from that exporter) covered by the duty assessment proceeding.

16. The express reference to Article 2 in the chapeau of Article 9.3 includes, among others, Article 2.1, which defines "dumping" for purposes of the entire AD Agreement in relation to the "product" under investigation as a whole. In *US – Zeroing (EC)*, the Appellate Body made an explicit interpretive connection between the "product as a whole" requirement of Article 2.1 and dumping determinations under Article 9.3. Based on the interpretation of Article 2.1 mentioned earlier, for purposes of periodic reviews as well, the investigating authority must aggregate all multiple comparison results to establish a margin of dumping for the "product" under investigation as a whole.

17. The Appellate Body clearly rejected the United States' argument that, in a periodic review, "dumping" and "margins of dumping" can be determined on an importer- or an import-specific basis. The Appellate Body explained in *US – Zeroing (EC)* that "[e]stablishing margins of dumping for exporters or foreign producers is consistent with the notion of dumping, which is designed to counteract the foreign producer's or exporter's pricing behavior. 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".

18. The Appellate Body also recognized that neither the AD Agreement nor the GATT 1994 prevents Members from *assessing* duties on an import - or importer-specific basis, provided that the total amount of duties levied does not exceed the margin of dumping for the "product", for the exporter or foreign producer.

19. In periodic reviews, the United States calculates: (1) a margin for each *exporter* that becomes the duty deposit rate for all entries of the product exported to the United States by that exporter until the next review; and (2) an *importer*-specific assessment rate based on the total amount of dumping attributable to each importer, which determines that importer's liability for the review period.

20. In light of its interpretation of Articles 9.3 and VI:2, in conjunction with other relevant provisions including Articles 2.1 and VI:1, the Appellate Body in *US – Zeroing (EC)* found that "the methodology applied by the USDOC in the administrative reviews at issue resulted in amounts of assessed anti-dumping duties that exceeded the foreign producers' or exporters' margins of dumping with which the anti-dumping duties had to be compared". Accordingly, the zeroing methodology is inconsistent with Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994.

21. The United States criticizes this conclusion on the grounds that if a Member is unable to calculate and assess the duties on a transaction-specific basis, importers of the merchandise for which the amount of dumping is greatest will actually have an advantage over their competitors who import at fair value prices because they will enjoy the benefit of offsets that result from their competitors' fairly priced imports.

22. However, anti-dumping duties are designed to counteract an exporter's pricing, and not an importer's, and because it is exporters that create a situation of dumping, the maximum amount of duties must be assessed in relation to exporter's margin of dumping. Furthermore, if duties are imposed on importers, it must be ensured that the total amount of duties does not exceed the exporter's margins of dumping. The above-mentioned situation on which the United States bases its criticism is consistent with the exporter-associated nature of the notion of dumping, not importer.