ANNEX D

ORAL STATEMENTS OR EXECUTIVE SUMMARIES THEREOF FIRST AND SECOND MEETINGS

ANNEX D-1

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF MEXICO – FIRST MEETING

Mr Chairman, members of the Panel:

I. SECURITY AND PREDICTABILITY IN THE WTO CASE LAW

1. Article 3.2 of the DSU states that the dispute settlement system is a "central element" in providing security and predictability to the multilateral trading system, which creates an expectation that panels will adopt the reasoning in previous Appellate Body reports on the same issues. The question of whether the *Anti-Dumping Agreement* allows investigating authorities to disregard or "zero" intermediate price comparisons where the export price exceeds normal value, was ruled on for the first time in 2001 by the Appellate Body in *EC – Bed Linen*. The zeroing procedures in that first case were applied in the context of an original investigation and in reference to comparisons between the weighted average of export prices and normal value, as defined in Article 2.4.2. However, the principles of definition set in the text of the Agreements, as the Appellate Body observed, clearly exceed the ambit of original investigations and average-to-average comparison.

2. This became evident in the next "zeroing" case analysed by the Appellate Body: *US - Softwood Lumber V*. Here, the Appellate Body extended its findings regarding zeroing practices, which apply in an original investigation where transaction-to-transaction comparison is used. In reaching its conclusion, the Appellate Body interpreted the text on the definitions of "dumping", "margins of dumping" and "product", in Article VI of the GATT 1994 and Article 2.1 and 2.4.2 of the *Anti-Dumping Agreement*, in the same way as it had in *EC – Bed Linen*.

3. The Appellate Body again relied on the same provisions of the Agreements and the same interpretation in *US – Zeroing (EC 1)*, in which it determined that the United States' zeroing procedure in original investigations where the average-to-average comparison methodology is used, is incompatible "as such" with the United States' obligations under the Agreements, and that the zeroing procedures as applied in sixteen periodic reviews where the comparison was between individual export prices and monthly average normal value, was likewise incompatible with the United States' obligations for calculating margins of dumping for the exporter in question, and in respect of the investigated product as a whole.

4. More recently, in *US – Zeroing (Japan)*, the Appellate Body resolved the last outstanding issue when it recognized that zeroing procedures in administrative reviews, sunset reviews and other proceedings are inconsistent "as such" with Article VI of the GATT 1994 and the relevant provisions of the *Anti-Dumping Agreement*. Again, an essential part of the Appellate Body's reasoning was consistency in applying the definitions of "dumping", "margins of dumping" and "product" discussed in *EC – Bed Linen*.

5. In examining the Appellate Body's consistent treatment of this matter in its reports, this Panel should acknowledge two relevant points. First, despite the United States' efforts to confuse the issue, the measure challenged in each of the above-mentioned cases is the same. As the Appellate Body said in *US – Zeroing (Japan)*, there is a single zeroing measure that applies in different contexts. Secondly, in its decisions in all these cases, the Appellate Body has changed neither its reasoning nor its interpretation of the text of the Agreements. Although the facts themselves have been different in each case, the Appellate Body's construction of the Agreements has been consistent in all the cases.

In its reports, the Appellate Body has always relied on the same fundamental principles of the Agreements.

6. In view of the foregoing, Mexico submits that the texts of the Agreements can support only the conclusion that *all* sales comparisons should be considered in calculating dumping margins.

II. THE CONCEPTS OF "DUMPING", "MARGINS OF DUMPING", AND "PRODUCT"

7. The position taken by Mexico and the Appellate Body rests on a number of basic principles of law. First, "dumping" and "margins of dumping", as defined in Article VI:1 and VI:2 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement*, relate to the "product" in question. Secondly, the concepts of "dumping" and "margins of dumping" relate only to the behaviour involved in establishing exporter or producer prices for the exported product.

8. The Appellate Body established in several cases a definition of the terms "dumping" and "margins of dumping" that is clear, coherent and in keeping with the texts. The United States, on the other hand, supports interpretations of these terms that are incompatible with the text, context, intent and object of the Agreement and so are incompatible with the customary rules of interpretation of public international law.

"Margins of Dumping" – calculated for the product as a whole and not for individual transactions or models

9. Article VI:1 and VI:2 of the GATT 1994 defines "dumping" in relation to a "product". This definition is carried over to the *Anti-Dumping Agreement* by Article 2.1, and by virtue of the opening phrase of the latter, "[f]or the purpose of this Agreement", the definition applies throughout the Agreement. Article 2.1 is thus a rule that governs the interpretation and the context of the term "margin(s) of dumping" throughout the Agreement. Similarly, the term "dumping" has the same meaning for all provisions of the Agreement and for all types of anti-dumping proceedings. Consequently, any "dumping" or "margin of dumping" in conformity with the Agreement must be calculated in relation to the product under investigation or review.

10. This raises the question of what the Agreements refer to when they use the term "product". The Appellate Body gave the answer in *EC – Bed Linen*. It found that the "product" for which the dumping and margins of dumping are calculated is and must be the investigated product "as a whole".

11. The terms "dumping" and "margins of dumping" necessarily relate to the same definition of "product" "because it is the product that is introduced into the commerce of another country at less than its normal value in that country" (Report of the Appellate Body, *US – Zeroing (Japan)*, para. 109). This concept of dumping for a defined product under investigation or review is also a factor taken into account in determining whether dumping causes or threatens injury.

12. Mexico concedes that it is permissible – even necessary in some circumstances – to carry out intermediate price comparisons on a model or transaction basis. However, as the Appellate Body has found time and again, starting with *EC – Bed Linen* and up to *US – Zeroing (Japan)*, such intermediate comparisons cannot be treated as "margins of dumping" as defined in the Agreements.

13. The United States' interpretation wrongly assumes that it is individual importers that engage in dumping. This position is at odds with the text and the intent of the Agreements.

"Margins of dumping" – calculated in respect only of individual exporters or foreign producers

14. The *Anti-Dumping Agreement* does not address the behaviour of individual importers or individual import transactions. Rather, it provides consistently that determinations of dumping are carried out in respect of every exporter or foreign producer investigated.

15. The focus on the exporter is evident throughout the text of Article VI of the GATT 1994 and the *Anti-Dumping Agreement*, and the Appellate Body found that this fact is clearly confirmed by the text of Article 6.10 of the *Anti-Dumping Agreement*.

16. Anti-dumping measures are designed to offset the effects of the pricing behaviour of producers and exporters, since the producer or exporter is necessarily involved in determining the price of the exports giving rise to sales at a price lower than normal value. Accordingly, the prices of *all* the export transactions of an exporter or foreign produce must be taken into account in determining whether it has engaged in dumping and, if so, to what extent.

17. There is a clear distinction between the establishment or collection of duties and the margin of dumping, which sets a ceiling on the amount of the duties that may be established or collected.

III. INTERPRETATION OF THE PHRASE "ALL COMPARABLE EXPORT TRANSACTIONS" IN ARTICLE 2.4.2

18. The United States overlooks this fundamental point when it reiterates in its First Submission that it is the phrase "all comparable export transactions" in Article 2.4.2 of the *Anti-Dumping Agreement* that lays down the requirement to calculate margins of dumping in reference to the "product" as a whole. It submits that, while the phrase "all comparable export transactions" refers solely to average-to-average comparisons, zeroing is prohibited only in the context of such comparisons.

19. In Mexico's view, this position is not supported by the reports of the Appellate Body. In the first case, *EC – Bed Linen*, in which zeroing was addressed and where the parties referred expressly in their arguments to Article 2.4.2, it is plain that the principles that led the Appellate Body to determine that investigating authorities may not ignore or alter the results of intermediate price comparisons, were to be found in the definitions of "dumping" and "margins of dumping" in Article VI:1 and VI:2 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement*. The fact that the phrase, "all comparable export transactions" was discussed in the context of Article 2.4.2 and the related arguments, was not a decisive element in the report of the Appellate Body.

20. Nor does Mexico agree with the United States' argument in its First Written Submission that in its report in *US – Softwood Lumber V*, the Appellate Body relied on the phrase "all comparable transactions" in Article 2.4.2. As in its earlier report, in *EC – Bed Linen*, the Appellate Body based its findings in *US – Softwood Lumber V* essentially on the definitions of "dumping" and "margins of dumping" that apply throughout the *Anti-Dumping Agreement*. The Appellate Body rejected the United States' argument, concluding that "dumping" and "margins of dumping" apply only to the investigated product as a whole and may not be determined at the level of a sub-product, model or category of that product.

21. The United States further argues that the report of the Appellate Body would void the phrase "all comparable export transactions" of meaning if zeroing were prohibited in all the comparison methods provided for in Article 2.4.2. However, as the Appellate Body said, the reason why the phrase "all comparable export transactions" appears only in connection with the average-to-average comparison methodology is that this is the only methodology to which it is relevant. Since in the average-to-average methodology groups of transactions can be aggregated, the phrase "all comparable export transactions" requires that each group include all transactions that are comparable, and that no

export transaction be excluded when margins of dumping are determined on the basis of this methodology. Furthermore, the average-to-average comparison methodology involves calculating a weighted average export price, whereas the transaction-to-transaction methodology takes account of all export transactions individually and compares them with the most appropriate transactions on the domestic market. Consequently, as the Appellate Body observed, the phrase "all comparable export transactions" is simply not relevant to the transaction-to-transaction methodology.

IV. MEXICO'S REQUEST FOR FINDINGS

22. The United States has expressed concern that Mexico refers to zeroing procedures as if they were a single measure. It is beyond all doubt that, as the Appellate Body concluded in *US – Zeroing (Japan)*, there is one single zeroing measure.

V. CONCLUSION

23. Mexico would again remind the Panel that the measure challenged as such in this dispute is the same as the measure on which the Appellate Body issued a decision in cases brought by Canada, the European Communities and Japan. The Appellate Body has consistently held that the measure is in breach of the United States' obligations under the Agreements.

24. In the interests of the security and predictability of the WTO system and in order to ensure that the Agreements negotiated by Members are implemented as their texts require, we urge the Panel to allow all Mexico's claims.

ANNEX D-2

CLOSING STATEMENT OF MEXICO – FIRST MEETING

I. INTRODUCTION

Mr. Chairman, Members of the Panel:

1. On behalf of the Mexican delegation, it is once again our privilege to appear before you to present the views of Mexico concerning the issues in this dispute.

2. Our closing statement will be brief and will focus on some key points.

3. In its opening statement, the United States equated Mexico's position regarding the security and predictability of WTO dispute settlement to "the Panel need do nothing more than blindly follow prior Appellate Body reports". This is incorrect. This dispute is not about the primacy of Appellate Body reports over panel proceedings nor is it about the doctrine of precedent. Rather, it is about the correct legal interpretation of the relevant provisions of the GATT 1994 and the Anti-dumping Agreement. Mexico asks only that this panel correctly interpret these provisions giving due consideration to prior Appellate Body findings on identical issues.

4. It is notable that in the oral statements of the parties given yesterday, no new issues were raised. The first written submissions of the parties express fully the issues before the Panel.

5. The differences in the positions of Mexico and the United States can be distilled into two questions.

6. First, which WTO terms and provisions form the foundation for the prohibition against zeroing? The United States takes the position that the sole basis for the prohibition is the phrase "all comparable export transactions" in Article 2.4.2 of the Anti-dumping Agreement. Mexico takes the position that the foundation of the prohibition is found in the meaning of the terms "dumping", "margins of dumping" and "product" in Articles VI:1 and 2 of GATT 1994 and Article 2.1 of the Anti-dumping Agreement.

7. Second, when interpreting the WTO terms and provisions applicable to the assessment of anti-dumping duties, should the focus be on the importer or the exporter/producer? The United States takes the position that the focus should be on the importer. Mexico takes the position that the focus should be on the exporter/producer.

8. Contrary to the submissions of the United States, the responses to these questions do not give rise to more than one "permissible" interpretation for each response.

9. The response to each question poses a single permissible interpretation. In both instances, the interpretations posed by Mexico are the permissible ones. Mexico's interpretations attribute a consistent meaning to the applicable terms and provisions as they are used throughout the Anti-dumping Agreement. They take into account the entire context of the Anti-dumping Agreement. They follow the interpretations presented by the Appellate Body in its reports concerning zeroing practices.

10. In contrast, the interpretations posed by the United States do not attribute consistent meaning to the applicable terms and provisions as they are used throughout the Anti-dumping Agreement. They do not take into account the entire context of the Anti-dumping Agreement. Finally, they directly contradict the interpretations presented by the Appellate Body in its reports concerning zeroing practices. The interpretations posed by the United States are, simply put, not permissible.

11. Embedded in the United States' submissions are arguments that rely on factual scenarios related to the technical application of anti-dumping duties. The findings required in this dispute do not require the Panel to consider the many different factual scenarios regarding the technical application of anti-dumping duties. Rather, they require the Panel to focus on the text of the applicable terms and provisions of GATT 1994 and the Anti-dumping Agreement and interpret those terms and provisions in a manner that is consistent with the rules of interpretation set out in Articles 31 and 32 of the *Vienna Convention of the Law of Treaties* as incorporated in Article 3.2 of the DSU.

12. Thank you once again for agreeing to serve on this Panel and for your efforts, and those of the Secretariat and translators, in preparing for this meeting.

13. This concludes our closing statement. We would be pleased to respond to any questions you may have.

ANNEX D-3

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF THE UNITED STATES – FIRST MEETING

Mr. Chairman, Members of the Panel:

Procedural Issues

1. This Panel is tasked with making its own objective assessment of the matter before it. This includes an assessment of the facts as well as the conformity of the challenged measures with the relevant covered agreements. Mexico and some third parties, however, would have this Panel neglect its responsibilities in the name of "security and predictability". According to them, it is sufficient that the Appellate Body previously has found zeroing to be inconsistent with provisions of the WTO Agreements.

2. The Appellate Body itself has stated that its reports are not binding on panels. Prior panel and Appellate Body reports should be taken into account only to the extent that the reasoning contained in them is persuasive. In our first written submission, we have provided cogent reasons why the findings and reasoning of the Appellate Body in *US – Zeroing (Japan)* and *US – Zeroing (EC)* are seriously flawed with respect to certain aspects relevant to this dispute and therefore should not be followed.

3. "Security and predictability" is not an independent obligation, nor is it a stated "object and purpose" of any WTO Agreement. The only reference to this phrase in the WTO Agreement is in DSU Article 3.2, which makes clear that security and predictability are achieved only when the dispute settlement system works as provided therein – that is, through the proper application of customary rules of interpretation of public international law to the agreed-upon provisions of the covered agreements, in order to preserve the rights and obligations to which the Members agreed. Security and predictability is provided by a dispute settlement system that does not add to or diminish the rights and obligations of WTO Members. A panel is not permitted to follow a prior panel or Appellate Body report in the name of "security and predictability" where that prior report has added to or diminished rights and obligations.

Scope of this Dispute

4. In light of its terms of reference and Article 7 of the DSU, this Panel may only address those matters identified by Mexico in its request for establishment of a panel. In its request for consultations and its request for the establishment of a panel, Mexico identified two alleged measures it was challenging "as such" - the use of "zeroing" in average-to-average comparisons in original investigations and the use of "zeroing" in assessment proceedings. Yet, in its first written submission, Mexico asserts that it is challenging a "single zeroing measure" in all antidumping proceeding contexts.

5. Mexico argues that in *US – Zeroing (Japan)*, the Appellate Body concluded that there was one single rule which it found to be inconsistent with US obligations. A prerequisite for the Appellate Body to reach that conclusion was its finding that "zeroing" in all contexts and with respect to all types of comparisons was within the scope of Japan's request for establishment of a panel and request for consultations. That is clearly not the case here.

6. There is nothing in US law that requires a monolithic use of "zeroing" in all contexts. This is supported by the fact that Commerce is no longer making average-to-average comparisons in original investigations without providing offsets for non-dumped comparisons, a fact which Mexico acknowledges in its first written submission. Mexico relies on descriptions of what Commerce has done in the past to argue the existence of a "single zeroing measure". Aside from the fact that these past examples do not cover all the contexts supposedly covered by the so-called "single zeroing measure", Mexico's arguments imply that if an administering authority acts in a non-arbitrary and consistent manner, this should expose it to dispute settlement for somehow maintaining a separate measure. This is a very troubling proposition.

The Claimed Obligation to Provide Offsets

7. Mexico argues that the Antidumping Agreement imposes on Members an obligation to provide an offset to dumping in all types of antidumping proceedings, including assessment proceedings. Mexico does this despite the absence of a textual basis for such an obligation and a permissible interpretation of the Antidumping Agreement that does not require such offsets.

8. In the disputes to date that have addressed the issue of offsets, the only textual basis panels have identified for an obligation to provide offsets has been the "all comparable export transactions" language in the text of Article 2.4.2 of the Antidumping Agreement. This is consistent with the approach articulated by the Appellate Body in *US – Softwood Lumber Dumping*. The phrase "all comparable export transactions" in Article 2.4.2 applies only to antidumping investigations and only when authorities use average-to-average comparisons pursuant to Article 2.4.2. The panels have consistently found that the obligation to provide offsets applies only as a consequence of the text-based obligation to include all comparable export transactions when making weighted-average to weighted-average comparisons in an investigation. The panels have also consistently found that there is no textual basis for an obligation to provide offsets outside the context of average-to-average comparisons in investigations. The analysis offered by the prior panels is persuasive and correct.

9. Article 2.4.2 provides for two symmetrical comparison types, average-to-average and transaction-to-transaction, and a third asymmetrical comparison type, average-to-transaction, which may be used under certain conditions. With respect to the average-to-average comparisons, the phrase "all comparable export transactions", as interpreted by the Appellate Body in *US – Softwood Lumber Dumping*, addresses whether the relevant comparison may be made at the level of averaging groups (or "models"). Under this reading, the word "all" in "all comparable export transactions" refers to all transactions across all models of the product under investigation. This is the textual basis for the conclusion that margins of dumping based on average-to-average comparisons must relate to the "product as a whole" rather than individual averaging group comparisons. This phrase, "all comparable export transactions", however, applies only to the use of average-to-average comparisons in an investigation.

10. A general prohibition of zeroing would negate and contradict the interpretation of the phrase "all comparable export transactions" that was the basis of the obligation to provide offsets in the context of average-to-average comparisons. However, in *US – Zeroing (Japan)*, the Appellate Body did just that by reinterpreting "all comparable export transactions" to relate solely to all transactions within a model, and not across models for the product under investigation. In doing so, the Appellate Body abandoned the only textual basis in the Antidumping Agreement for prohibiting zeroing. In this case, Mexico argues that margins of dumping calculated in assessment proceedings must relate to the "product as a whole", and cannot be calculated for individual transactions. However, "product as a whole" is not a term found in the Antidumping Agreement nor does it have any defined meaning. To the extent the concept of "product as a whole" has any relevance to the Antidumping Agreement, it is only as a shorthand for the operation of the phrase "all comparable export transactions" in the context

of average-to-average comparisons in investigations. Mexico's argument relies entirely on the concept of "product as a whole" being applied in a manner detached from that textual basis.

11. Mexico seeks to redefine the concept of dumping contained in Article 2.1 of the Antidumping Agreement and Article VI of the GATT 1994 such that the terms "dumping" and "margins of dumping" relate "solely, and exclusively, to the "product" under consideration taken "as a whole"".

12. The text of these provisions defines and describes dumping as occurring in the course of individual commercial transactions. The commercial reality is that prices are generally set in individual transactions and products are "introduced into the commerce" of the importing country in individual transactions. In other words, dumping – as defined under these provisions – may occur in a single transaction. To the extent that some transactions introduce merchandise into the market of an importing country at a price above normal value, this is to the benefit of the seller, not the domestic industry injured by other transactions made at less than normal value.

13. Mexico asserts that dumping and margins of dumping "are concepts that have no meaning unless considered with reference to the product under consideration taken as a whole". The Appellate Body reports relied upon by Mexico are unpersuasive because they cannot alter the simple fact that the relevant text of these provisions, the relevant context for interpreting the meaning of these terms, and the well-established prior understanding of these concepts all confirm that dumping and margins of dumping do have a meaning in relation to individual transactions. Our written submission sets forth the textual, contextual, and other evidence that the concepts of dumping and margins of dumping are applicable to individual transactions. That evidence conclusively establishes that the terms dumping and margins of dumping as used in Article 2.1 of the Antidumping Agreement and Article VI of the GATT 1994 do not support the existence of an obligation to provide offsets for instances of non-dumping in assessment proceedings.

14. Mexico's misinterpretation of the term "margin of dumping" is the basis for its claim of inconsistency with Article 9.3. Article 9.3 requires that the amount of the antidumping duty assessed shall not exceed the margin of dumping. That obligation, just like the term "margin of dumping" itself, may be applied at the level of individual transactions. This understanding is particularly appropriate in the context of antidumping duty assessments, where duties are assessed on individual customs entries resulting from individual transactions for which importers are liable for payment. Mexico's argument that excess antidumping duties were assessed in this dispute depends on its misinterpretation of the term "margin of dumping" referred to in Article 9.3 as relating exclusively to the product "as a whole" considered on an exporter-wide basis. The panels examining this issue have consistently observed that interpreting the term "margin of dumping" as relating exclusively to the "product as a whole" for all importers of product from a particular exporter is inconsistent with the importer- and import-specific obligation to pay an antidumping duty.

15. Mexico's interpretation of Article 9.3 cannot be reconciled with the recognition in Article 9 of prospective normal value systems of assessment. Under such systems, the amount of liability for payment of antidumping duties is determined at the time of importation on the basis of a comparison between the price of the individual export transaction and the prospective normal value. If the margin of dumping must relate exclusively to the "product as a whole" determined on an exporter-specific basis, the administration of such an assessment system is simply impossible. An obligation to account for other imports in assessing antidumping duties on a particular entry is contrary to the very concept of a prospective normal value system and, if accepted, would effectively render prospective normal value systems WTO-inconsistent unless they were converted to a retrospective system by adopting retrospective assessment reviews.

16. Antidumping duties are applied at the level of individual entries. In this way, an importer may be induced to raise resale prices to cover the amount of the antidumping duty, thereby preventing

the dumping from having further injurious effect. If, instead, the amount of the antidumping duty must be reduced to account for the amount by which some other transaction was sold at above normal value, possibly involving an entirely different importer, then the antidumping duty will be insufficient to have the intended effect. The importer of the dumped product would remain in a position to profitably resell the product at a price that continues to be injuriously dumped. If Mexico's reading of "margin of dumping" is accepted as the sole permissible interpretation of Article 9.3, the remedy provided under the Antidumping Agreement and the GATT 1994 will be prevented from fully addressing injurious dumping.

17. Mexico claims inconsistency with the "fair comparison" requirement of Article 2.4, arguing that the United States has assessed antidumping duties "in excess of the actual margin of dumping for the product" because the duties assessed exceeded the margin of dumping for the product as a whole. The relevant text of Article 2.4, however, provides only that a "fair comparison shall be made between the export price and the normal value". The text of Article 2.4 does not address whether any particular assessment of antidumping duties exceeds the margin of dumping, whether "dumping" and "margins of dumping" are concepts that apply to individual transactions, or whether a margin of dumping may be specific to each importer. Indeed, the text of Article 2.4 does not resolve the question of whether zeroing is "fair" or "unfair". Resolution of Mexico's claim depends not on the text of Article 2.4, but on whether it is permissible to interpret the term "margin of dumping" as used in Article 9.3 as applying to transactions. As prior panels have found, it is permissible to understand the term "margin of dumping" as used in Article 9.3 as applying to an individual transaction. Therefore, the challenged assessments do not exceed the margin of dumping and there is no basis for a finding of inconsistency with Article 2.4.

18. Any interpretation that gives rise to a general prohibition of zeroing also renders the second sentence of Article 2.4.2, the "targeted dumping provision", inutile. This is because the targeted dumping methodology mathematically must yield the same result as an average-to-average comparison if, in both cases, non-dumped comparisons are required to offset dumped comparisons. This defect cannot be ignored or assumed away by supposing that the targeted dumping provision permits an authority to ignore any obligation in the Antidumping Agreement other than the obligation to use one of the two symmetrical comparison methods.

19. The United States respectfully disagrees with the Appellate Body's reasoning in *US – Zeroing (Japan)* that the Antidumping Agreement includes a general prohibition of zeroing. The United States agrees with the reasoning applied by the panels that outside the context of average-to-average comparisons in investigations the Antidumping Agreement does not impose an obligation to provide offsets for non-dumping. At a minimum, we urge this Panel to find that a permissible interpretation of the Antidumping Agreement, consistent with the Appellate Body's original interpretation in *US – Softwood Lumber Dumping* and faithful to the text of the Antidumping Agreement, contains no obligation to provide for an offset to dumping in assessment proceedings.

ANNEX D-4

CLOSING STATEMENT OF THE UNITED STATES – FIRST MEETING

Mr. Chairman, Members of the Panel:

1. On behalf of the United States' delegation, I would once again like to thank you and the members of the Secretariat for your work on this dispute. We appreciated the opportunity to provide you with preliminary thoughts on your questions and look forward to providing you with additional comments in our written responses and our second submission.

2. We will be very brief in our closing statement. Mexico would have this Panel merely follow the Appellate Body report in *US – Zeroing (Japan)* without engaging in its own analysis. Having failed to include a "single zeroing measure" in its request for establishment of the panel, Mexico even argues that the Panel should find the existence of such a measure because the Appellate Body did so in a separate dispute.

3. Mexico would have the Panel do this in the interest of "security and predictability". Security and predictability is provided by a dispute settlement system that does not add to or diminish the rights and obligations to which the Members agreed. This requires the proper application of customary rules of interpretation of public international law to the agreed upon provisions of the covered agreements. Therefore, any prohibition of zeroing must be found in the text of the Antidumping Agreement. Aside from a prohibition of zeroing in the context of average-to-average comparisons in original investigations, there is plainly no general prohibition of zeroing.

4. Mexico's proposed obligation to treat non-dumped imports as a remedy for injurious dumping by reducing the assessment of antidumping duties on dumped imports depends upon a definition of dumping that is not based upon the text of the Antidumping Agreement, but on an abstract concept of dumping. Ultimately Mexico's interpretation cannot be reconciled with the commercial, administrative realities to which the Antidumping Agreement must relate.

5. The prior panels addressing this issue have recognized the deficiencies inherent in Mexico's proposed interpretation and have found that the relevant text, the relevant context, and the well-established prior understanding of the terms "dumping" and "margin of dumping" as used in the Antidumping Agreement demonstrate that these concepts are not devoid of meaning except in relation to the product as a whole.

6. As detailed in our first written submission, Mexico's interpretation cannot be reconciled with the ordinary meaning of the terms with which dumping and margins of dumping are defined, and which describe dumping as occurring in the course of ordinary commercial transactions, and which do not define products as "introduced into the commerce" of the importing country "as a whole", or prices of all the products at issue in an assessment proceeding generally being set "as a whole".

7. Mexico's interpretation cannot be reconciled with the Appellate Body's interpretation of the phrase "all comparable export transactions" in *US – Softwood Lumber Dumping*.

8. Nor can it be reconciled with the targeted dumping provision in the second sentence of Article 2.4.2; with the importer- and import-specific obligation to pay antidumping duties; with the

existence of prospective normal value systems of assessment as provided in Article 9; and, with the effective functioning of antidumping duties as a remedy for injurious dumping.

9. Finally, let me reiterate the position of the United States with respect to Mexico's particular claims in this dispute. First, regarding Mexico's "as such" claims, Mexico has failed to establish the existence of any measure that may be challenged "as such", whether the measures are taken as described in Mexico's panel request – as they must be – or as a single measure as described in Mexico's first written submission. Accordingly, Mexico's "as such" claims should be rejected in their entirety.

10. Second, regarding Mexico's "as applied" claim relating to the investigation of stainless steel from Mexico for which the Department of Commerce used average-to-average comparisons without providing offsets for non-dumped comparisons, the United States does not contest that its calculation in this investigation was inconsistent with the obligation to account for "all comparable export transactions" in calculating the "margin of dumping" as these terms were interpreted by the Appellate Body in *US – Softwood Lumber Dumping*.

11. Third, a correct interpretation of the Antidumping Agreement does not impose an obligation to provide offsets for instances of non-dumping in assessment proceedings. Accordingly, Mexico's "as applied" claims with respect to the five periodic reviews should be rejected.

12. Mr. Chairman, Members of the Panel, we appreciate this opportunity to present these closing comments and look forward to continuing to work with you on these issues.

ANNEX D-5

THIRD PARTY ORAL STATEMENT OF CHINA

1. Mr. Chairman, distinguished members of the panel, it is my great honour to appear before you today to present the views of China as a third party to these proceedings.

2. Notwithstanding China did not submit a written submission to the panel, China would like to emphasize its systematic interests in this dispute regarding whether the "zeroing procedures" adopted by the United States in the original anti-dumping investigation and periodic reviews are consistent with the GATT and the Anti-Dumping Agreement.

3. Both Mexico and United States don't contest the fact that all major issues arising under this case have been examined by the Appellate Body in previous anti-dumping disputes. Thus, the reasoning and findings of the Appellate Body in these disputes can provide valuable guidance in the present case. In this regard, China would like to draw the attention of the panel to the Appellate Body's findings in "*EC - Bed Linen*", "*US- Softwood Lumber V*", "*US – Zeroing (EC1)*", "*US – Softwood Lumber V (Art. 21.5-Canada)*" and "*US – Zeroing (Japan)*".

4. In these disputes, the Appellate Body found that the zeroing procedure may be challenged "as such" and is prohibited in all circumstances whenever calculating the "margins of dumping" regardless of the specific phase or comparison methods. To be more specific, no matter the comparing method is weighted average-to–weighted average ("W-W"), transaction–to–transaction ("T-T") or weighted average–to–transaction ("W-T"), the use of zeroing in original investigation is always inconsistent with Articles 2.1, 2.4.2 and 2.4 of AD Agreement. As to the zeroing methodology in the administrative reviews, it has also been found incompatible with AD Agreement Article 9.3 and GATT Article VI:2. On all these matters, China believes that the legal position is clear, and sees little purpose in a lengthy re-iteration of the consistent jurisprudence developed by the Appellate Body in these cases. Besides, China can't find any remarkable new argument in United States' rebuttal comparing with those it has raised before. Since these arguments have all been dismissed by the Appellate Body with well-founded reasoning, China sees no reason why the present panel shall depart from the Appellate Body's prior rulings.

5. In light of the forgoing, China urges the Panel to approve Mexico's claims that the zeroing measures adopted by the United States are inconsistent "as such" with Articles 2.1, 2.4, 2.4.2 and 9.3 of the AD Agreement. It is time for the United States to eliminate the systematic use of zeroing, a practice which is not permissible under the WTO Agreement and harmful to the balance of rights and obligations established by it.

6. Mr. Chairman, this concludes the oral statement of China as a third party to this proceeding. Thank you for your attention.

ANNEX D-6

THIRD PARTY ORAL STATEMENT OF THE EUROPEAN COMMUNITIES

Mr. Chairman, Members of the Panel:

1. The European Communities appreciates this opportunity to appear before you today. The European Communities makes this third party oral statement because of its systemic interest in the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU").

2. This case also raises important substantive issues in relation to Article VI of the General Agreement on Tariffs and Trade 1994 and the Agreement on Implementation of Article VI ("Anti-Dumping Agreement") thereof. However, none of the issues raised in this proceeding relating to anti-dumping are new. Mexico's claims appear to be supported by a consistent body of reasoning and findings, contained in all reports issued by the Appellate Body since the *EC-Bed Linen* case. Further, the European Communities has been unable to detect anything new in the argumentation used by the United States to defend its zeroing methodologies and practices.

3. The European Communities' oral statement will therefore be brief. In its written submission the European Communities set out at length the systemic reasons why in its view, this Panel should follow the findings and conclusions contained in previous Appellate Body reports on zeroing.[1]

4. It is not disputed that adopted panel and Appellate Body reports are binding, *qua* reports, only on the immediate parties to the dispute. Further, like many other international adjudicatory systems, the WTO dispute settlement system does not formally recognise the doctrine of *stare decisis* – the doctrine of binding judicial precedent. But these principles do not detract from the interest that the WTO dispute settlement system has in common with all other responsible adjudicatory systems: maintaining consistency, stability and predictability of the case law. Further, as the European Communities has set out at length in its written submission, in all adjudicatory systems, whether national or international, that are two- or multi-tier systems, decisions of the hierarchically superior body are binding on the hierarchically lower body, in particular on issues of law.

5. The European Communities submits that in the WTO dispute settlement system the expectations upon panels are no different. 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 the WTO 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 DSU). Its very purpose 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.

6. It is beyond dispute that the practice of zeroing in anti-dumping cases has been contested many times in WTO dispute settlement proceedings. The Appellate Body in particular has adjudicated on the issues raised in this case frequently, including in cases involving different variations of zeroing, both in original anti-dumping investigations and reviews, in different factual circumstances and between different parties.[2]

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[1] See EC's written submission, 11 April 2007, part IV.

[2] In its written submission the European Communities has reviewed the salient reasoning and findings of the Appellate Body in each of these reports. See EC's written submission, 11 April 2007, part III. Reference

7. The United States does not contest this, but argues that this Panel should not follow these Appellate Body reports. On the contrary, the United States explicitly invites this Panel to re-apply findings and follow the reasoning contained in panel reports that have been rejected and overturned – in many cases more than once– by the Appellate Body, in reports which have subsequently been adopted by the Dispute Settlement Body.

8. The European Communities submits that the suggestion by the United States that this Panel should be free to depart from adopted Appellate Body reports on issues of law and legal interpretations relating to the covered agreements, is misguided.

9. The Appellate Body itself has addressed this very question in several cases. As set out in the European Communities' written submission, some of these cases are particularly relevant as they deal with appeals in zeroing cases. In *US –Softwood Lumber V (Art. 21.5 – Canada)*, the United States requested the Appellate Body not to "import wholesale the findings and reasoning" from another case, *EC – Bed Linen*, on the following grounds: the United States was not a party to the latter dispute, the arguments raised in that case were different, and the United States' practice of zeroing was not at issue in the *EC – Bed Linen* case.

10. The Appellate Body started its response to this request by recalling its previous statement in *Japan – Alcoholic Beverages II*, according to which adopted panel reports create "legitimate expectations among Members". It also referred to its statement in *US – Shrimp (Article 21.5 – Malaysia)*, according to which this principle of legitimate expectations also applies to adopted Appellate Body reports. The Appellate Body then recalled that it had in *US – Shrimp (Article 21.5 – Malaysia)* explicitly approved of a panel report that had used reasoning and findings of an adopted Appellate Body report; and that it explicitly held that the panel had been correct in using the Appellate Body's findings as a "tool for its own reasoning". The Appellate Body proceeded with citing Article 3.2 of the DSU in full and stated, in response to the United States' request, that it had decided to take account of the reasoning and findings contained in the Appellate Body report in *EC – Bed Linen*, "as appropriate".[3]

11. Furthermore, there should be no doubt that the Appellate Body expects panels to follow its conclusions: in *US – Oil Country Tubular Goods Sunset Reviews*, the Appellate Body explicitly held 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"[4]; and in *US – Zeroing (Japan)*, the Appellate Body took firm exception to the fact that the panel had come to conclusions on the basis of reasoning relating to the Anti-Dumping Agreement, which the Appellate Body had rejected earlier.[5]

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is made in particular to the adopted Appellate Body Reports in the following cases: *EC – Bed Linen*, adopted 12 March 2001; *US – Softwood Lumber V*, adopted 31 August 2004; *US – Zeroing (EC1)*, adopted 9 May 2006; *US – Softwood Lumber V (Article 21.5 – Canada)*, adopted 15 August 2006; *US – Zeroing (Japan)*, adopted 9 January 2007.

[3] See EC's written submission, 11 April 2007, paras. 155-159.

[4] *Ibid*., para. 166.

[5] *Ibid*., para. 85.

12. In conclusion, the European Communities submits that as the Appellate Body is the hierarchically superior body in the WTO dispute settlement system, 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. The United States' submission that this Panel should not follow Appellate Body findings and reasoning in zeroing cases, and that analogous cases can be decided in a contrary sense by this Panel, must be rejected.

13. The European Communities stands ready to participate further in the discussion, or to answer any questions that this Panel may have regarding the matters set out in its written submission. Thank you for your attention.

ANNEX D-7

THIRD PARTY ORAL STATEMENT OF JAPAN

I. INTRODUCTION

1. Mr. Chairman, distinguished Members of the Panel, on behalf of the Government of Japan, I thank you for your attention to this matter. This morning, Japan will focus mainly on the arguments of the parties concerning the WTO-consistency of the use of zeroing in periodic reviews and endeavour to reinforce Japan's position on the issue as much as possible.

2. Before talking about the issues related to periodic reviews, let me briefly point out the fundamental flaw in the United States' argument on the "scope of the *as such* claims" made by Mexico. The United States contends that the *as such* claim made by Mexico on "a single zeroing measure, the Zeroing Procedures" is baseless because it addressed only limited aspects of the use of zeroing within the whole antidumping regime of the United States. In doing so, the United States even quotes the Appellate Body's report in *United States – Zeroing* (DS322) brought by Japan. However, in that dispute, the point that the Appellate Body made clear was to the contrary to the United States' contention. There, the Appellate Body upheld the Panel's conclusion that the "zeroing procedures" under different comparison methodologies, and in different stages of antidumping proceedings, simply reflect different manifestations of a single rule or norm.[1] The mere fact that Mexico's request for panel establishment did not cover as wide range of zeroing as the Japan's case never undermines the single nature of zeroing procedures which can be challenged as such. The zeroing procedures, as such, have been declared inconsistent with the US obligations in DS322, and the subject of the Mexico's claims is simply a part of such WTO incompatible measure.

II. THE UNITED STATES MISUNDERSTANDS THE NOTION OF "DUMPING"

3. Turning to specific arguments, first of all, Japan would like to point out that the normative notion of "dumping" that is defined by the provisions of Antidumping Agreement and the GATT 1994 is different from the individual transaction at a price lower than normal value of a product.

4. The United States argues that "dumping nevertheless occurs at the level of individual transactions" as a starting point of its argument with regard to permissibility of zeroing in periodic reviews.[2] However, when the exporting price is less than normal value, it is just a "discount" that occurs at the level of the individual transactions. It is not "dumping" as set forth in the provisions of Antidumping Agreement and the GATT 1994. We can find no textual support in the Antidumping Agreement to consider a mere "discount" at the level of an individual transaction as "dumping". As the Appellate Body has repeatedly stated clearly, the existence of dumping has to be decided only in relation to "a product" as defined by the authority, as the texts of Article 2.1 of Antidumping Agreement and Article VI of the GATT 1994 suggest[3].

5. Thus, the interpretation of the United States that "dumping" can exist at the level of an individual transaction is in contradiction with the interpretation of Antidumping Agreement and the

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[1] *See* Appellate Body Report, *US – Zeroing (Japan)*, para. 88.

[2] United States' First Written Submission, para.89.

[3] Appellate Body Report, *US –Zeroing(Japan)*, paras. 108-109, 115; Appellate Body Report, *US – Softwood Lumber V*, para 93.

GATT 1994 by the Appellate Body in the past zeroing disputes, and therefore subsequent arguments of the United States based on such misinterpretation are also incorrect.

III. ARTICLE 9 READ TOGETHER WITH ARTICLE 2 OF THE ANTIDUMPING AGREEMENT DOES NOT SUPPORT THE ARGUMENTS OF THE UNITED STATES

6. Secondly, the United States submits that "there is no textual support in Article 9.3 for the view that the AD Agreement requires an exporter-oriented assessment of antidumping duties"[4], and asserts that "the obligation set forth in Article 9.3 to assess no more in antidumping duties than the margin of dumping" is applicable "at the level of individual transactions".[5]

7. Japan does not deny that the amount of antidumping duty can be assessed on individual transactions. However, as required by Article 9.3 of the Antidumping Agreement, the assessment shall not lead to the imposition of an amount exceeding the "margin of dumping as established under Article 2". And the "margin of dumping" must be determined for the product as a whole, as the Appellate Body has repeatedly pronounced.

8. The Appellate Body has also held that Articles 9.2 and 9.5 of the Antidumping Agreement and Article VI:2 of the GATT 1994 confirm the view that antidumping duties are imposed "on the product", not on individual transactions.[6] Moreover, consistent with the rules under Article 2 of the Antidumping Agreement, the "margin of dumping" must be established for the "product" as a whole.[7] As a result, in a duty assessment review, the authority must ensure that the aggregate amount of the duty levied on the product during the review period does not exceed the margin of dumping for the product for that period.

9. Accordingly, the argument of the United States is not supported by the texts as well as the interpretation by the Appellate Body of the provisions under the Antidumping Agreement and GATT 1994.

IV. THE EXISTENCE OF A PNV SYSTEM CANNOT JUSTIFY ZEROING

10. Thirdly, the United States continues to argue that, under the prospective normal value (PNV) system, "margins of dumping" may be calculated for individual import transactions.[8]

11. However, the Appellate Body has previously considered, and rejected, this argument.[9] The Appellate Body concluded that a "margin of dumping" is not determined at the time of importation on a transaction specific basis[10]: margins are first calculated in original investigations; antidumping duties are imposed upon each entry for importation of the product; the amount of duties initially imposed may be reviewed, and in the case of the prospective system, a "refund" must be paid in accordance with Article 9.3.2 of the Antidumping Agreement "when the duties paid exceed the actual margin of dumping".[11] In *any* review under Article 9.3 – under *any* system of duty collection – the

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[4] United States' First Written Submission, para.85.
[5] *Ibid.*, para.83.
[6] Appellate Body Report, *US – Softwood Lumber V*, para.94 and 99.
[7] Appellate Body Report, *US – Zeroing(Japan)*, para. 110.
[8] United States' First Written Submission, para.93.
[9] Appellate Body Report, *US – Zeroing (Japan)*, paras. 161 and 162.
[10] Appellate Body Report, *US – Zeroing (Japan)*, para.151. *See also*, Appellate Body Report, *US – Zeroing (EC)*, para. 128. Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 87 ("the results of transaction-specific comparisons are not, in themselves, "margins of dumping" ").
[11] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 112.

authority must determine a margin of dumping for the product as a whole by aggregating all multiple comparison results.[12]

V. MEMBERS MUST REFUND TO ENSURE THAT THE AMOUNT OF ANTIDUMPING DUTIES DOES NOT EXCEED THE MARGIN OF DUMPING DETERMINED FOR AN EXPORTER

12. Finally, it is not limited to the case of the prospective system that the authority needs to refund all or part of the deposits to meet the obligation under Article 9.3. Japan emphasizes that under Article 9.3, to the extent that the total amount of duties were collected at the time of importation in the form of a deposit in excess of the margin of dumping determined upon review for individual exporters, the authority should refund such exceeding amount. As stated by the Appellate Body, "[u]nder any system of duty collection, the margin of dumping established in accordance with Article 2 operates as a ceiling for the amount of anti-dumping duties that could be collected in respect of the sales made by an exporter"[13] and the Antidumping Agreement "provides for a refund if the ceiling is exceeded".[14]

13. Accordingly, regardless of what sort of duty assessment system is used, the authority must refund to the importers (1) all deposits paid at the time of entries when no margin of dumping is established in reviews for those entries, or (2) such amount of deposits as exceed the margin of dumping as established in such reviews.

VI. CONCLUSION

14. Japan respectfully requests the Panel to examine carefully the facts presented by the parties to this dispute taking into consideration the points that Japan has raised, so as to ensure fair and objective application of the Antidumping Agreement. Thank you for your attention, Mr. Chairman, distinguished Members of the Panel.

[12] Appellate Body Report, *US – Zeroing (EC)*, para. 132.
[13] Appellate Body Report, *US – Zeroing (Japan)*, para. 162.
[14] Appellate Body Report, *US – Zeroing (Japan)*, para.163.

ANNEX D-8

THIRD PARTY ORAL STATEMENT OF THAILAND

1. Mr. Chairman and Members of the Panel: Thailand appreciates the opportunity to participate in this proceeding and to present its views today.

2. Thailand reserved its right to participate as a third party in this proceeding under Article 10.2 of the *Dispute Settlement Understanding* due to our concern about the continued use of "zeroing" by the United States in original investigations as well as periodic reviews. In Thailand's view, the use of zeroing in any circumstance is inconsistent with both the spirit and the substance of Article VI of the *GATT 1994* and the *Anti-Dumping Agreement*. In effect, the use of zeroing either artificially creates margins of dumping where none would otherwise have been found or, at a minimum, artificially inflates margins of dumping and the consequent imposition of anti-dumping measures, whether in an original proceeding or a periodic review. As evidenced by the numerous zeroing-related disputes either concluded or initiated against the United States just over the course of the previous year, Thailand is not alone in this view.

3. Thailand generally supports the arguments made by Mexico, the European Communities, and Japan regarding the United States' use of zeroing in this dispute. Because these delegations have already submitted detailed analyses, we do not think it necessary to repeat those arguments today. We instead simply remind the Panel that the Appellate Body's rulings to date on the issue of zeroing have coherently and consistently addressed the numerous different arguments put before it in each dispute, ranging from *EC – Bed Linen* to the latest *US – Zeroing (Japan)*. To summarize, the Appellate Body has held that whenever an investigating authority uses intermediate comparisons between subgroups of export prices and normal values – whether on a model-by-model, transaction-by-transaction or any other basis – as a step to arrive at the overall dumping margin for that product, the investigating authority may not, in aggregating those intermediate comparisons, "zero" the results of some of those comparisons.

4. Regardless of whether each successive Appellate Body report states this principle in identical terms, addresses all of the different methodologies in which zeroing can be used, or repeats all of the reasoning of previous reports, Thailand considers this principle to have been fully and correctly reasoned by the Appellate Body and to apply equally and fully to the issues that are before the Panel in this case. We agree also with the arguments made by the European Communities on the need for security and predictability within the multilateral trading system.[1] Thailand therefore urges this Panel to follow the reasoning and findings of the Appellate Body, and rule that as submitted by Mexico the use of zeroing by the United States in original investigations and periodic reviews - regardless of the comparison methodology used - is inconsistent with its obligations under Article VI of the *GATT 1994* and the *Anti-Dumping Agreement*.

5. Thank you.

[1] Third Party Submission by the European Communities, para. 167.

ANNEX D-9

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF MEXICO – SECOND MEETING

I. INTRODUCTION

Mr. Chairman, Members of the Panel:

1. In this opening statement, we do not intend to provide an exhaustive presentation of Mexico's case. Instead, we limit our discussion to certain key points concerning Mexico's claims against the United States' Zeroing Measures respecting model zeroing in original investigations and simple zeroing in periodic reviews.

II. MODEL ZEROING IN ORIGINAL INVESTIGATIONS

2. Mexico maintains its request for a finding on this claim. As outlined in Mexico's response to Question 13 of the Panel, the scope of the United States' abandonment of model zeroing in original investigations is incomplete. Accordingly, for implementation reasons, a Panel finding on this claim is necessary. Mexico also maintains its "as such" claim regarding model zeroing in original investigations to the extent that such zeroing in original investigations has not been fully abandoned by the United States, as described in Mexico's response to Question 13 of the Panel. Although the United States has not acknowledged the merits of this claim, Mexico has presented a *prima facie* case with respect to each requisite element of this claim and the United States has not rebutted Mexico's *prima facie* case.

III. SIMPLE ZEROING IN PERIODIC REVIEWS

3. Mexico and the United States have filed detailed submissions on Mexico's claim regarding simple zeroing in periodic reviews. It is clear from a review of these submissions that Mexico has presented a *prima facie* case with respect to each requisite element of this claim and that the United States has not rebutted Mexico's *prima facie* case.

IV. OTHER KEY ISSUES

4. We would like to elaborate upon certain key issues that have been raised by the United States.

A. EVIDENCING A MEASURE THAT CAN BE CHALLENGED AS SUCH

5. The Appellate Body has found that an "as such" claim of the kind asserted by Mexico can be sustained where the complaining party establishes clearly through arguments and supporting evidence: (1) that the alleged rule or norm is attributable to the responding Member; (2) its precise content; and (3) that it has general and prospective application.

6. The United States does not appear to seriously challenge the first or second prongs of this test. There is no doubt that the zeroing measure is attributable to the United States, specifically that it is attributable to the USDOC as the investigating authority in US anti-dumping proceedings. Likewise, Mexico has amply documented the specific content of the Zeroing measures as applied by the USDOC in original investigations and periodic reviews and the fact that this measure is invariably

applied in all periodic reviews and in all original investigations (at least until February 2007) as rule of general and prospective application.

B. THE MANDATORY/DISCRETIONARY DISTINCTION

7. As it has done in the past, the United States seeks to sidestep these conclusions by asserting that zeroing is not *mandated* under the US anti-dumping laws. In its response to Question 19 of the Panel, the United States argues that "[i]n order to find that a measure, as such, breaches an obligation, the measure must mandate that breach". In making this argument, the United States mischaracterizes the applicability of the mandatory/discretionary distinction to the facts of this dispute.

8. In both *US – Zeroing (EC)* and *US – Zeroing (Japan)*, there was no issue as to whether zeroing was "mandated" under US law. There is similarly no such issue in this dispute.

C. MATHEMATICAL EQUIVALENCY

9. Mexico notes that the mathematical equivalency argument was considered and rejected by the Appellate Body in both *US – Softwood Lumber V (21.5)* and *US – Zeroing (Japan)*. The argument has no merit based on these two adopted Appellate Body reports.

10. Although there is no need for Mexico to further rebut the mathematical equivalency argument, in light of the fact that the United States has introduced Exhibit US-10 to support its response to Question 15 of the Panel, Mexico is presenting an example of its own that demonstrates the absence of mathematical equivalency.

11. In order for the US allegation of "inutility" to be sustained in this case, its argument of mathematical equivalency must hold in all possible circumstances. Mexico will employ the figures in the United States' example to show that mathematical equivalency will *not* hold in all possible circumstances. The United States bases its example on the assumption that identical period-long average normal values in both average-to-average and average-to-transaction comparisons must always be used. This assumption was adopted, erroneously in Mexico's view, by panels in *US – Softwood Lumber V (21.5)* and *US – Zeroing (Japan)*.[1] The Appellate Body has neither specifically endorsed nor rejected this assumption in its decisions to date.

12. The statutory provisions governing targeted dumping are set out in 19 U.S.C. § 1677f-1(d)(1)(B) and the regulatory provisions in 19 CFR § 351.414(e) and (f) (**Exhibit MEX-3**). Paragraph (e), *inter alia*, sets out a requirement for contemporaneous monthly average normal values. Thus, the USDOC Regulations explicitly link the "average-to-transaction" method in targeted dumping investigations to the use of contemporaneous monthly average normal values. Moreover, the Regulations specifically link the "average-to-average" method with the use of period-long average normal values.

13. Mexico presents in its example 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. Mexico offers this example because it is entirely consistent with US domestic law on this subject.

14. The examples provided above demonstrate, by means of the same comparison methodologies specified under the USDOC Regulations for A-T comparisons made in periodic reviews and for A-T comparisons used to evaluate targeted dumping in original investigations, that the US claim of

[1] Panel Report, *US – Softwood Lumber V (21.5)*, paras. 5.49-5.51; Panel Report, *US – Zeroing (Japan)*, paras. 7.128-7.129.

mathematical equivalency, absent zeroing, fails. Indeed, there is plainly no mathematical equivalency between these methods, because the use of monthly normal values in the US system of conducting A-T comparisons removes the prospect of uniform equivalency.

V. CONCLUSION

15. Mexico again reminds the Panel that the measure at issue challenged as such by Mexico is identical to the measure decided by the Appellate Body in cases brought by Canada, the EC and Japan. The Appellate Body has consistently determined that this measure is contrary to the United States' obligations under the Agreements. In reaching its determinations, the Appellate Body has considered and rejected virtually all of the arguments presented by the United States in this dispute and has interpreted the text of the Agreements in accordance with recognized principles of international law applicable to dispute settlement proceedings and has applied its reasoning in a coherent and consistent manner.

16. Mr. Chairman, and members of the Panel, these prior decisions must be taken into account. Their reasoning has withstood the arguments posed against them by the United States. Third Party submissions in this case overwhelmingly support our case. For the sake of the security and predictability of the WTO system, and to ensure that the Agreements negotiated by the Members are enforced in accordance with their text, we urge you to sustain Mexico's claims in their entirety.

ANNEX D-10

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF THE UNITED STATES - SECOND MEETING

1. We note Mexico's acknowledgment in response to the Panel's questions that its claims are limited by the language of its panel request to the use of model zeroing in average-to-average comparisons in original investigations and simple zeroing in periodic reviews. Mexico continues to cling to its argument that there is a single measure taken by the United States that requires the Department of Commerce to "zero". Mexico presents no new evidence of the existence of a measure that prescribes and requires specific action. It merely continues to present the same evidence of past actions by Commerce. Mexico has not demonstrated that there is any "as such" measure requiring zeroing, because there is no such measure.

2. Mexico insists on making accusations regarding alleged non-compliance by the United States with respect to the DSB recommendations and rulings in *US – Zeroing (EC)*. Mexico states that it "does not agree that the United States fully abandoned the use of 'model zeroing' in investigations as of February 22, 2007". Mexico argues that full compliance would require the United States to revise all existing measures.

3. Aside from the fact that it is not for Mexico to unilaterally determine the non-compliance of another Member, as DSU Article 23 makes clear, we note that the EC does not appear to share Mexico's view. In its recent request for consultations under Article 21.5, the complaint of the EC is limited to its "as applied" claims. Indeed at the 24 April 2007 meeting of the DSB, the EC welcomed the decision to abandon zeroing in original investigations when calculating the dumping margin on a weighted average-to-weighted average basis.

4. Moreover, in arguing that a Member can implement a ruling against a measure "as such" only by revising all applications of that measure, Mexico improperly blurs the distinction between "as such" and "as applied" claims.

5. Mexico also continues to argue that a suggestion from the Panel regarding implementation is necessary. However, it is well-established that a Member has the right to determine the means of implementation. Further, Mexico appears to be seeking though a suggestion a result that goes well beyond any right it might have under the Agreement. In this connection, we note Mexico's recognition that the provision of offsets in the original investigation on stainless steel would still result in a margin of dumping well above the *de minimis* threshold. Therefore, the antidumping order would remain in place.

6. Regarding the alleged legal basis for requiring offsets, Mexico explains that its claim that the Antidumping Agreement contains an obligation to reduce antidumping duties to account for instances of non-dumping rests on two essential textual foundations. These two supposed foundations fail to support Mexico's claims with respect to periodic reviews.

7. Mexico's first alleged textual foundation is that the terms "dumping" and "margin of dumping" as they are defined in Article VI:1 and VI:2 of the GATT 1994 and in Article 2.1 of the Antidumping Agreement have no meaning except in relation to the product taken in its entirety. The text of these definitions, however, does not contain the words "taken in its entirety" or "taken as a whole" or any words to that effect. Instead, the text of these definitions contains only the word "product". Mexico admits that the term "product" can refer to individual transactions in the context of

numerous provisions of the GATT 1994, including within Article VI. Nevertheless, Mexico argues that those uses of the term "product" are distinguishable because they arise in contexts other than the determination of margins of dumping. By so arguing, Mexico effectively concedes that the ordinary meaning of the term "product" – standing alone – cannot serve as the textual basis for an interpretation that requires the phrase "margin of dumping" to relate solely to the "product as a whole". Moreover, Mexico has identified no other textual basis for interpreting the term "product" – as used in the definitions of "dumping" and "margin of dumping" – to mean the "product as a whole". Nor has Mexico identified any textual basis for excluding the possibility that the term "product" – as used in these definitions – may include the concept of individual transactions.

8. In fact, the text of these definitions supports the individual transaction meaning of the term "product", since the price of a product is established for each transaction and since each transaction is introduced into the commerce of the importing country. The fact that prices are set in individual transactions and the fact that products are introduced into the commerce of an importing country pursuant to individual transactions are not "subjective views" of the United States, as Mexico argues. Rather, this is the actual commercial conduct that is described by the text of the provisions of the Antidumping Agreement. As the panel in *US – Zeroing (Japan)* concluded, the definition of dumping itself "undermines the argument that it is not permissible to interpret the concept of dumping as being applicable to individual sales transactions".

9. Mexico argues that a second essential foundation of its claims in this case is the notion that the remedies contained in the Antidumping Agreement are not directed toward importers. It is not disputed that dumping results from the pricing behaviour of exporters and producers. It is also indisputable, however, that antidumping duties are directed at importers. The fact that importers are the parties that actually pay the antidumping duties must not be ignored if antidumping duties are to be an effective remedy to "offset or prevent" dumping as provided in Article VI:2 of the GATT 1994.

10. Mexico misunderstands the remedies provided for in the Antidumping Agreement as punitive measures directed at the conduct of producers and exporters. On the contrary, antidumping duties are remedial measures taken to "offset or prevent" dumping and its injurious effects by removing any incentive the importer has to import merchandise at less than normal value and to induce the importer to increase the resale price to cover the expense of the antidumping duties and prevent further injurious effect. Mexico interprets the Antidumping Agreement to require that the amount of antidumping duties be reduced in the amount by which some transactions are sold at prices in excess of normal value. Mexico is essentially arguing that non-dumped transactions constitute a remedy for dumped transactions that supplants the remedy provided for in the Antidumping Agreement. There is no basis for this interpretation in the provisions of the GATT 1994 or the Antidumping Agreement.

11. The lack of a textual basis for Mexico's claims with respect to periodic reviews is also demonstrated by Mexico's attempt to apply the "product as a whole" concept in a manner that is detached from the concept's underlying textual basis in the first sentence of Article 2.4.2 of the Antidumping Agreement. The concept of "product as whole", however, was originally derived from the phrase "all comparable export transactions" in the first sentence of Article 2.4.2. Not surprisingly, Mexico is forced to acknowledge that the phrase "all comparable export transactions" cannot lend any support to its claims with respect to periodic reviews, because that phrase pertains only to average-to-average comparisons in original investigations.

12. Nevertheless, Mexico attempts to find support for its interpretation in the Appellate Body report in *US – Softwood Lumber Dumping* by asserting that the phrase "all comparable export transactions" was not integral to the Appellate Body's reasoning in that report. Mexico's assertion is erroneous, because the Appellate Body expressly stated that it was interpreting the term "margins of dumping" and the phrase "all comparable export transactions" in an "integrated manner". Thus, the Appellate Body did not ignore, but instead based its findings on, the phrase "all comparable export

transactions". In addition, the fact that the Appellate Body was not deriving its interpretation of "margins of dumping" solely from the definitions in Article 2.1 of the Antidumping Agreement and Article VI of the GATT 1994 is further demonstrated by the fact that the Appellate Body declined to address the contextual argument that a general prohibition of zeroing would be inconsistent with the provision for transaction-to-transaction comparisons in Article 2.4.2. If the Appellate Body was articulating a general prohibition of zeroing based on the definitional provisions, as Mexico argues, there would have been no sound basis for declining to address the transaction-to-transaction context.

13. For these reasons, Mexico's proposed interpretation is at odds with the provisions of the Antidumping Agreement upon which it relies. With respect to Article VI:2 and Ad Article VI:2 of the GATT 1994, and Articles 2.2, 2.4.2 second sentence, and Article 9 of the Antidumping Agreement, the implications of the interpretation proposed by Mexico provide further contextual support for the conclusion that Mexico's interpretation is not correct. Mexico's proposed interpretation carries with it implications that simply cannot be reconciled with these provisions.

14. Article 2.4.2 provides for average-to-transaction comparisons under certain circumstances as an alternative to average-to-average or transactions-to-transaction comparisons. The interpretation offered by Mexico is incorrect because it renders inutile the average-to-transaction comparisons provided for in the second sentence of Article 2.4.2. Contrary to Mexico's arguments, the United States is not asserting an "affirmative defense" based on the second sentence. Rather, the United States is arguing that application of the customary rules of interpretation of public international law leads to the conclusion that Mexico's proposed interpretation fails to give effect to the provisions of Article 2.4.2, second sentence.

15. The redundancy of the average-to-transaction comparison type with the average-to-average comparison type, if offsets are granted, is a function of the mathematics of calculating weighted averages, and can be readily demonstrated, as the United States did in its response to the Panel's questions. As detailed in our submissions, under Mexico's interpretation that the Antidumping Agreement incorporates a general prohibition of dumping, this comparison type is rendered a nullity because it cannot mathematically produce a result that differs from the average-to-average comparison type.

16. With respect to Article 9.3, Mexico argues that excess antidumping duties have been assessed. This argument rests on its misinterpretation of the term "margin of dumping" in Article 9.3 as relating exclusively to the product "as a whole", and as considered exclusively from the perspective of the exporter and on an aggregate basis over some frame of reference that is nowhere mentioned in the text. This interpretation of the term "margin of dumping" in Article 9.3 is not supported by the text of the Article. Indeed, this interpretation is at odds with the text of Article 9.3, which provides for determination of final liability for antidumping duties that are paid by importers on the basis of individual import transactions.

17. The mismatch between the nature of the assessment proceedings provided for in Article 9.3 and the interpretation of the term "margin of dumping" proposed by Mexico result in perverse incentives and absurd results. In particular, as previously noted, the reduction of antidumping duties to account for non-dumped transactions will result in a remedy that is insufficient to "prevent or offset" dumping and its injurious effects as intended by Article VI:2 of the GATT 1994. Moreover, the offsets contemplated by Mexico would confer an additional competitive disadvantage upon importers who refrain from importing dumped merchandise from the same exporter or producer as an importer that does import dumped merchandise. Under Mexico's proposed interpretation, the antidumping duty liability for the importer of the dumped transactions would be reduced by the offset attributable to the non-dumped import transactions. This 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 by the Panel as consistent with a correct interpretation of Article 9.3.

18. In addition, an obligation to account for other imports in assessing antidumping duties on a particular entry is contrary to the very concept of a prospective normal value system provided for in Article 9. Under such a system, the amount of liability for payment of antidumping duties is determined at the time of importation on the basis of a comparison between the price of the individual export transaction and the prospective normal value. If the margin of dumping must relate exclusively to an aggregation of all transactions constituting the "product as a whole", as Mexico argues, the administration of such an assessment system cannot function as intended.

19. Under Mexico's interpretation, a prospective normal value assessment system necessarily requires retrospective reviews on the basis of the aggregation of transactions because, according to Mexico, the margin of dumping for the "product as a whole" can never be known at the time of importation. Nothing in the text of Article 9, however, suggests that the refund proceeding described therein necessarily must relate to an aggregated examination of all transactions. Nor does Mexico attempt to explain why, if refund proceedings under Article 9.3 require aggregation of transactions for the "product as a whole", Article 9.3 fails to provide for any time frame over which the transactions would be aggregated. Thus, it is impossible to discern from the text the universe of transactions that comprise the "product as a whole".

20. Mexico tries to avoid the natural conclusion of its own argumentation by explaining that the possibility of retrospective refund proceedings would arise in a prospective normal value system only if the sum total of antidumping duties applied upon importation were to exceed the margin of dumping determined on the basis of aggregating all transactions and providing offsets for non-dumped transactions. But, under Mexico's own interpretation, this would arise in virtually every circumstance. Upon entry of any non-dumped transaction, under a prospective normal value system, zero antidumping duty liability is incurred. Under Mexico's interpretation, however, each of those non-dumped transactions will result in an offset that must reduce the antidumping duty liability for the other dumped transactions. Thus, the only way to avoid the necessity of a retrospective review under Mexico's interpretation of a prospective normal value system is if there are no non-dumped transactions. This interpretation contradicts the prospective nature of the assessment system described in the text of Article 9.

21. Nevertheless, Mexico argues that the US position renders the refund proceeding a nullity because it means that, without an aggregated retrospective determination of the margin of dumping, the margin of dumping and the antidumping duty applied at the time of importation would always be identical. This is not correct; a more limited refund proceeding is consistent with the prospective nature of this type of assessment system. For example, a refund proceeding would be necessary to deal with instances in which the price or other relevant elements of the transaction change after importation of the product occurs. In such instances the actual margin of dumping may differ from the antidumping duty applied upon importation.

22. Mexico also argues that zeroing is inconsistent with the "fair comparison" requirement of Article 2.4 because it is "biased" and "inflates" the margin of dumping. The relevant text of Article 2.4, however, provides only that a "fair comparison shall be made between the export price and the normal value". It is not disputed, however, that the United States makes a "fair comparison" between export price and normal value for each export transaction in an assessment proceeding. Mexico's claims relate not to the comparison of export price and normal value, but to a supposed obligation to aggregate the results of those comparisons. Mexico has repeatedly argued that zeroing does not occur when export price and normal value are compared, but when the results of those comparisons are aggregated without providing offsets for the non-dumped transactions. Accordingly, Mexico's complaints with respect to zeroing can have no bearing on whether the United States makes a fair comparison of export price and normal value consistent with Article 2.4.

23. Even if the "fair comparison" requirement of Article 2.4 were pertinent to Mexico's claims, there is no textual basis in Article 2.4 for concluding that the denial of offsets for non-dumped transactions is unfair. If the Panel finds, as prior panels have found, that it is permissible to understand the term "margin of dumping" as used in Article 9.3 as applying to an individual transaction, then there will be no basis for a finding that the margins of dumping calculated by the United States in periodic reviews are "inflated" or the result of "bias".

24. In summary, Mexico has failed to reconcile its proposed general prohibition of zeroing with a correct interpretation based on the text and context of the relevant provisions of the Antidumping Agreement. The practical consequences of adopting Mexico's interpretation counsel strongly in favour of the interpretation adopted by prior panels, which is that, except for the context of average-to-average comparisons in investigations, the Antidumping Agreement does not impose an obligation to provide offsets for non-dumping.