ANNEX E

PARTIES' COMMENTS ON THE APPELLATE BODY REPORT IN *US – STAINLESS STEEL (MEXICO)* (DS344)

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ANNEX E-1

COMMENTS OF THE EUROPEAN COMMUNITIES ON THE APPELLATE BODY REPORT IN *US – STAINLESS STEEL (MEXICO)* (DS344)

The European Communities refers to the Panel's letter inviting the Parties to comment on the Appellate Body Report in DS344. The European Communities observes that, as was entirely foreseeable, the Appellate Body has once again confirmed that the correct interpretation of the *Anti-Dumping Agreement* precludes the zeroing methodology used by the United States in the measures at issue.

The European Communities agrees with the Appellate Body's analysis and respectfully invites the Panel, in making an "objective assessment of the matter before it" under Article 11 of the DSU to adopt the same approach. We draw the Panel's particular attention to the statement that "absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case" (para. 160); and that "the relevance of clarification contained in adopted Appellate Body reports is not limited to the application of a particular provision in a specific case" (para. 161).

The European Communities considers that, if the Panel were not to follow the Appellate Body, its findings would inevitably be reversed on appeal. We therefore fail to see what useful purpose could possibly be served by prolonging discussion of what has already been decided.

ANNEX E-2

COMMENTS OF THE UNITED STATES ON THE APPELLATE BODY REPORT IN *US – STAINLESS STEEL (MEXICO)* (DS344)

TABLE OF REPORTS

Short Form	Full Citation
US – Softwood Lumber V (AB)	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004
US – Zeroing (EC) (AB)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins*, WT/DS294/AB/R, adopted 9 May 2006
US – Zeroing (Japan) (Panel)	Panel Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/R, adopted 23 January 2007, as modified by the Appellate Body Report, WT/DS322/AB/R
US – Zeroing (Japan) (AB)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted 23 January 2007
US – Stainless Steel (Mexico) (Panel)	Panel Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/R, adopted 20 May 2008, as modified by the Appellate Body Report, WT/DS344/AB/R
US – Stainless Steel (Mexico) (AB)	Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/R, adopted 20 May 2008

I. INTRODUCTION

1. The United States thanks the Panel for the opportunity to address the Appellate Body report in *US – Stainless Steel (Mexico)*. In that report, the Appellate Body reversed the panel and found that simple zeroing by the United States in periodic reviews is, as such, inconsistent with Article 9.3 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") and Article VI:2 of the GATT 1994.[1] The Appellate Body also reversed the panel and found that the United States acted inconsistently with Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 by applying simple zeroing in the five periodic reviews at issue.[2] The United States has demonstrated in its submissions to the Panel, and at the Panel's substantive meetings, that the text of the AD Agreement and the GATT 1994 do not prohibit zeroing in periodic reviews. As set out more fully below, the United States believes that the Appellate Body's most recent report on the issue of zeroing in *US – Stainless Steel (Mexico)* is deeply flawed and should not be treated as persuasive by this Panel.[3]

2. The Appellate Body Division that heard *US – Stainless Steel (Mexico)* would like this Panel to abandon its obligation to undertake an objective assessment of the matter before it under Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"). Instead, the Division has indicated that panels need to follow prior Appellate Body reports on zeroing, all in the name of "security and predictability" of the WTO dispute settlement system and a "coherent and predictable body of jurisprudence", even if such past reports add to or diminish the rights and obligations of Members under the covered agreements. There is no support in the DSU for the Division's approach, which would undermine the security and predictability of the multilateral trading system and expand the legal effect of Appellate Body reports beyond what was agreed by Members.

3. The Division's finding that zeroing in periodic reviews is inconsistent with Article VI:2 of the GATT 1994 and Article 9.3 of the AD Agreement lacks a basis in the text of the covered agreements, and contradicts what the negotiating history of the AD Agreement confirms. The Division claims that its interpretation is the only permissible one under Article 17.6(ii) of the AD Agreement, but in reality, it represents a modification of the reasons for the prohibition on zeroing in periodic reviews, thereby contradicting its conclusion that there is only one permissible interpretation. The United States urges this Panel to find that the AD Agreement and the GATT 1994 allow the calculation of transaction-specific margins of dumping, and that there is no requirement for the provision of offsets in the assessment proceedings at issue.

II. THE PANEL IN *US – STAINLESS STEEL (MEXICO)* PROPERLY FULFILLED ITS OBLIGATIONS UNDER THE DSU

4. Mexico argued on appeal that the panel in *US – Stainless Steel (Mexico)* acted inconsistently with Article 11 of the DSU by "failing to follow well-established Appellate Body jurisprudence" on the issue of zeroing.[4] Although the Appellate Body Division ultimately declined to make a finding on Mexico's claim, in *obiter dicta* it expressed its deep concern over the panel's "departing from" prior Appellate Body reports addressing the same legal issues.[5] The United States respectfully disagrees with the Division's approach, which would transform Appellate Body reports into authoritative

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[1] *US – Stainless Steel (Mexico) (AB)*, para. 165(a). The United States notes that the European Communities ("EC") does not make an as such claim of inconsistency in the present dispute.

[2] *US – Stainless Steel (Mexico) (AB)*, para. 165(b).

[3] The United States has attached copies of its statement at the meeting of the Dispute Settlement Body on the DSB's consideration for adoption of the panel and Appellate Body reports in *US – Stainless Steel (Mexico)* as Annex 1 to these comments and its separate written communication to the DSB on those reports as Annex 2.

[4] *US – Stainless Steel (Mexico) (AB)*, para. 154.

[5] *US – Stainless Steel (Mexico) (AB)*, para. 161-62.

interpretations of the covered agreements. Drawing similar conclusions to prior panel and Appellate Body reports, the panel in *US – Stainless Steel (Mexico)* recognized the proper role of prior Appellate Body reports in the WTO dispute settlement system, correctly understood what was required of it under the DSU, and acted consistently with its obligations.

5. The panel, before proceeding to a consideration of Mexico's substantive claims, observed that it was "not bound by previous Appellate Body or panel decisions that have addressed the same issue, i.e. simple zeroing in periodic reviews, which is before us in these proceedings".[6] As the panel affirmed, "[t]here is no provision in the DSU that requires WTO panels to follow the findings of previous panels or the Appellate Body on the same issues brought before them. In principle, a panel or Appellate Body decision only binds the parties to the relevant dispute."[7] The Division at first also recalled the well-established understanding that there is no *stare decisis* in the WTO dispute settlement system[8], but then appears to have suggested the contrary.[9]

6. The panel was fully mindful of its obligation under Article 11 of the DSU to undertake an "objective assessment" of the matter before it. Recalling the panel report in *US – Zeroing (Japan)*, the panel noted that "the concern over the preservation of a consistent line of jurisprudence should not override a panel's task to carry out an objective examination of the matter before it through an interpretation of the relevant treaty provisions in accordance with the customary rules of interpretation of public international law".[10] After a "careful consideration" of the matter before it, the panel decided that "we have no option but to respectfully disagree with the line of reasoning developed by the Appellate Body regarding the WTO-consistency of simple zeroing in periodic reviews".[11] Likewise, the panel concluded that "[i]n light of our obligation under Article 11 of the DSU to carry out an objective examination of the matter referred to us by the DSB ... we have felt compelled to depart from the Appellate Body's approach".[12] It is clear that the panel approached its job seriously, that it conducted a very critical and thorough examination of prior Appellate Body reports on the issue of zeroing, and that it did not lightly deviate from those reports.

7. The Division, in criticizing the panel for departing from past Appellate Body reports, failed to acknowledge that the panel did what was required under Article 11 of the DSU – that is, the panel undertook an "objective assessment" of the matter before it.[13] The Division also suggested that:

> consistency and stability in the interpretation of [Members'] rights and obligations under the covered agreements is essential to promote 'security and predictability' in the dispute settlement system. ... The Panel's failure to follow previously adopted Appellate Body reports addressing the same issues undermines the development of a coherent and predictable body of jurisprudence clarifying Members' rights and obligations under the covered agreements as contemplated under the DSU.[14]

The Division's discussion cannot be reconciled with the text of Article 3.2 of the DSU. The "security and predictability" referred to in Article 3.2 is the "security and predictability" of the "multilateral

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[6] *US – Stainless Steel (Mexico) (Panel)*, para. 7.102.

[7] *US – Stainless Steel (Mexico) (Panel)*, para. 7.102.

[8] *US – Stainless Steel (Mexico) (AB)*, para. 158 (quoting *Japan – Alcoholic Beverages II (AB)*, pp. 12-15).

[9] *US – Stainless Steel (Mexico) (AB)*, paras. 161-62.

[10] *US – Stainless Steel (Mexico) (Panel)*, para. 7.105.

[11] *US – Stainless Steel (Mexico) (Panel)*, para. 7.106.

[12] *US – Stainless Steel (Mexico) (Panel)*, para. 7.106.

[13] Ironically, the panel did offer "cogent reasons" for departing from prior Appellate Body findings on zeroing, which makes the Division's criticism all the more misplaced according to the Division's own criteria.

[14] *US – Stainless Steel (Mexico) (AB)*, para. 161.

trading system", and not the "'security and predictability' in the dispute settlement system".[15] Under Article 3.2, the DSB's recommendations and rulings "cannot add to or diminish the rights and obligations provided in the covered agreements".[16] Recommendations and rulings that add to or diminish such rights and obligations undermine the very security and predictability of the multilateral trading system that is mentioned in Article 3.2. What is more, to the extent such rulings are followed without hesitation, the security and predictability of the agreements that Members negotiated will be even further undermined.

8. The Division has essentially found that "security and predictability" in the dispute settlement system and the need for "a coherent and predicable body of jurisprudence" should trump other provisions of the DSU, including the requirement under Article 3.2 that the DSB's recommendations and rulings not add to or diminish Members' rights and obligations under the covered agreements, and a panel's obligation under Article 11 to conduct an objective assessment. Indeed, carried to its logical extreme, the Division's reasoning would mean the Appellate Body could never change its mind or should never have a dissenting opinion since either would detract from "security and predictability".

9. While the Appellate Body has an undeniably important role in the WTO dispute settlement system, the Appellate Body was not set up to issue authoritative interpretations on the covered agreements; only the Ministerial Conference and General Council may do that.[17] The Division, in discussing the Appellate Body's "distinct" role in the alleged "hierarchical structure" of the WTO dispute settlement system[18], appears to downgrade the very important role of panels and panels' fundamental responsibilities as agreed by Members in the DSU.

10. The United States wishes to recall that despite the Division's *dicta* to the contrary, prior Appellate Body reports on zeroing are not binding. This Panel, like the panel in *US – Stainless Steel (Mexico)*, should undertake an objective assessment of the matter before it, as required by Article 11 of the DSU.[19] We also ask this Panel to remain mindful of the proper interpretation of Articles 3.2 and 19.2 of the DSU and ensure that its findings do not add to or diminish the rights and obligations of Members under the covered agreements.[20] The Panel should decline any invitation to adopt uncritically the reasoning in Appellate Body reports simply in the name of consistent jurisprudence or "security and predictability".

III. THE APPELLATE BODY DIVISION'S REASONING IS FLAWED AND SHOULD NOT BE FOLLOWED BY THIS PANEL

11. The United States is deeply troubled by the Appellate Body Division's evaluation of the issue of zeroing. **The question before the Division was whether the Members agreed to prohibit zeroing as part of their WTO obligations. Any such agreement could only be manifest in the text of the AD Agreement. However, the text of the AD Agreement is silent on the issue of zeroing. Faced with agreement language that does not address zeroing at all, let alone include a broad prohibition on zeroing, the Division has drawn inferences that the text cannot support about what it is that Members intended with respect to zeroing.**

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[15] *US – Stainless Steel (Mexico) (AB)*, para. 160.

[16] Likewise, Article 19.2 ensures that the findings and recommendations of panels and the Appellate Body cannot add to or diminish the rights and obligations of Members under the covered agreements.

[17] WTO Agreement, Art. IX:2.

[18] *US – Stainless Steel (Mexico) (AB)*, para. 161.

[19] *See, e.g.*, US First Written Submission, paras. 24, 28-29; US Opening Statement at First Substantive Meeting of the Panel, paras. 4, 6, 9.

[20] *See, e.g.*, US First Written Submission, paras. 28, 32; US Opening Statement at First Substantive Meeting of the Panel, paras. 7-8.

12. **The difficulties and problems of the Appellate Body's approach are illustrated by the individual Appellate Body reports on the issue. Over several reports, the Appellate Body has modified its analysis in mutually contradictory ways. The Appellate Body's most recent effort in** *US – Stainless Steel (Mexico)* **is no less flawed. In particular, the Appellate Body report largely assumes its conclusion, relying not on the text of the AD Agreement but on language from its previous reports removed from its context. The Appellate Body's shifting rationales throughout its successive zeroing reports detracts from its conclusion that under Article 17.6(ii) of the AD Agreement, only one permissible interpretation exists of the AD Agreement and Article VI of the GATT 1994.**[21]

The Appellate Body's Shifting Explanation for the Prohibition on Zeroing

13. **In *US – Softwood Lumber V*, the Appellate Body interpreted the term "margins of dumping" in the first sentence of Article 2.4.2 in an integrated manner with the phrase "all comparable export transactions" to derive a concept of the "product as a whole" as distinguished from sub-groups or models of a product.**[22] **The phrase "all comparable export transactions" appears only in connection with average-to-average comparisons, but Article 2.4.2 also provides for the calculation of a margin of dumping on a transaction-to-transaction or average-to-transaction basis. Thus, in *US – Softwood Lumber V* the Appellate Body had concluded that zeroing was not permitted in the context of "multiple averaging", but did not explain how zeroing could be prohibited in the context of "multiple comparisons" generally. Indeed, it specifically refrained from making a finding concerning the other two methods of comparison.**

14. Then, in contrast to *US – Softwood Lumber V*, in *US – Zeroing (EC)* the Appellate Body appeared to embrace a new interpretation, such that a new concept of the "product as a whole" led to the conclusion that zeroing is prohibited whenever "multiple comparisons" are made.[23] **Again, these phrases do not appear in the AD Agreement, but were derived from interpretations based on the phrase "all comparable export transactions", which appears only in connection with average-to-average comparisons in investigations. In considering this, the panel in *US – Zeroing (Japan)* found that the Appellate Body had provided:**

> **[N]o explanation of this shift from the use of the "product as a whole" concept as context to interpret the term "margins of dumping" in the first sentence of Article 2.4.2 of the AD Agreement in connection with multiple averaging, on the one hand, to the use of this concept as an autonomous legal basis for a general prohibition of zeroing, on the other. In this regard, we note, in particular, that the Appellate Body does not discuss why the fact that in the context of multiple averaging the terms "dumping"and "margins of dumping" cannot apply to a *sub-group* of a product logically leads to the broader conclusion that Members may not distinguish between *transactions* in which export prices are less than normal value and *transactions* in which export prices exceed normal value.**[24]

15. Then, in *US – Zeroing (Japan)*, the Appellate Body reinterpreted the "all comparable export transactions" language to relate solely to all transactions within a model, and not across models of the product under investigation.[25] Previously, the Appellate Body relied on the word "all" in "all

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[21] *US – Stainless Steel (Mexico) (AB)*, para. 136.
[22] *US – Softwood Lumber V (AB)*, paras. 86-103.
[23] *US – Zeroing (EC) (AB)*, para. 127.
[24] ***US – Zeroing (Japan) (Panel)*, para. 7.101.**
[25] ***US – Zeroing (Japan) (AB)*, para. 124.**

comparable export transactions" as the textual basis for requiring the results of all model-average-to-model-average comparisons to be included in the margin of dumping in the average-to-average context.[26] The Appellate Body insisted that the word "all" was not necessary to its finding that a single overall margin of dumping must be calculated and must include the results of all transaction-to-transaction comparisons. Because the Appellate Body has concluded that there is a single permissible interpretation of these provisions of the AD Agreement, the term "all" is either relevant, or it is not. The Appellate Body cannot adopt one permissible interpretation in one instance, and then adopt a contradictory interpretation with regard to the same issue, and still continue to maintain that there is only one permissible interpretation provided for in the text.

16. Finally, and most recently, in *US – Stainless Steel (Mexico)*, the Appellate Body, shifting its emphasis yet again, relied on Article VI of the GATT 1994, and on Articles 2.1 and 9.3 of the AD Agreement, for its conclusion that because "dumping" and "margins of dumping" carry one rigid, identical meaning throughout the AD Agreement regardless of the context in which the terms are placed, transaction-specific calculations are prohibited.

17. In attempting to reach a desired result on the issue of zeroing, the Appellate Body's reasoning varies from one dispute to the next. Such varying conclusions defy common sense. Considering the text of the AD Agreement and the various contradictory interpretations offered on the issue of zeroing, this Panel, when making its own objective assessment of the matter before it, should find that at the very least, an alternative interpretation – that the AD Agreement does not prohibit the calculation of dumping on a transaction-specific basis in assessment reviews – is permissible.

The Division's Flawed Reasons for the Prohibition on Zeroing in Periodic Reviews

18. The Division's finding that zeroing is inconsistent with Articles 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 lacks a textual basis and is without support in the negotiating history of the Uruguay Round Agreements. The AD Agreement and the GATT 1994 do not prohibit the calculation of transaction-specific antidumping margins, nor do they require offsets to be provided for non-dumped transactions. The United States respectfully refers the Panel to, and incorporates the comments set out in, the attached Communication of the United States to the Dispute Settlement Body, dated 20 May 2008, in which we explain in more detail the errors in the Division's reasoning.[27]

IV. CONCLUSION

19. The United States thanks the Panel once again for the opportunity to comment on the recent Appellate Body report in *US – Stainless Steel (Mexico)*. We respectfully ask the Panel to remain mindful of its obligation to undertake an objective assessment as required by Article 11 of the DSU. To the extent that the Panel takes the Appellate Body report into account, the United States believes that for the reasons discussed above, and in the comments set out in the attached documents, the Panel will find that report unpersuasive and incorrect, and will agree that the AD Agreement and the GATT 1994 do not prohibit zeroing as applied in the assessment proceedings challenged by the EC.

[26] *US – Softwood Lumber V (AB)*, paras. 86-103.
[27] *See* Annex 2.

ANNEX 1

US COMMENTS ON *US – STAINLESS STEEL (MEXICO) (AB)*

Oral Statement of the United States on the DSB's Consideration for Adoption of the Reports of the Panel and Appellate Body in *United States – Final Antidumping Measures on Stainless Steel from Mexico* (WT/DS344)

Mr. Chairman, the United States would first like to welcome the panel report being adopted today. We commend the Panel for the professional job that it performed in this dispute, for its careful analysis of the relevant provisions of the Antidumping Agreement and the GATT 1994 and for taking so seriously its responsibility to Members to conduct an objective examination of the matter placed before it.

It is clear from the Panel's report that the Panel did not lightly choose not to follow the earlier Appellate Body reports on zeroing. It would have been far simpler, not to mention I suspect far more popular, for the Panel just to go along with what the Appellate Body had said on this subject. However, the Panel clearly was deeply troubled by the flaws in the logic and approach of those previous reports.

In light of the Panel's careful examination and obvious struggle in attempting to reconcile the agreed text of the WTO agreements with statements made by the Appellate Body in its prior reports, it would have seemed that this Appellate Body Division would have felt called upon to address most carefully the issues raised and the Panel's concerns. Thus, it is even more troubling that the Appellate Body Division on this appeal not only summarily rejected the Panel's points, but also took the Panel to task simply for taking the Panel's duties to heart and trying to ensure that the Panel's findings were consistent with the agreed text of the WTO agreements.

The United States is deeply troubled by the Appellate Body Division's response on two levels, each of them posing serious systemic problems for us, the Members. First, once again a Division has devised a new basis to justify findings against zeroing in reviews – this time that the margin of dumping is exporter based and that somehow this precludes finding a margin of dumping with respect to an individual transaction. The reasoning under this approach continues to be deeply flawed and fails to comport with the actual, agreed treaty text.

Second, the Division has significantly departed from the established understanding of the relationship between panel and Appellate Body reports and the role of the Appellate Body and that of Members. This report purports to create a new legal effect for Appellate Body reports, one that would appear to grant to the Appellate Body the very authority to issue authoritative interpretations of the covered agreements that is reserved by the WTO Agreement exclusively to Members.

With respect to the first systemic level of concern, let me simply note that there are numerous flaws in the Appellate Body's reasoning in this latest report, including in particular its rejection of the fact that the Uruguay Round negotiators did not agree to prohibit zeroing in assessment reviews. No common understanding was reached on zeroing in the Uruguay Round because, despite extensive efforts by many participants, proposals to prohibit zeroing were firmly opposed by many others, including several users of antidumping measures.

However, if the Members of the WTO never agreed to ban zeroing, then the DSU does not empower the Appellate Body to create new obligations that impose such a ban. The Appellate Body's approach ought to be of concern to every single WTO Member, any one of which may someday be called upon to defend its own laws and regulations, and every one of which will want to rely on the

negotiated outcome of the Uruguay Round, the Doha Round, or other WTO negotiations – and not be held to rules found nowhere in those outcomes.

We will not dwell on those points further this afternoon. Instead, we have prepared a written statement that addresses the continuing and evolving flaws with the Appellate Body's analysis of zeroing; a copy will be available in the room after the meeting and will be circulated to all delegations.

The second level of systemic concern is of such enormous institutional significance for the dispute settlement system that we are compelled to elaborate on our concerns today.

In this dispute, the Panel correctly noted its obligations under DSU Articles 11, 3.2 and 19.1 and **undertook its work in accordance with those obligations. And, in carrying out its task, this Panel – like another panel before it – carefully considered, and ultimately disagreed with, the various versions of the Appellate Body's reasoning in prior disputes involving zeroing in assessment reviews. On appeal, Mexico raised a claim under DSU Article 11.**

The first few paragraphs of the Appellate Body report's discussion of that appeal are unexceptional. The Division first recalls the task of the Panel under DSU Article 11: to assist the DSB in discharging its responsibilities, and to make an objective assessment of the matter, including the applicability of and conformity with the covered agreements. It further recalls that under DSU Article 3.2, "the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system". And, it recalls that the original members of the Appellate Body, in one of the very first appeals it heard, clarified the status of prior adopted reports: they are not binding, except with respect to the particular dispute between the parties, but they "should be taken into account where they are relevant to any dispute". We have no quarrel with any of this, and we believe that all Members share that view.

The discussion then turns, however, in a significantly different direction – one that no longer relies on WTO Agreement text or even on prior adopted reports. The discussion begins to use terms such as "'security and predictability' in the dispute settlement system" – which is a misstatement of the text, since the DSU only speaks to the dispute settlement system providing security and predictability to the "multilateral trading system". The discussion also asserts that the Panel's "failure to follow previously adopted Appellate Body reports ... undermines the development of a coherent and predictable body of jurisprudence clarifying Members' rights and obligations under the covered agreements".

The Division closes by expressing its concern about "the Panel's decision to depart from" the Appellate Body's prior rulings on these issues, stating that the Panel's approach has "serious implications for the proper functioning of the WTO dispute settlement system".

Mr. Chairman, with respect, the Appellate Body Division is mistaken. This second part of the Appellate Body's discussion misperceives the WTO Agreement and this Member-driven organization. It is WTO Members that negotiate and agree to obligations, and we do so by consensus. We have also established one and only one means for adopting binding interpretations of the obligations that we agree to: Article IX:2 of the WTO Agreement provides that the Ministerial Conference and the General Council have the exclusive authority to adopt such interpretations.

Yet the approach in this Appellate Body report would appear to mean that Appellate Body reports should be treated as authoritative interpretations of the covered agreements – they are to be followed by panels regardless of whether a panel in a particular dispute agrees with those prior reports. In other words, panels are simply to abdicate their responsibility to conduct an objective assessment of the matters before them and should simply follow prior Appellate Body reports.

This does a disservice to panels and the serious responsibility that the DSB assigns to them.

What is more, WTO Members have made it clear – in fact, the DSU says it twice – that the findings of panels and the Appellate Body cannot add to or diminish the rights and obligations in the covered agreements. Perhaps unlike some other institutions, the WTO does not rely on adjudication to advance its objectives. However, this Appellate Body report's approach, including its references to a "coherent and predictable body of jurisprudence", would appear to transform the WTO dispute settlement system into a common law system. But that was nowhere agreed among Members.

And what is more, this Division raised all of these systemic concerns unnecessarily, some might even say gratuitously. The report rejected Mexico's Article 11 appeal, so all of this discussion was mere *dicta* by the Division.

We do, of course, share the Appellate Body's interest in having similar cases treated similarly. We expect that all Members do likewise. We do not, however, share this report's view that this means that panels must follow Appellate Body reports in different disputes. Rather, to cite again to the *Japan – Alcoholic Beverages* Appellate Body report, we would expect any panel to take account of any other relevant adopted report, whether authored by the Appellate Body or by a different panel.

To take account of an adopted report, of course, does not mean to follow it without hesitation. To the contrary, to take account of such a report means to examine it, to consider it, and to engage with its reasoning. We recall that an *objective* assessment is one that is critical and searching. Such an assessment can lead, in fact, to further or greater clarification.

Mr. Chairman, the WTO dispute settlement system functions properly when the rules that Members established for that system are respected. One of those rules is that a panel must make an objective assessment of the matter before it, including an objective assessment of the "applicability of and conformity with the relevant covered agreements". Whatever one's views of the substantive issues in this dispute, there is no question but that the Panel did so here.

We therefore strongly believe that the Appellate Body's concerns about the Panel's approach are misplaced. Rather than presenting "serious implications" for the dispute settlement system, the Panel's actions in this dispute affirm the strength of that system.

ANNEX 2

US COMMENTS ON *US – STAINLESS STEEL (MEXICO) (AB)*

Communication to the DSB by the United States on *United States – Final Antidumping Measures on Stainless Steel from Mexico* (WT/DS344)

1. On 20 December 2007, the Panel in *United States – Final Antidumping Measures on Stainless Steel from Mexico* ("*US – Stainless Steel*") circulated its final report. In that report, the Panel engaged in a lengthy analysis of the legal relationship under the WTO dispute settlement system between panel reports and Appellate Body reports. The Panel recalled "that this is not the first case in the WTO in which simple zeroing in periodic reviews has been challenged. The WTO-consistency of simple zeroing in periodic reviews was questioned before the panels in *US - Zeroing (EC)* and *US - Zeroing (Japan)*. In both cases, the panels found this practice not to be inconsistent with the obligations set out in the relevant provisions cited by the complaining parties. We also recall that the Appellate Body reversed the decisions of both panels and found simple zeroing in periodic reviews to be WTO-inconsistent."[1]

2. Indeed, the Panel correctly noted "that, although adopted panel reports only bind the parties to the dispute that they concern, the Appellate Body expects future panels to take them into account to the extent that the issues before them are similar to those addressed by previous panels".[2] Furthermore, the Panel accurately concluded "that even though the DSU does not require WTO panels to follow adopted panel or Appellate Body reports, the Appellate Body *de facto* expects them to do so to the extent that the legal issues addressed are similar".[3]

3. At the same time, the Panel stated:

> We also note, however, that the panel in *US - Zeroing (Japan)*, while recognizing the need to provide security and predictability to the multilateral trading system through the development of a consistent line of jurisprudence on similar legal issues, drew attention to the provisions of Articles 11 and 3.2 of the DSU and implied that the concern over the preservation of a consistent line of jurisprudence should not override a panel's task to carry out an objective examination of the matter before it through an interpretation of the relevant treaty provisions in accordance with the customary rules of interpretation of public international law. We also share the concern raised by the panel in *US - Zeroing (Japan)* regarding WTO panels' obligation to carry out an objective examination of the matter referred to them by the DSB.[4]

4. Despite all of this, the Panel finally concluded that:

> After a careful consideration of the matters discussed above, we have decided that we have no option but to respectfully disagree with the line of reasoning developed by the Appellate Body regarding the WTO-consistency of simple zeroing in periodic reviews. We are cognizant of the fact that in two previous cases, *US – Zeroing (EC)* and *US – Zeroing (Japan)*, the decisions of panels that

[1] Panel Report, para. 7.101.
[2] Panel Report, para. 7.104.
[3] Panel Report, para. 7.105.
[4] Panel Report, para. 7.105.

> found simple zeroing in periodic reviews to be WTO-consistent were reversed by the Appellate Body and that our reasoning set out below is very similar to these panel decisions. In light of our obligation under Article 11 of the DSU to carry out an objective examination of the matter referred to us by the DSB, however, we have felt compelled to depart from the Appellate Body's approach for the reasons explained below.[5]

5. These passages demonstrate the Panel's awareness of likelihood that the Appellate Body would reverse the Panel's findings while underscoring the seriousness of the Panel's disagreement with the prior Appellate Body reports. Despite that risk of reversal, the Panel ultimately concluded that:

> We are not convinced that the treaty provisions cited by Mexico, on which the Appellate Body based its reasoning, necessarily compel a definition of 'dumping' based on an aggregation of all export transactions.[6]

In particular, the Panel was "troubled by the fact that the principal basis of the Appellate Body's reasoning in the zeroing cases seems to be premised on an interpretation that does not have a solid textual basis in the relevant treaty provisions".[7] Ultimately, the Panel stated that "we find the Appellate Body's reasoning not to be convincing".[8]

6. The Panel correctly assessed the likelihood that the Appellate Body would reverse its findings. On 30 April 2008, the Appellate Body Division hearing the appeal circulated its report[9], reversing the Panel's findings.

7. The United States wishes to offer its views on the Appellate Body Division's report. In light of the fact that the Appellate Body had previously reversed a panel's findings on this issue, despite the panel's respectful (and unprecedented) disagreement with the Appellate Body and despite the US comments offered on an even earlier Appellate Body report, the United States offers its comments only after careful consideration – the United States does not offer these comments lightly.[10]

8. At the outset, the United States would note that some Members have argued that zeroing is "unfair". But many people do not know what zeroing is. A brief explanation may be helpful. If an import is dumped, the Member collects a duty. If the import is not dumped, the Member collects nothing. That is zeroing: treating a non-dumped import as – not dumped.

9. Thus, simple common sense confirms that zeroing does not "inflate" the margin of dumping but rather simply treats non-dumped imports neutrally. That logic is reflected in Article VI of the GATT 1994 and the Antidumping Agreement, which recognize that Members may calculate a margin of dumping on a transaction-by-transaction basis, and, thus, collect duties on dumped imports, while collecting no duties on non-dumped imports.

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[5] Panel Report, para. 7.106 (footnote omitted).
[6] Panel Report, para. 7.117.
[7] Panel Report, para. 7.119.
[8] Panel Report, para. 7.121.
[9] WT/DS344/AB/R.
[10] For the comments of the United States on prior Appellate Body reports regarding the issues of zeroing in assessment proceedings, see *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, Communication by the United States, WT/DS294/16 (17 May 2006); *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, Communication from the United States, WT/DS294/18 (19 June 2006); and *United States – Measures Relating to Zeroing and Sunset Reviews*, Communication from the United States, WT/DS322/16 (26 February 2007).

10. Four times the DSB has been presented with the question of whether margins of dumping can be calculated on a transaction-specific basis and zeroing is thus permissible in contexts such as assessment proceedings. Four times panels – that have included in their membership antidumping administrators and negotiators – have concluded that zeroing is permitted in such circumstances. Four times the Appellate Body has disagreed. And each time that the Appellate Body has done so, it has presented a new rationale for its position that does not withstand close scrutiny. Thus, it is not surprising that *two* panels have taken the unprecedented step of examining, and then rejecting, the Appellate Body's reasoning.

11. Panels have not been alone in critiquing the Appellate Body's reasoning. Academics – including those who are not necessarily supporters of the antidumping remedy – have acknowledged that the Appellate Body's findings have no sound basis in the text of the agreements, and they recognize the danger to the WTO system of such extra-legal behaviour.[11] They rightly perceive that whatever one's personal views on antidumping in general, or zeroing in particular, if the Appellate Body is perceived to be arrogating to itself the authority to make policy, it would pose a far greater danger to trade than antidumping authorities declining to make adjustments for so-called negative dumping margins. This is because the Antidumping Agreement, like all of the covered agreements, reflects a balance of interests negotiated by the Members. When the Appellate Body alters the negotiated balance, it acts beyond its authority and jeopardizes Members' confidence that the bargains that are negotiated are the bargains that will be respected.

12. In this regard, the Appellate Body Division responsible for *Stainless Steel* has for the first time suggested that if a panel should decline to follow Appellate Body reasoning – regardless of how flawed that reasoning may be – the panel acts at odds with the "promotion of security and predictability" and the "prompt settlement of disputes".[12] This Division's view of its role is deeply disturbing. Members have agreed that the "dispute settlement system of the WTO is a central element in providing security and predictability of the multilateral trading system".[13] The Appellate Body Division misstates this provision by arguing that it refers to "'security and predictability' in the dispute

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[11] *See e.g.* Professor Chad P. Bown and Professor Alan O. Sykes, *The Zeroing Issue: A Critical Analysis of Softwood V*, revised version forthcoming in *World Trade Review*, ("[T]he legal foundation for the Appellate Body's ruling is somewhat dubious, doubly so in the face of the standard of review applicable under the ADA ... . The danger of such decisions is that they will undermine confidence in the Appellate Review process and make it more difficult for WTO Members in the future to reach agreement on contentious issues." (p. 30)) <http://people.brandeis.edu/~cbown/papers/Bown-Sykes-ALI.pdf>; Terence P. Stewart, Amy S. Dwyer & Elizabeth Hein, *"Trends in the Last Decade of WTO Trade Remedy Decisions: Problems and Opportunities for the WTO Dispute Settlement System*", 24 ARIZONA J. COMP. L. 251 (2007); Professor Roger P. Alford, "*Reflections on U.S.– Zeroing: A Study in Judicial Overreaching by the WTO Appellate Body*", 45 COLUM. J. TRANSNAT'L L. 196 (2006-2007), ("The Appellate Body's report in *US – Zeroing* crystallizes some of the concerns that have been expressed in the past regarding judicial excess in the WTO dispute settlement regime." (p. 220)); Professor Phoenix X.F. Cai, "*Between Intensive Care and Crematorium: Using Standard of Review to Restore Balance to the WTO*", 15 TULANE J. INT'L & COMP. L. 465 (2006-2007); Professor Richard H. Steinberg, *"Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*", 98 AM. J. INT'L L. 247 (2004); Professor Daniel K. Tarullo, *"Paved with good intentions: the dynamic effects of WTO review of anti-dumping action*", 2 WORLD TRADE REVIEW 373 (2003); John Greenwald, "*WTO Dispute Settlement: An Exercise in Trade Law Legislation*", 6 J. INT'L ECON. L. 113 (2003); John Ragosta, Navin Joneja, and Mikhail Zeldovich, "*WTO Dispute Settlement System Is Flawed and Must Be Fixed*", 37 INT'L LAWYER 697(2003); Professor Daniel K. Tarullo, "*The Hidden Costs of International Dispute Settlement: WTO Review of Domestic Anti-dumping Decisions*," 34 L. & POLICY INT'L BUS. 109 (2002-2003); Geert A. Zonnekeyn, "*The Bed Linen Case and its Aftermath*," 36 J. WORLD TRADE 993 (2002); Claude Barfield, *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization*, 2 U. CHI. J. OF INT'L L. 403 (2001).

[12] Appellate Body Report, para. 161.

[13] DSU Article 3.2.

settlement system".[14] Instead, the dispute settlement system only provides "security and predictability" to the multilateral trading system when the Dispute Settlement Body ("DSB"), and the panels and the Appellate Body that serve it, respect the parameters set out in Article 3.2 – that the recommendations and rulings of the DSB cannot add to, or diminish, the rights and obligations in the covered agreements. Suggesting, as this Division did, that panels are required blindly to follow erroneous Appellate Body conclusions in the name of security and predictability is simply inconsistent with Article 3.2. The Panel recognized this, and should be commended for its devotion to Articles 3.2 and 11 of the DSU.

13. With that backdrop, it is important to examine the particular reasoning used this time by the Appellate Body Division and its approach to zeroing in assessment reviews.

A. THE APPELLATE BODY'S REJECTION OF NEGOTIATING HISTORY

14. On appeal, the United States explained that, even assuming *arguendo* there was any ambiguity in the text regarding a prohibition on zeroing, an examination of the negotiating history would confirm that Members did not agree to prohibit it. In light of the absence of a textual prohibition on zeroing – neither "zeroing" nor "negative dumping margins" appears anywhere in the Antidumping Agreement – one would have expected the Division to have wanted to consult the negotiating history if the Division were considering viewing the text as implicitly dealing with zeroing. Surprisingly, however, the Division's view was that recourse to the negotiating history was not "strictly necessary".[15] Moreover, although the Division did in the end examine the US explanations of the negotiating history, the Division's conclusions regarding the negotiating history simply cannot be reconciled with that history.

The Tokyo Round Antidumping Code permitted zeroing

15. For example, in 1979, certain contracting parties concluded the Agreement on Implementation of Article VI of the GATT. Because the title is identical to the title of the WTO agreement, and the agreement resulting from the Kennedy Round, we will refer to the 1979 Agreement by its colloquial name, the Tokyo Round Anti-Dumping Code ("Code"). As its name indicates, drawing on Article VI of the GATT, the Code set out further disciplines on the imposition of antidumping measures, including disciplines on the assessment of antidumping duties. Signatories twice brought disputes, arguing that zeroing was inconsistent with the Code. Those claims failed.

16. During the Uruguay Round, further disciplines were negotiated, resulting in yet another Agreement on Implementation of Article VI of the GATT, which we will refer to as the Antidumping Agreement. While some aspects of the Code were radically altered, the provisions governing assessment proceedings – found not to have prohibited zeroing – were not.[16] In fact, the two key provisions were identical.

17. Article 8:3 of the Tokyo Round Anti-Dumping Code provides that:

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

18. Article 9.3 of the Antidumping Agreement provides that:

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[14] Appellate Body Report, paras. 160-161.

[15] Appellate Body Report, para. 128.

[16] For example, the United States has accepted that there is a colorable argument that Article 2.4.2 prohibits zeroing in average-to-average comparisons in investigations, through its use of the phrase "all comparable export transactions". There was no corresponding provision in the Code.

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

19. Yet the Division examined the negotiating history and drew the extraordinary conclusion that "we are not persuaded that the [Tokyo Round Code] provide[s] guidance as to whether simple zeroing is permissible under Article 9.3. of the *Anti-Dumping Agreement*".[17] At least one panel had declined to find a prohibition in Article 8.3 itself. That provision is directly incorporated into the Antidumping Agreement as Article 9.3. Even in light of these facts, the Division concluded that Article 9.3 of the Antidumping Agreement prohibits zeroing in assessment proceedings.[18]

20. The Appellate Body Division's report finds that "the relevance of" the panel reports under the Code "is diminished by the fact that the" Code was separate from the GATT 1947 and has been "terminated". Both of these statement are quite puzzling when referring to negotiating history. It is completely unclear what legal significance attaches to the termination of a previous agreement that served as part of the negotiating history of the Antidumping Agreement. By definition, negotiating history is just that – it is "history" and so in the past. There is no requirement that negotiating history only consist of agreements or documents still in force at the time an agreement is being interpreted. And while the Code was separate from the GATT 1947, the negotiators of the Antidumping Agreement relied on and drew from its provisions, so the interpretation of those provisions would be directly relevant to understanding the Antidumping Agreement. The Marrakesh Agreement reflects this understanding, noting in Article XVI:1 that the "WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947". And ironically, later in its report the Appellate Body Division extols the persuasive value of panel reports.

Article VI of the GATT did not bar zeroing

21. Japan was one of the contracting parties that challenged zeroing – unsuccessfully – under the Tokyo Round Code. While Japan challenged zeroing as being inconsistent with Article 2 of the Code, and, consequentially, with Article 8:3, Japan did *not* challenge zeroing as being inconsistent with

[17] Appellate Body report, para. 130.

[18] The Division dismissed the relevance of panel reports interpreting the Tokyo Round Code because those disputes involved Article 2.6 of that Code – the fair comparison provision – which changed in the Antidumping Agreement. However, the Division failed to take into account that in *EEC – Antidumping Duties on Audiocassettes Originating in Japan*, ADP/136 (28 April 1995) (unadopted). Japan *did* challenge zeroing under Article 8.3 of the Code and did not prevail. *EC – Audiocassettes*, para. 11. This renders puzzling Japan's comment that the negotiators did not include a prohibition on zeroing in Article 9.3 because they already considered it to be prohibited. Appellate Body Report, para. 130. Even more surprising then is the Division's reliance on that comment, which is plainly inconsistent with the historical record.

Likewise, it is surprising to the United States that the Division credits the EC's submission for the proposition that "there is a 'strong indication of consensus that the interests of both parties in the asymmetry and zeroing debate could be accommodated in the targeted dumping provisions that eventually became the second sentence of Article 2.4.2". Appellate Body Report, para. 130 (quoting EC Third Participant's Submission, para. 226). The United States struggles to comprehend how, if the EC considered that the Antidumping Agreement prohibits zeroing in all but the targeted dumping situation, the EC nevertheless continued to zero until the *EC – Bed Linen* dispute, in which the DSB recommendations and rulings were adopted in 2001. *EC – Antidumping Duties on Cotton-Type Bed Linen from India*, DS141 (adopted 12 March 2001). If the EC were sincere, then it would appear that the EC is acknowledging that it intentionally breached its WTO obligations from 1995 to 2001.

Article VI:1. The same is true for Brazil in its dispute against the EEC involving Cotton Yarn.[19] The latter is an adopted panel report and thus forms part of the GATT *acquis.*[20]

22. This history confirms that the Uruguay Round negotiators operated from a premise that zeroing was *not* prohibited under Article VI of the GATT or Article 8:3 of the Tokyo Round Code. Japan's view that the negotiators understood zeroing to be prohibited already is impossible to reconcile with its own unsuccessful pursuit of pre-WTO dispute settlement on that very topic. The EC did not agree that the text prohibited zeroing, as its defense in *EC – Audiocassettes* confirms. Article 8:3 was directly incorporated into Article 9.3 of the Antidumping Agreement. In this context, there is simply no basis for the Appellate Body's conclusion that Article VI:1 of the GATT or Article 9.3 of the Antidumping Agreement prohibits zeroing in assessment proceedings.

23. In light of the foregoing discussion, it is clear that the Division has not based its "prohibition" of zeroing on language that is differently phrased or new. It has based its prohibition on Article VI of the GATT and Article 9.3, both of which existed (the latter as Article 8.3) at the time of the Tokyo Round Code.

24. At best, there was *no* consensus that zeroing was already prohibited by the text of the agreements in question. Given that fact, and the fact that Article 8:3 of the Tokyo Round Code is replicated in Article 9.3 of the Antidumping Agreement, and the presence of Article 17.6(ii) of the Antidumping Agreement, it is difficult to understand the Division's refusal to acknowledge the relevance of the negotiating history.

25. The implications of the Division's creation of new obligations in the absence of textual changes is particularly troubling as the Membership strives to conclude the Doha Round. What this Division is saying to the Membership is that it is insufficient to remain silent in the text in the face of a disagreement in the negotiations. Such silence may be construed at some future date by the Appellate Body as agreement to change the meaning of the text. Thus, if the disagreement cannot be bridged with affirmative text, the continuing disagreement should be reflected in text confirming the lack of consensus - a task that is likely to prove difficult, if not impossible, for the negotiators.

26. If the Division did not rely on the negotiating history, then the natural question is: what did it rely on? The Division primarily relied upon a three-part analysis:

a) the margin of dumping is exporter related;
b) dumping and margin of dumping can only be found to exist at the level of multiple transactions; and
c) it is obligatory to include all transactions, dumped and non-dumped, in those multiple transactions.

B. THE APPELLATE BODY'S MISGUIDED EMPHASIS ON EXPORTER MARGINS OF DUMPING

27. The Division spends a significant portion of its report on the question of whether a margin of dumping is exporter or importer related. However, it is not clear why this matters or why it must be exclusively one or the other. The Division itself acknowledges that any dumped price results from a negotiation involving the exporter *and* the importer.

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[19] *EEC – Imposition of Anti-Dumping Duties on Cotton Yarn from Brazil*, ADP/137, 42S/17, adopted by the ADP Committee 30 October 1995.

[20] Further, even after implementation of the Antidumping Agreement, India's challenge to zeroing in *EC – Bed Linen* did not involve a claim of inconsistency with Article VI, nor did Canada's challenge to zeroing in *US – Final Lumber AD Determination*, WT/DS264, adopted 31 August 2004 (*"Softwood Lumber")*, or *US – Final Lumber AD Determination (21.5)*, WT/DS264, adopted 1 September 2006 ("*Softwood Lumber (21.5)").*

28. In any event, the question of whether a margin of dumping is exporter related does not resolve the question of whether it can be determined on the basis of individual transactions or must always be determined on the basis of multiple transactions. A margin determined on the basis of an exporter's action with respect to an individual transaction is no less exporter-related than one determined on the basis of multiple transactions by that exporter.[21]

29. The emphasis on "exporter-related" misses the point. The purpose of collecting antidumping duties is to counteract dumping. Importers pay the duties. Thus, duties counteract dumping by dissuading the importer from having any interest in a dumped price. The importer will try to avoid dumped prices by recognizing that there is an export price below which the importer will derive no benefit if negotiations with the exporter result in an even lower price. The antidumping duty, paid by the importer, would erase any gain netted by such negotiation because the importer could not profitably resell the merchandise at a price less than its normal value.

30. More importantly, the Division's conclusion about an exporter-wide margin of dumping is at odds with Article 9.3.2. According to the Appellate Body, the *exporter's* margin of dumping, calculated on the basis of *all* of that exporter's transactions, establishes the ceiling for assessment of duties. Under Article 9.3.2, the *importer* may request a refund if that request is "duly supported by evidence ...". If the amount of the liability is capped by the margin of dumping, and the margin of dumping is calculated on the basis of the *exporter's* transactions, how can the *importer* duly support its request with evidence? The importer only knows what that importer's *own* transactions are. Nor does the importer necessarily have information about transactions handled by *other importers*.

31. In fact, the Division's affirmation that margins of dumping must be calculated on an exporter-wide basis unwittingly authorizes Members with prospective ad valorem systems to *decline to provide full refunds*. The importer best positioned to request a refund is an importer who has engaged in non-dumped transactions. It can support its refund with evidence from its own transactions. But if another importer has engaged in dumped transactions with the same exporter, those transactions *will offset the first importer's refund.* Take an example: the margin of dumping for an exporter in the investigation is 5 per cent. Normal value is 5 per cent higher than the export price. An importer knows that all of his export prices have risen, some well beyond the 5 per cent differential. That importer requests a refund. A second importer's export prices have all declined, some well beyond the 5 per cent differential. The result is that the first importer does not get a refund. Moreover, the second importer cannot provide evidence on which to base a request for a refund. He is only owed a

[21] In this regard, it is interesting that the Division begins its analysis with the concept of the exporter-wide margin of dumping and only then proceeds to the transaction-specific margin of dumping. In its discussion of whether a margin of dumping is exporter- or importer-specific, the report appears to collapse the question of whether a dumping margin is exporter- or importer-specific with the question of whether such a margin comprises multiple transactions. Thus, the report states that there is "nothing in Articles 5.8, 6.10, and 9.5 of the *Anti-Dumping Agreement* to suggest that it is permissible to interpret the term 'margin of dumping' under those provisions as referring to multiple 'dumping margins' occurring at the level of individual importers". However, the question the Division sought to address in that section of the report was not the issue of *multiple* margins of dumping, but rather whether the margin is calculated for the exporter, rather than the importer.

There are also questions about the Division's interpretation of the French and Spanish texts. At note 200 of the report, the Division states that the French version of Article 6.10 of the Agreement, "une marge de dumping individual" translates into "'one' single margin of dumping". In fact, the French text translates into "an individual margin of dumping". It does not refer to "one" margin or to one "single" margin of dumping. The report's translation of the Spanish version is no better. The Spanish text – not reproduced in the footnote – refers to "el margen de dumping que corresponda a cada exportador". This translates as "a margin of dumping corresponding to each exporter". In any event, there is no reason Article 6.10 would refer to multiple margins. Article 6.10 imposes an obligation to calculate an individual margin of dumping for each exporter, as opposed to one margin for *all exporters*. It has nothing to do with the question of whether one may calculate multiple margins of dumping for each such exporter.

refund on the basis of the first importer's transactions, evidence the second importer does not have and cannot supply to the investigating authority to "duly substantiate" his request. Thus, in requiring a margin of dumping to be calculated on the basis of all of the exporter's transactions, *the Division has authorized prospective systems to deny importers full refunds.*

C. TRANSACTION-SPECIFIC MARGIN OF DUMPING

32. The Division then devotes all of two paragraphs to the central question of whether the margin can be at the transaction-specific level.[22]

33. As the United States has noted before, and as four panels have found, the calculation of a transaction-specific margin of dumping for purposes of the assessment of antidumping duties is a permissible interpretation of the Antidumping Agreement. That a margin of dumping may be calculated on a transaction-specific basis leads to the conclusion that authorities are not required to offset a dumping margin calculated for one transaction with a negative dumping margin calculated in a separate transaction.

34. Canada agrees:

> An investigating authority assesses antidumping duties when the export price is lower than the weighted-average normal value, *but applies no anti-dumping duties to non-dumped transactions when the opposite is true*. It is not the same as the practice of zeroing ... .[23]

35. Put differently, a permissible interpretation of the Antidumping Agreement is that a Member may calculate a margin of dumping on the basis of individual transactions, is not obligated to provide offsets for one transaction as compared to another, and thus zeroing is not prohibited in such circumstances. Under Article 17.6 of the Antidumping Agreement, if an interpretation is permissible, a measure based on it must be allowed to stand.

36. If a margin of dumping can be calculated on the basis of an individual transaction, then the exporter's margin of dumping is the *same* as the importer's antidumping liability, and the various provisions of the Antidumping Agreement fit together neatly.[24] Article 6 and its focus on margins of dumping for *exporters* – in which the Appellate Body has attempted to find a prohibition on zeroing for purposes of antidumping duty assessment – melds seamlessly with Article 9 and its emphasis on duty assessment for *importers*. It is useful to bear this concept in mind when evaluating the conclusions of the Division that the Antidumping Agreement prohibits the calculation of a margin of dumping on a transaction-specific basis.

37. The Division states that:

> [T]he *notion* that a "product is introduced into the commerce of another country at less than its normal value" ... *suggests* to us that the determination of dumping with respect to an exporter is properly made not at the level of individual export transactions, but on the basis of the totality of an exporter's transactions of the subject merchandise over the *period of investigation*.[25]

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[22] Appellate Body Report, paras. 98-99.

[23] Quoted in *US – Softwood Lumber (21.5) (Panel)*, para. 5.55 (emphasis added).

[24] The Appellate Body report acknowledges this fact, but in a footnote. *See* Appellate Body Report, n.219.

[25] Appellate Body Report, para. 98 (emphasis).

38. There are two important aspects of this conclusion, in particular, that require comment.

1. Lack of Textual Basis for Prohibition

39. What jumps out at the reader is that the Division does not cite to any actual text that directs the calculation of a margin of dumping at a particular level (transaction-specific or multiple transactions). Instead, the Division relies on a "notion" that "suggests" a particular result. However, a "notion" that "suggests" a particular interpretation is not sufficient to conclude that the text of a covered agreement prohibits particular action. This is especially true in the case of the Antidumping Agreement, Article 17.6(ii) of which provides:

> Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

40. Moreover, a closer examination of the language upon which the Division's report relies does not support its interpretation of Article VI:1 as precluding the calculation of margins of dumping on a transaction-specific basis. Article VI:1 provides:

> a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another ... is less than the comparable price ... for the like product ... .

41. The Division fails to offer a meaningful explanation as to why this sentence *precludes* the calculation of a margin of dumping on a transaction-specific basis. Indeed, the ordinary meaning of the text, read in context, does not support the conclusion that the *only* interpretation of Article VI:1 is one involving *multiple transactions*.[26]

42. The Division's reliance on the word "product" is misplaced. "Product" in Article VI is not confined to meaning all transactions of that product. Such a reading cannot be reconciled with the use of "product" in Article II:2(b) of the GATT 1994: "Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product:

> ...
> (b) any anti-dumping or countervailing duty applied consistently with the provisions of Article VI... .

43. For a duty to be applied "on the importation of any product" it will be applied on a particular transaction. A duty is not applied only after there have been multiple transactions. Nor would the Division's reading of "product" work for the other elements of Article II:2.

44. The Panel considered carefully Mexico's arguments, which relied on one of the lines of reasoning advanced in prior Appellate Body reports; namely, the notion that margins of dumping

[26] If the Appellate Body were correct that the term "product" refers not to individual importations of the product, but the "product as a whole", then it stands to reason that the term "product" would *always* appears in the singular in the Antidumping Agreement. However, the term "product" *does* appear in the plural. Thus, Article 2.3 refers to "the price at which the imported products are first resold ... ". Similarly, Article 2.5 refers to "where products are not imported directly ...". Thus, the Appellate Body's view that "product" can *only* refer to multiple importations of the product, as opposed to an individual importation, is simply not supported by the text.

must be calculated on the basis of the "product as a whole". The Panel noted – as had other panels before it – that the term "product as a whole" does not appear in the GATT 1994 or the Antidumping Agreement.[27] The Panel also agreed with the following analysis of the *US – Zeroing (Japan)* panel:

> We fail to see why the notion that a "product is introduced into the commerce of another country" cannot apply to a particular export sale and would necessarily require an examination of different export sales at an aggregate level.[28]

45. Thus, the Panel engaged in a careful analysis of the *actual words* in the relevant provision. However, in lieu of explaining *why* the Panel's careful analysis was flawed, the Division *simply dismissed it* – "Contrary to what the Panel indicates ..."[29] – without addressing *any* of the arguments the Panel made. Indeed, the Appellate Body report offered *no textual analysis of the provision.*

46. Taken to its logical extreme, the Division's reading of Article VI:1 suggests that there is in fact only *one* product, *one* normal value, and *one* export price, for *all* goods exported from the country in question. Article VI:1 does not even use the term "*exporter.*" There is no textual basis for the Divisions' conclusion that Article VI:1 "suggests ... that the determination of dumping ... is properly made ... on the basis of the totality of *an exporter's* transactions ...".[30]

47. Indeed, it would require that no margin could be determined until all imports had stopped. The Division appears to overlook this problem with its reference to the "totality of an exporter's transactions of the subject merchandise over the period of investigation".[31] But that fails to address the question of the relevant time period. Nothing in the text specifies the time period as being the period of investigation, nor does the text specify the period to be used after the period of investigation. The Division was imputing into the text words that are not there.

48. In summary, the Division was unsuccessful in its struggle to identify something in the text of the GATT 1994 or the Antidumping Agreement that would support that the margin of dumping cannot be transaction-specific.

2. Erroneous Reliance on Calculations in Other Proceedings

49. The Division also relied on "contextual" references. For instance, it referred to the fact that *"whether* an exporter is dumping can only be made on the basis of an examination of the exporter's pricing behavior as reflected in *all* of its transactions over a period of time".[32] The Division also refers to the "purpose" of an antidumping duty, which is to "counteract the injury caused or threatened to be caused by 'dumped imports' to the domestic industry".[33]

50. However, to the extent that these arguments are relevant at all, they pertain to antidumping *investigations*. The "determination of dumping" occurs in an investigation. The "determination of injury" occurs in an investigation. The *US – Stainless Steel* appeal did not involve an investigation: it involved an *assessment proceeding*.

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[27] For a more detailed discussion of the flaws in the "product as a whole" rationale, *see United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, Communication by the United States, 12 June 2006.

[28] *US – Measures Relating to Zeroing and Sunset Reviews (Panel)*, WT/DS322, adopted 23 January 2007, para. 7.105, quoted in Panel Report, para. 7.117 (*US – Zeroing (Japan*)).

[29] Appellate Body Report, para. 98.

[30] Appellate Body Report, para. 98 (emphasis added).

[31] Appellate Body Report, para. 98.

[32] Appellate Body Report, para. 98. As noted above, the idea that the text provides guidance as to this period of time is mistaken.

[33] Appellate Body Report, para. 98.

51. Panels, and the Appellate Body itself, have repeatedly noted that different antidumping proceedings serve "different purposes".[34] It is not clear why, even if the analysis of multiple transactions is required in an investigation, such analysis is *also* required in assessment proceedings, which serve an entirely different purpose. As the Appellate Body has stated, "[t]he disciplines applicable to original investigations cannot, therefore, be automatically imported into review processes".[35]

52. Further, in a footnote, the Division addressed a report issued in 1960 by the Group of Experts, which, as the name indicates, comprised a group of antidumping experts. According to the Group of Experts, "the ideal method [for making a dumping determination] was to make a determination in respect of *each single importation of the product concerned".*[36] Thus, as far back as 1960, antidumping experts recognized that margins of dumping would ideally be calculated on the basis of individual transactions. As a result, it is clear that a permissible interpretation of Article VI of the GATT 1994 is to determine a margin of dumping on a transaction-specific basis.

53. The Division's basis for rejecting the interpretation inherent in the Group of Experts statement was the following: the Group of Experts recognized that such a method was impracticable, particularly with respect to an injury determination[37], and perhaps most remarkably, that the WTO Agreement entered into force "long after" the Group of Experts Report. In other words, the Division considered that a report by experts far closer in time to the conclusion of the agreement at issue was "of little relevance" because it was old.[38] This approach would appear to reverse the customary rules of interpretation of public international law.

54. The Division appears to have misunderstood the relevance of the Group of Experts' statement. That statement is relevant for purposes of understanding the permissible interpretation of Article VI.

55. The Division has failed to explain why the fact that a particular system is *administratively impracticable* leads to the conclusion that Members necessarily agreed to another system with *a completely different concept of a margin of dumping, i.e,* one that is numerically different. Members did no such thing. Instead, they devised an *administratively practicable* system that allows them to assess a duty with the *same* margin of dumping. Thus, investigations may be conducted on the basis of multiple transactions, and so may assessment proceedings and reviews.[39] Whether the system described by the Group of Experts is possible or not, it provides critical insight into how the concept of a margin of dumping has been viewed under the GATT 1947 and the WTO regime.

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[34] *See, e.g., United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany (AB),* WT/DS213/AB/R, adopted 19 December 2002, para. 87; *United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico,* WT/DS282/AB/R, adopted 28 November 2005, para. 170; *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina,* WT/DS268/AB/R, adopted 17 December 2004, para. 359 ("*US – OCTG from Argentina")*; *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan,* WT/DS244/AB/R, adopted 9 January 2004, para. 106; *Mexico – Definitive Anti-Dumping Measures on Beef and Rice; Complaint with Respect to Rice,* WT/DS295/R, adopted 20 December 2005, as modified by the Appellate Body Report, WT/DS295/AB/R, para. 7.144, citing *United States – Anti-dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above From Korea,* WT/DS99/R, adopted 19 March 1999, para. 6.90.

[35] *US – OCTG from Argentina,* para. 359.

[36] Appellate Body Report, n. 213.

[37] Appellate Body Report, n. 213.

[38] Appellate Body Report, para. 132.

[39] The United States recalls that the basis for the prohibition on zeroing in average-to-average comparisons in investigations came not from the definition of dumping but from the language "all comparable export transactions" in Article 2.4.2. Thus, the existence of multiple transactions does not of itself require offsets.

56. As required by Article 17.6 of the Agreement, the question is whether a transaction-specific margin of dumping is a *permissible* interpretation. The Panel report that respected the requirements of Article 17.6.

57. Finally, the Division further bases its rejection of the concept of a transaction-specific margin of dumping on the fact that it does not believe that such a margin "can be done" for purposes of Articles 5.8, 6.10, 6.10.2, 9.4, 9.5, 11.2, and 11.3. The United States has not taken the position that a margin of dumping *must always* be calculated on a transaction-specific basis, but rather that the Agreement *allows* it to be calculated on a transaction-specific basis, and also *allows* it to be calculated on the basis of multiple transactions. Thus, in an investigation using an average-to-average comparison, there will of course be multiple transactions, and the overall margin of dumping will ultimately be calculated on the basis of those transactions. But the Division has failed to explain how the text requires in every instance that the calculation be made on the basis of multiple transactions, particularly in light of the negotiating history and practice under the GATT 1947, Tokyo Round Code, and the WTO.

58. It is clear, therefore, that the text does not support the Division's view that Article VI prohibits calculating a margin of dumping on a transaction-specific basis, and that its analysis is too summary, conclusive, and dismissive of the contrary evidence. In this light, it was unnecessary and largely irrelevant for the Division to engage in the analysis under its third part of its analysis: whether it is permissible when using multiple transactions to disregard the amount by which the export price exceeds the normal value is unnecessary. Given that the text does not prohibit the calculation of margins of dumping on a transaction-specific basis, there is no need to examine whether the text expressly authorizes "disregarding" certain transactions.

D. PROSPECTIVE NORMAL VALUE SYSTEMS

59. Panels have repeatedly relied on the existence of prospective normal value systems to confirm that a margin of dumping may be calculated on a transaction-specific basis. The first panel to do so was in the *Softwood Lumber (21.5)*, where Canada – a Member with a prospective normal value system – was the complaining party. In that dispute, Canada itself recognized that prospective normal value systems operate on the basis of a *transaction-specific margin of dumping*, as noted in the quotation from Canada in Section C above.

60. Each panel, including this Panel, that has found zeroing to be permissible on the basis of a transaction-specific margin of dumping has explained that prospective normal value systems confirm the calculation of margins of dumping on such a basis.

61. The Division errs in stating that "if the prospective normal value has been *improperly* determined, a review can be requested ...".[40] The Division presumes that in PNV systems, a "proper" PNV can be determined such that a retrospective review of all export transactions will be unnecessary. This is despite the fact that the Division is imposing an obligation for imports priced *above* the PNV to offset imports priced *below* the PNV. Under the Division's own view of zeroing, whether the "proper" PNV has been determined or not, any transactions above even the "proper" PNV would have to be offset against those below the "proper" PNV in a review under Article 9.3.2. Thus, the Division's arguments about zeroing are inconsistent with its arguments about PNV systems. Moreover, this would simply transform a PNV system into a retrospective system.

62. In addition, the key element of a prospective normal value system is that it uses a *prospective* normal value, not a *contemporaneous* normal value. It informs the importer of the prospective normal

[40] Appellate Body report, para. 121 (emphasis added).

value so that the importer has a basis for knowing whether the export price will suffice to eliminate dumping. However, the Division's views on PNV systems undo that certainty by suggesting that the prospective normal value is subject to retrospective recalculation.

63. There is a flaw even with this aspect of the Division's analysis. Article 9.3.2 conditions a request for a refund on a request *by the importer*, duly substantiated with evidence. Assuming such a thing as a "proper" normal value exists, the importer does not know what it is. The normal value is established in the country of export. It would have been illogical for the Agreement to authorize an importer to request a refund without any basis for knowing whether he is in fact entitled to any such refund to begin with and to require him to do so on the basis of evidence that is not in his possession.

E. CONCLUSION

64. Like the panels before it, the Panel in this dispute provided a very careful, text-based analysis of whether zeroing is permitted in assessment proceedings. The Division should at a minimum have conceded that there is more than one permissible interpretation of the Antidumping Agreement. However, the Division instead:

- asserts that the text of Article VI prohibits zeroing, but without providing any textual analysis of that provision;

- fails to recognize that, before the Division decided that zeroing was prohibited on the basis of Article VI, *five* zeroing disputes had been brought and decided, under both the Tokyo Round Code and the Antidumping Agreement, without a single Article VI claim;

- fails to recognize that zeroing had *not* been found inconsistent in assessment proceedings under the Tokyo Round Code, despite Japan's claim to the contrary;

- fails to recognize that the key Tokyo Round Code provision at issue in that dispute was incorporated wholesale into the Antidumping Agreement; and

- despite all these facts, concludes the negotiating history is of "little relevance" to the questions in this dispute.

65. The Division's casual dismissal of the negotiating history and imputing into the agreed text obligations that do not appear there should give every Member pause, particularly at a time when Members are negotiating a new set of rights and obligations and are, naturally, basing those negotiations on the rights and obligations they know to be in existence today and relying on the fact that they are only taking on those obligations that appear in the text they negotiate.

ANNEX E-3

COMMENTS OF THE EUROPEAN COMMUNITIES ON THE UNITED STATES' COMMENTS ON THE APPELLATE BODY REPORT IN *US – STAINLESS STEEL (MEXICO)* (DS344)

1. The European Communities hesitates to make any comment at all on the United States' comments on the Appellate Body Report in DS344. The legal arguments have been re-iterated so many times; and the matter is so clearly decided, that one wonders about the usefulness of continuing the exchange. Not least because the United States' submissions are increasingly bereft of legal argument, preferring in instead the endless repetition of: misrepresentations of the arguments; other statements that are little more than slogans; and irrelevant non-legal assertions. It appears to the EC that the United States is just playing for time, under pressure from protectionist internal constituencies, which is a matter of regret, and hardly consistent with the United States' DSU obligations. However, in order to try to assist the Panel to the greatest extent possible, here, once again, are the pertinent points, as they emerge from the latest US submission.

2. First, the United States often repeats – as if it were a slogan – that reports *cannot add to or diminish the rights and obligations* of Members. Two can play at that game. The European Communities has explained that, in the view of the EC, the US position diminishes the obligations of the US and the rights of the other WTO Members on the question of zeroing. Bandying this slogan backwards and forwards does little to address, in legal terms, the *legal claims* that have been made against the measures at issue, which legal claims and arguments the US continues to simply ignore. Rhetoric such as this is no substitute for proper legal argument – although one might, from a litigator's perspective, have some sympathy with the US, since it is clear that, in legal terms, the US has nothing left to say, which is why it resorts to this style of submission.

3. More specifically, the US simply ignores the other half of the equation: reports *clarify the existing provisions of the covered agreements in accordance with customary rules of interpretation of public international law*. And Appellate Body reports deal specifically with "issues of law" and "legal interpretations".[1] It is, of course, a basic feature of any law expressed in abstract terms, and subjected to binding judicial review, that its meaning will have to be clarified or interpreted in subsequent litigation. That is the whole point of having a system of litigation, and specifically one whose results are *binding* and should be *unconditionally* accepted. *Together*, these two statements encapsulate a basic truth and feature about the law: we must have interpretation; we do not want judicial legislation. To repeatedly cite one half of this equation is, of course, to say precisely nothing in legal terms – and would not pass muster in a first year law school paper – never mind a court of international law.

4. In this respect, fundamentally, the US goes against one of the backbone principles of the dispute settlement system, which is to provide "security and predictability". What can bring more security and predictability to the system than four Appellate Body reports consistently ruling against zeroing? The US assertion that taking the Appellate Body's logic to the extreme would mean that the Appellate Body would never change its mind because this would detract from "security and predictability" is simply rhetoric. Indeed, the Appellate Body has articulated the possibility for adjudicatory bodies to change previous legal interpretations in light of *cogent reasons*. Needless to say, repeated attempts by the US to bring the same legal arguments do not amount to cogent reasons.

[1] DSU, Article 17(6).

5. Second, the EC has noted the documents circulated by the US to the DSB in relation to the Appellate Body Report, as in past zeroing cases. The EC is not at all impressed by these documents. The EC notes that Article 17(14) of the DSU, final sentence, states that the adoption procedure is without prejudice to the rights of Members to 'express their views' on an Appellate Body Report. Naturally, one would not wish to preclude Members from doing that in general terms. However, the EC is of the view that it is hardly appropriate, pursuant to this provision, for a Member to circulate a lengthy document that contains what is in reality a legal submission containing a re-hash of the submissions previously made to the panel and the Appellate Body. The EC takes the view that such documents serve no useful purpose, and are hardly consistent with a Member's obligation to unconditionally accept the report. It appears to the EC that the US appears to believe that by "shouting" in procedural terms it might get its way. However, in the view of the EC, this kind of activity – which amounts to little more than propaganda – has precisely the opposite effect: it simply confirms that the US has no further legal arguments on which to rely.

6. Third, we note that the US repeatedly refers to the Appellate Body "division". It is not clear what the US intent is here, but we have three comments. First, we note that the Appellate Body has decided several cases on zeroing, in which the three persons serving on the case, within the meaning of Article 17(1) of the DSU, have been different. Thus, these several reports do not represent the views of one "division" – they represent the views of many individuals – and of the Appellate Body as a whole. Second, and following on from the preceding point, Appellate Body reports are attributable to the Appellate Body itself, and not a particular "division" of the Appellate Body. In fact, according to Rule 4 of the Appellate Body Working Procedures on collegiality, all Appellate Body Members convene on a regular basis to discuss matters of policy, practice and procedure and exchange views before a division finalises a report. Third, the reports are in any event adopted by the DSB – that is, the whole WTO Membership. Thus, the US' repeated references to the "division" simply serve no useful purpose, and may and should be disregarded.

7. Fourth, on the question of "permissible interpretation" – another US slogan. The Appellate Body has rightly clarified that this is a tie-breaker that operates *after* the application of the agreed rules of interpretation of public international law. Nor could it be otherwise. As any lawyer would confirm, it is *possible* to *argue anything*, however absurd or counter-factual it might be (as the US submissions in the zeroing cases bear witness). Just because something is "possible or permissible" in this sense does not make it consistent with the agreed rules of interpretation in the Vienna Convention. The US view of this provision amounts to saying that the disciplines in the *Anti-Dumping Agreement* might as well not be there at all – since, according to the US, it can interpret them as it wishes. The WTO Members would not have gone to the trouble of negotiating bound tariff rates and a set of complex agreements, if an importing Member could, in effect unilaterally, impose additional anti-dumping duties at will, based on the US proposition that the *Anti-Dumping Agreement* is a "hotch-potch of obscurity", and thus means all things to all persons. The *Anti-Dumping Agreement* is not a religious tract. It is an international agreement that exhaustively regulates in considerable detail the limited circumstances in which an anti-dumping duty can be applied, over and above the bound tariff rate. Furthermore, the concept of "permissible interpretation" has nothing to do with the US *Chevron* doctrine, which regulates the relationship between the legislature, executive and judiciary within the US – a problem that has nothing to do with centralised and binding dispute settlement in a multilateral organisation of 152 Members.

8. Fifth, the US repeatedly refers to the term "text" – another US slogan – as if to suggest that the EC is not relying on the text of the *Anti-Dumping Agreement*. In fact, the US appears to use this term to refer either to the text containing the specific obligation in question, or to the ordinary meaning of that text – in both instances the usage is erroneous. The term "text" appears once in Article 31 of the Vienna Convention, and clearly refers at least to the entire *Anti-Dumping Agreement*, thus necessarily encompassing also the context and the object and purpose. It is thus the EC that

bases its case on the text – all the text – of Article VI of the GATT 1994 and the *Anti-Dumping Agreement*; and the US that seeks to ignore the text of those agreements.

9. Sixth, as the EC has explained at length, this case has nothing to do with "offsets" (it is no defence to alter the claim, and then argue that there is no "text" prohibiting offsets). Nor does the term "zeroing" fully capture the essence of the problem, which is the selection of the relatively low-priced export transactions as the only or preponderant basis of the calculation, without any relevant targeting dumping pattern being identified. The US thus continues to simply refuse to respond to the actual legal claims made against it.

10. Seventh, the US complains that the Appellate Body does not respect the will of the legislator. But it is of course the US that flatly ignores the significance of the targeted dumping provisions, within the context of Article VI of the GATT 1994 and the *Anti-Dumping Agreement* as a whole. Even when the truth of the matter is apparent from the implied admission in the US' own municipal law (the SAA). And even when the US is incapable of rebutting the EC submissions regarding the correct interpretation of the phrase "the existence of margins of dumping during the investigation phase". Thus, it is the US, not the Appellate Body, which demonstrates an absence of any respect for the will of the legislator.

11. Eighth, how it is that the US continues to make the bare assertion that its position is supported by the negotiating history can only continue to astonish. The EC has explained precisely why the opposite is the case; and the US has simply not responded.

12. Ninth, the US assertion that the Appellate Body has changed its analysis in different cases is wholly without merit. What the Appellate Body has done is to limit itself in any given case to interpreting the legal provisions that need to be interpreted in order to resolve the specific dispute before it. One does not have to decide everything before one can decide anything. In the context of zeroing, there are different ways of expressing the same basic point, according the specific measure at issue and the specific claims and arguments that have been made. Thus, what the Appellate has demonstrated is a highly intelligent exercise of great judicial *restraint*. For the United States to present this as "inconsistency" and, in the same breath, accuse the Appellate Body of judicially legislating is ironic in the extreme.

13. In short, the US comments are, once again, the world turned on its head – this really is Alice Through the Looking Glass stuff. So much so that the US position hardly represents one articulated within the context of a rules-based approach; it is just a veneer beneath which a thinly veiled power-oriented expression of will is readily apparent. The EC expects it to be dealt with accordingly.

ANNEX E-4

COMMENTS OF THE UNITED STATES ON THE COMMENTS OF THE EUROPEAN COMMUNITIES ON THE APPELLATE BODY REPORT IN *US – STAINLESS STEEL (MEXICO)* (DS344)

TABLE OF REPORTS

Short Form	Full Citation
US – Softwood Lumber Dumping (AB)	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004
US – Stainless Steel (Mexico) (Panel)	Panel Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/R, adopted 20 May 2008, as modified by the Appellate Body Report, WT/DS344/AB/R
US – Stainless Steel (Mexico) (AB)	Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/R, adopted 20 May 2008

1. The United States thanks the Panel for this opportunity to provide these comments on the comments of the European Communities ("EC") on the Appellate Body report in *US – Stainless Steel (Mexico)*.

2. The EC asks the Panel, when making its "objective assessment" under Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), to "adopt the same approach" as the Appellate Body report in *US – Stainless Steel (Mexico)*. The EC drew "the Panel's particular attention to the statement that 'absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case' (para. 160)".

3. In this regard, the United States recalls the finding of the panel in *US – Stainless Steel (Mexico)*: "We are cognizant of the fact that in two previous cases, *US – Zeroing (EC)* and *US – Zeroing (Japan)*, the decisions of panels that found simple zeroing in periodic reviews to be WTO-consistent were reversed by the Appellate Body and that our reasoning set out below is very similar to these panel decisions. In light of our obligation under Article 11 of the DSU to carry out an objective examination of the matter referred to us by the DSB, however, we have felt compelled to depart from the Appellate Body's approach for the reasons explained below."[1] The United States appreciates that the EC's approach would have the Panel here resolve the legal question of zeroing in the same way as the equivalent adjudicatory body – the panel in *US – Stainless Steel (Mexico)* – and depart from the Appellate Body's approach.

4. As the Appellate Body itself has noted, and as the panel in *US – Stainless Steel (Mexico)* recognized, prior Appellate Body reports "are not binding, except with respect to resolving the particular dispute between the parties to that dispute".[2] To the extent that the reasoning in prior Appellate Body reports is persuasive, those reports may be taken into account, but they have no *stare decisis* effect under the DSU. Indeed, to find otherwise would conflict with Article IX:2 of the WTO Agreement, under which only the Ministerial Conference and General Council may issue authoritative interpretations under the covered agreements. The Appellate Body cannot create such an authority in itself.

5. The EC warns the Panel that if it were not to follow the Appellate Body, "its findings would inevitably be reversed on appeal". However, the panel in *US – Stainless Steel (Mexico)* was also "cognizant of the fact that in two previous cases, *US – Zeroing (EC)* and *US – Zeroing (Japan)*, the decisions of panels that found simple zeroing in periodic reviews to be WTO-consistent were reversed by the Appellate Body and that our reasoning set out below is very similar to these panel decisions", yet decided that its responsibility under DSU Article 11 to conduct an objective assessment meant that it needed to depart from the Appellate Body's prior reasoning. This Panel should also, in the EC's words, "in making an 'objective assessment of the matter before it' under Article 11 of the DSU … adopt the same approach".[3]

6. The EC also believes that "the Appellate Body has once again confirmed that the correct interpretation of the *Anti-Dumping Agreement* precludes the zeroing methodology used by the United States in the measures at issue". As the United States has demonstrated in its comments to the Panel, the Appellate Body report in *US – Stainless Steel (Mexico)* is deeply flawed.[4] Its findings lack

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[1] *US – Stainless Steel (Mexico)(Panel)*, para. 7.106.

[2] *US – Softwood Lumber Dumping (AB)*, para. 111 (quoting *Japan – Alcohol Taxes (AB)*); *see also US – Stainless Steel (Mexico) (Panel)*, para. 7.102.

[3] It also is presumptuous of the EC to assert with such certainty that the Panel would be reversed. The EC is not the Appellate Body, and does not know what a different division of the Appellate Body would do on appeal.

[4] Comments of the United States on the Appellate Body Report in *US – Stainless Steel (Mexico)* (WT/DS344), paras. 11-18 & Annex 2.

a basis in the text of the Antidumping Agreement and the GATT 1994 and contradict the negotiating history of the Antidumping Agreement. To the extent the Panel takes into account the Appellate Body report in *US – Stainless Steel (Mexico)*, we believe that for the reasons specified in our comments, this Panel will find that report unpersuasive, as previous panels have found the prior Appellate Body reports unpersuasive.

7. For all the reasons provided by the United States in its comments on the Appellate Body report and these comments on the EC's comments, the United States respectfully requests the Panel to find that the Appellate Body report is unpersuasive and, in conducting an objective assessment of the matter before it, the Panel should depart from the Appellate Body's approach.