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

Communication from the United States

The following communication, dated 20 May 2008, is circulated at the request of the delegation of the United States.

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1. On 20 December 2007, the Panel in *United States – Final Anti-Dumping 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

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

> 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 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]

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[4] Panel Report, para. 7.105.
[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).

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 Anti-Dumping 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.

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 behavior.[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 Anti-Dumping 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.

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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. In this regard, the Appellate Body Division responsible for *US - 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 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 Anti-Dumping 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.

1. 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 Anti-Dumping Agreement. While some aspects of the Code were radically altered, the provisions

[12] Appellate Body Report, para. 161.
[13] DSU Article 3.2.
[14] Appellate Body Report, paras. 160-161.
[15] Appellate Body Report, para. 128.

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 Anti-Dumping Agreement provides that:

> 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 Anti-Dumping Agreement as Article 9.3. Even in light of these facts, the Division concluded that Article 9.3 of the Anti-Dumping 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 Anti-Dumping 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 Anti-Dumping Agreement relied on and drew from its provisions, so the interpretation of those provisions would be directly relevant to understanding the Anti-Dumping 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

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[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.

[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 – Anti-Dumping Duties on Audio Tapes in Cassettes Originating in Japan*, ADP/136 (April 28, 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 Anti-Dumping 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 – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R (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.

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.

2. 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 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 Anti-Dumping 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 Anti-Dumping 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 Anti-Dumping Agreement, and the presence of Article 17.6(ii) of the Anti-Dumping 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

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[19] *EEC – Imposition of Anti-Dumping Duties on Cotton Yarn from Brazil*, ADP/137, BISD 42S/17, adopted by the ADP Committee October 30, 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/R, adopted August 31, 2004 (*"US – Softwood Lumber"),* or *US – Final Lumber AD Determination (21.5)*, WT/DS264/RW adopted September 1, 2006 ("US – *Softwood Lumber (21.5) (Panel)").*

(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.

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*.

[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.

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%. Normal value is 5% higher than the export price. An importer knows that all of his export prices have risen, some well beyond the 5% differential. That importer requests a refund. A second importer's export prices have all declined, some well beyond the 5% 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 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 Anti-Dumping 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 Anti-Dumping 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 Anti-Dumping 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 Anti-Dumping 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

[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.

conclusions of the Division that the Anti-Dumping 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]

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

(a) 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 Anti-Dumping 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:

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

[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 Anti-Dumping 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.

> ...
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> (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 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 Anti-Dumping 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 Anti-Dumping Agreement that would support that the margin of dumping cannot be transaction-specific.

(b) 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

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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/R, 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.

pricing behaviour 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*.

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.

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[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.

[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, *quoting* Group of Experts Report.

[37] Appellate Body Report, n. 213.

[38] Appellate Body Report, para. 132.

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.

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.

[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.

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 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 Anti-Dumping 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 Anti-Dumping 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 Anti-Dumping 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.

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