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UNITED STATES – LAWS, REGULATIONS AND METHODOLOGY FOR CALCULATING DUMPING MARGINS ("ZEROING")

Communication from the United States

The following communication, dated 12 June 2006, is circulated at the request of the delegation of the United States.

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1. In a prior communication[1], the United States presented some initial observations regarding the report of the Appellate Body in *US – Zeroing (EC)*.[2] In light of comments received, including those by other Members regarding the report at the last meeting of the Dispute Settlement Body, and because the United States considers the issues presented by this Appellate Body report to be important to the effectiveness and credibility of the WTO dispute settlement system, the United States takes this opportunity to share with Members some additional observations concerning the report.

2. In the First US Communication, the United States described the troubling implications of the Appellate Body's conclusions for other provisions of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Anti-Dumping Agreement"). The United States also described the disturbing failure of the Appellate Body's analysis to address significant arguments that were presented.

3. However, an even more significant defect in the Appellate Body report is that the Appellate Body's reasoning is fatally flawed. In brief, the Appellate Body erroneously concluded that Members must provide offsets for non-dumped transactions whenever "multiple comparisons" are made, and that only by aggregating the results of those multiple comparisons will a Member determine a margin of dumping for the "product as a whole". This conclusion finds no basis in the text of the Anti-Dumping Agreement. This conclusion also fails to take into account important context for the terms that are in the text of the Anti-Dumping Agreement and the *General Agreement on Tariffs and Trade 1994* ("GATT 1994").

4. Obligations under the covered agreements flow from the text of those agreements, and the text of those agreements alone. As the Appellate Body has noted: "The legitimate expectations of the parties to a treaty are reflected in the language of the treaty itself."[3] Unfortunately, in *US – Zeroing (EC)*, the Appellate Body did not base its findings on a reasoned analysis of the text of the applicable

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[1] *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"); Communication from the United States*, WT/DS294/16 (17 May 2006) (hereinafter "First US Communication").

[2] Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006 (hereinafter "*US – Zeroing (EC) (AB)*").

[3] Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, para. 45.

agreements. Instead, it relied primarily on prior Appellate Body reports (and a misapprehension of those reports, at that). While Appellate Body reports can provide valuable clarification of the covered agreements, Appellate Body reports are not themselves agreed text nor are they a substitute for the text that was actually negotiated and agreed. In relying on prior Appellate Body reports rather than the text of the covered agreements, the Appellate Body took findings from one set of factual circumstances and applied them inappropriately to another, different set of factual circumstances without making allowances for those differences. Specifically, the Appellate Body declared that its findings of an obligation to provide offsets when aggregating comparisons in the context of multiple averaging[4] necessarily led to a finding that there is an obligation to provide offsets whenever multiple comparisons of any kind are made, whether averaged or not.[5]

5. Furthermore, the Appellate Body, as noted in the First US Communication, failed to consider contextual arguments demonstrating that the approach it ultimately chose would create severe problems of interpretation not only with respect to the Anti-Dumping Agreement, but also with respect to the GATT 1994.[6] The meager analysis found in *US – Zeroing (EC) (AB)* stands in stark

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[4] Previously, the Appellate Body defined multiple averaging as "the practice of investigating authorities of sub-dividing the product under investigation into sub-groups of comparable transactions and determining a weighted average normal value and a weighted average export price for the transactions in each sub-group." Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004, para. 68 (hereinafter "*US – Softwood Lumber V (AB)*").

[5] *US – Zeroing (EC) (AB)*, para. 127 ("Therefore, if the investigating authority establishes the margin of dumping on the basis of multiple comparisons made at an intermediate stage, it is required to aggregate the results of all of the multiple comparisons, including those where the export price exceeds the normal value.").

The Appellate Body may have been confusing "model zeroing" with "simple zeroing," to use the terminology employed by Members that have challenged the use of zeroing, such as the European Communities ("EC") and Japan. According to these Members, "model zeroing" refers to a method whereby an authority makes average-to-average comparisons of export price and normal value within individual "averaging groups" established on the basis of physical or other characteristics ("models") and disregards any amounts by which average export prices for particular models exceed normal value in aggregating the results of these multiple comparisons to calculate a weighted average margin of dumping. Under "model zeroing," when an authority aggregates the results of model-specific, average-to-average comparisons of normal value and export price into a weighted average margin of dumping, the numerator of that margin of dumping only includes the results of models for which the average export price is less than the normal value.

On the other hand, "simple zeroing," in the parlance of Members such as the EC and Japan, refers to a method whereby an authority determines a weighted average margin of dumping or an assessment rate based on average-to-transaction or transaction-to-transaction comparisons between export price and normal value and disregards any amounts by which export prices of individual transactions exceed normal value in aggregating the results of these multiple comparisons. Under "simple zeroing," when an authority aggregates the results of comparisons of normal value and export price made on an average-to-transaction basis or on a transaction-to-transaction basis, the numerator of the weighted average margin of dumping only includes the results of those comparisons in which individual export prices are less than the normal value.

Previous Appellate Body reports involving zeroing dealt with "model zeroing." See *US – Softwood Lumber V (AB)*; and Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001. In *US – Zeroing (EC) (AB)*, the Appellate Body appeared to simply assume that because "model zeroing" has been found to be prohibited, "simple zeroing" also is prohibited. Of course, if these types of "zeroing" could be presumed to be the same, there would have been no need for complaining parties to label them differently. In addition, the Appellate Body's apparent assumption overlooks the fact that "simple zeroing" occurs in the context of transaction-specific comparisons, whereas "model zeroing" occurs in the context of comparisons involving averages.

[6] In this regard, the United States notes that the Appellate Body has in other disputes recognized the value and importance of considering the impact of a proposed interpretation for other agreement provisions. For example, in the *US – Softwood Lumber CVD* dispute, the Appellate Body disagreed with the Panel's understanding that the term "in relation to" meant "in comparison with". To support its conclusion, the Appellate Body went through the SCM Agreement and showed how such an interpretation would not make sense in other parts of the SCM Agreement where "in relation to" was used:

contrast to the reports in *US – Zeroing (EC) (Panel)* and *US – Softwood Lumber V (Article 21.5)*.[7] These two reports, which were drafted by panelists with extensive experience in the trade remedies area, came to the conclusion that with the exception of average-to-average comparisons in investigations, the GATT 1994 and the Anti-Dumping Agreement do not preclude zeroing. In reaching a different conclusion, the Appellate Body simply erred, both as a matter of interpretation and as a matter of the applicable standard of review.

A. The Appellate Body's Erroneous Conclusion that Authorities Must Provide Offsets Whenever They Conduct Multiple Comparisons

6. In *US – Zeroing (EC)*, the Appellate Body based its analysis in key respects not on the text of the Anti-Dumping Agreement but on its own prior reports, particularly its report in *US – Softwood Lumber V (AB)*. As just one example, the Appellate Body relied heavily on its interpretation of the term "product as a whole". However, "product as a whole" is a term that is not found anywhere in the Anti-Dumping Agreement nor in Article VI of the GATT 1994. In using its prior reports as a key starting point for its analysis rather than the text of the covered agreements, the Appellate Body came to the erroneous conclusion that any kind of aggregated comparison requires an offset, regardless of context.

1. The Appellate Body's Mistaken Expansion of Softwood Lumber V

7. Contrary to the Appellate Body's suggestion, *US – Softwood Lumber V (AB)* was limited to the first sentence of Article 2.4.2 of the Anti-Dumping Agreement and the question of whether zeroing is permissible when using the average-to-average comparison method in an anti-dumping investigation. The Appellate Body's analysis in that dispute is simply inapplicable in other contexts, such as assessment proceedings.

8. More specifically, the issue in *US – Softwood Lumber V (AB)* was whether Article 2.4.2 of the Anti-Dumping Agreement proscribes zeroing in the context of "multiple averaging"; *i.e.*, a method whereby an authority divides a product under investigation into product types or models, calculates a weighted average normal value and a weighted average export price for each product type or model, and then aggregates the results of these comparisons to derive an overall margin of dumping. The

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> We observe that the phrase "in relation to" is used in other provisions of the SCM Agreement in a manner that does not connote "in comparison with". For instance, Article 15.6 of the SCM Agreement states that "[t]he effect of the subsidized imports shall be assessed in relation to the domestic production of the like product". Article 15.6 cannot properly be read as requiring a comparison between "[t]he effect of the subsidized imports" and "the domestic production of the like product". Similarly, Article 15.3 of that Agreement provides that, in order to assess cumulatively the effects of imports of a product from more than one country that are simultaneously subject to countervailing duty investigations, investigating authorities must determine that, inter alia, "the amount of subsidization established in relation to the imports from each country is more than de minimis". In this provision, the phrase "in relation to" is not used in the sense of "in comparison with" but rather in the sense of "in proportion to". Therefore, the precise meaning of the phrase "in relation to" will vary depending on the specific context in which it is used.
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> Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, para. 89, note 107.

[7] Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/R, adopted 9 May 2006, as modified by the Appellate Body (hereinafter "*US – Zeroing (EC) (Panel)*"); and Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada: Recourse to Article 21.5 of the DSU by Canada*, WT/DS264/RW, circulated 3 April 2006 (hereinafter "*US – Softwood Lumber V (Article 21.5)*").

Appellate Body agreed with the participants in that dispute that Article 2.4.2 permits such multiple averaging, and noted that the participants disagreed on the proper interpretation of the terms "all comparable export transactions" and "margins of dumping" in Article 2.4.2. With respect to the interpretation of the term "margins of dumping", the Appellate Body stated that the "disagreement turns on the question of whether that term applies to the *product under investigation as a whole, or, at the sub-group level, when multiple averaging is undertaken*".[8] In its analysis of this question, the Appellate Body consistently characterized the issue before it in terms of whether the terms "dumping" and "margins of dumping" apply at the product or "sub-group" or "sub-product" level[9] and concluded, in light of, *inter alia*, Article 2.1 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994, that, for purposes of Article 2.4.2, dumping and margins of dumping can be found to exist only for a product as a whole and not for "a type, model or category of that product".[10] In other words, the Appellate Body developed the notion of "the product [under investigation] as a whole" to make a distinction between the "product," on the one hand, and "sub-group", "sub-product", "type", "model" or "category" on the other.

9. Thus, the terminology used by the Appellate Body in this respect was closely connected to the multiple averaging method and the Appellate Body's analysis thereof. Indeed, the Appellate Body itself indicated in *Softwood Lumber V* that it was interpreting the phrases "margins of dumping" and "all comparable export transactions" as they appear in Article 2.4.2 "in an integrated manner".[11]

10. In addition, in *Softwood Lumber V* the Appellate Body specifically declined to consider contextual arguments regarding the denial of offsets when an investigating authority uses the transaction-to-transaction or average-to-transaction comparison methods.[12] The Appellate Body stated:

> We fail to see how we could find that the transaction-to-transaction and average-to-individual methodologies could provide contextual support for the United States' interpretation of Article 2.4.2 without examining first whether zeroing is permitted under those methodologies.[13]

If the Appellate Body's finding in *US – Softwood Lumber V (AB)* had been based on an interpretation of Article 2.1 and some general obligation to find margins of dumping for the "product as a whole," then there would have been no need for the Appellate Body to consider separately whether the denial of offsets was permitted under the transaction-to-transaction and average-to-transaction comparison methods. In other words, it would have been misleading for the Appellate Body to claim that its finding left open the question of whether offsets were required under these other methods.

11. In *US – Zeroing (EC)*, the Appellate Body inexplicably divorced the phrase "product as a whole" from the original context in which it was coined[14] – the use of average-to-average comparisons in an investigation. In so doing, the Appellate Body also divorced the concept embodied in the phrase from its limited applicability in the context of Article 2.4.2. The Appellate Body simply decided that the concept "product as a whole" is not limited to the interpretation of obligations relating to multiple averaging. It did so by asserting that in *Softwood Lumber V* the requirement to calculate margins of dumping for the "product as a whole" meant that offsets must be provided not

[8] *US – Softwood Lumber V (AB)*, para. 84 (emphasis added).
[9] *US – Softwood Lumber V (AB)*, paras. 90-91, 97, 99, 101-103 and 115.
[10] *US – Softwood Lumber V (AB)*, paras. 93, 96.
[11] *US – Softwood Lumber V (AB)*, para. 85.
[12] *US – Softwood Lumber V (AB)*, para. 105.
[13] *US – Softwood Lumber V (AB)*, para. 105.
[14] It bears repeating that the phrase "product as a whole" was invented and is not a phrase found in the text of either the Anti-Dumping Agreement or Article VI of the GATT 1994.

only when aggregating intermediate values in the context of *multiple averaging*, but when undertaking "*multiple comparisons*" more generally.[15] That statement is simply wrong.[16] The reasoning in *US – Softwood Lumber V (AB)* was expressly limited to comparisons in connection with multiple averaging, not all so-called "multiple comparisons" more generally.

12. The Appellate Body's assumption that the analysis in *US – Softwood Lumber V (AB)* is applicable to all instances when there are multiple comparisons, rather than just multiple averaging, is not just unfounded but also leads to further errors. The Appellate Body appears to view "multiple comparisons" as including any situation in which there is more than a single export transaction. Although the Appellate Body has suggested that Members have a choice as to whether to use "multiple comparisons" in calculating the margin of dumping, the inevitable consequence of the Appellate Body's reasoning would be that Members *must*, in fact, aggregate transactions in order to calculate a margin of dumping whenever there is more than a single export transaction; *i.e.*, in virtually all situations.[17] Thus, as discussed below, not only is the Appellate Body's assertion that "an investigating authority *may choose* to undertake multiple comparisons"[18] simply wrong, but it means that the Appellate Body, based on a phrase it created and that is not in the text of the Anti-Dumping Agreement, has prohibited zeroing in every circumstance in which a Member calculates a margin of dumping.

2. The Correct Analysis of "Product as a Whole" and "Margins of Dumping"

"Product as a whole"

13. In *US – Softwood Lumber V (Article 21.5)*, the panel properly rejected Canada's attempt to take the phrase "product as a whole" – not found anywhere in the Anti-Dumping Agreement or the GATT 1994 – that the Appellate Body used in *US – Softwood Lumber V (AB)* and apply it outside of the context of Article 2.4.2 of the Anti-Dumping Agreement. The panel correctly noted that in the context of the average-to-average method where comparisons are made for each of several sub-groups, "it was entirely logical for the Appellate Body to have concluded that the margin of dumping for the 'product as a whole' must fully reflect those instances where, for a particular sub-group, the weighted average export price was greater than the weighted average normal value".[19] The panel then explained why it would be wrong to extend the Appellate Body's "product-as-a-whole" concept to other comparison methods:

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[15] The Appellate Body in *US – Zeroing (EC)* states that the "Appellate Body specified that, while an investigating authority may choose to undertake multiple comparisons or multiple averaging at an intermediate stage to establish margins of dumping, 'it is only on the basis of aggregating *all* these 'intermediate values' that an investigating authority can establish margins of dumping for the product under investigation as a whole." Para. 126, citing *US – Softwood Lumber V (AB)*, para. 97 (emphasis in original). To the contrary, however, in paragraph 97 of *US – Softwood Lumber V (AB)*, the Appellate Body expressly referenced "multiple averaging" and "multiple comparisons *at the sub-group level*" (emphasis added).

[16] The Appellate Body now considers zeroing to be prohibited whenever a Member engages in "multiple comparisons," but it declined to address whether zeroing is also prohibited in transaction-to-transaction comparisons in investigations. Notwithstanding the logical flaw in that view, to the extent the Appellate Body may consider zeroing to be prohibited only where "multiple comparisons" occur, it should be noted that, as discussed below, the US assessment system results in the same assessment of anti-dumping duties as a transaction-by-transaction, prospective normal value system, but only if zeroing is permitted under the US system. Otherwise, to equalize the two systems, zeroing would have to be also prohibited in transaction-by-transaction assessment systems, which is akin to requiring authorities to compensate an importer for individual importations for which normal value is less than the export price.

[17] Based on the experience of the United States, it is exceedingly rare for an anti-dumping investigation or review to involve only a single export transaction for an exporter.

[18] *US – Zeroing (EC) (AB)*, para. 126 (emphasis added).

[19] *US – Softwood Lumber V (Article 21.5)*, para. 5.22.

> [A]lthough there is little doubt that a margin of dumping is established for each exporter/producer with respect to the product under investigation, further examination indicates that "product" need not necessarily be interpreted as "product as a whole", in the sense that Canada posits, that is, the summed results, fully reflecting negative and positive results, of all comparisons concerning the product under investigation. There are also good reasons why "margins of dumping" need not necessarily relate to "the product as a whole" in all circumstances in the *AD Agreement*.

The Appellate Body drew its conclusion that dumping is to be found for the "product as a whole" from its consideration of Article VI of *GATT 1994* and Article 2.1 of the AD Agreement, which both define the concept of "dumping", in the case of the latter, by its own terms for the entire *AD Agreement*. To extend the Appellate Body's reference to the concept of "product as a whole" in the sense that Canada proposes to the [transaction-to-transaction] methodology would entail accepting that it applies throughout Article VI of *GATT 1994*, and the *AD Agreement*, wherever the term "product" or "products" appears. A review of the use of these terms does not support the proposition that "product" must always mean the entire universe of exported product subject to an anti-dumping investigation. For instance, Article VI:2 states that a contracting party "may levy on any dumped product" an anti-dumping duty. Article VI:3 provides that "no countervailing duty shall be levied on any product". Article VI:6(a) provides that ["] no contracting party shall levy any anti-dumping or countervailing duty on the importation of any product ...". Similarly, Article VI:6(b) provides that a contracting party may be authorized "to levy an anti-dumping or countervailing duty on the importation of any product". Taken together, these provisions suggest that "to levy a duty on a product" has the same meaning as "to levy a duty on the importation of that product". Canada's position, if applied to these provisions, would mean that the phrase "importation of a product" cannot refer to a single import transaction. In many places where the words product and products are used in Article VI of the *GATT 1994*, an interpretation of these words as necessarily referring to the entire universe of investigated export transactions is not compelling.[20]

14. The United States agrees with the panel's analysis, and makes the following observations in support thereof. In its report, the Appellate Body refers several times to the concept of the "product as a whole" and states that this concept is "clear" from the text of Article 2.1 of the Anti-Dumping Agreement and Article VI of the GATT 1994.[21] It is very unclear what the Appellate Body means by "product as a whole" or why that concept derives from the terms of Article 2.1 of the Anti-Dumping Agreement and Article VI of the GATT 1994. Neither of those provisions contains the term "product as a whole". In fact, those provisions both refer simply to "product". The term "product" does not in and of itself convey the meaning the Appellate Body assigns to it: "if the investigating authority establishes the margin of dumping on the basis of multiple comparisons made at an intermediate stage, it is required to aggregate the results of all of the multiple comparisons, including those where the export price exceeds the normal value. If the investigating authority chooses to undertake

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[20] *US – Softwood Lumber V (Article 21.5)*, paras. 5.22-5.23. The panel added that:

> [W]e consider that there is nothing inherent in the word "product[]" (as used in Article VI:1 of the *GATT 1994* and Article 2.1 of the *AD Agreement*) to suggest that this word should preclude the possibility of establishing margins of dumping on a transaction-specific basis, although this should not imply that a margin of dumping established with respect to a particular transaction is sufficient to impose an anti-dumping measure on all subsequent imports of the product. The notion that "a product is introduced into the commerce of another country" (Article 2.1) clearly can meaningfully apply to a particular export sale and does not require consideration of different export sales taken together.

Id., note 32.

[21] *US – Zeroing (EC) (AB)*, para. 126.

multiple comparisons at an intermediate stage, it is not allowed to take into account the results of only some multiple comparisons, while disregarding others."[22]

15. In other words, for the Appellate Body, the term "product" means that Members are required to average the entries of all of the particular product from a particular exporter or producer, at least where the investigating authority "chooses" to undertake multiple comparisons at an intermediate stage. As the United States has explained, the Appellate Body interprets Article 6.10 as prohibiting the calculation of a margin on transaction-specific basis, and there is therefore no real "choice" for investigating authorities. Such a reading of the term "product" would have significant implications for other places where "product" is used. It would mean for example that the treatment of a "product" is to be determined not with respect to the entry of that product, but with respect to an average of all particular entries of that product.

16. However, there is nothing in the Anti-Dumping Agreement nor the GATT 1994 that requires such a constrained reading of the term "product". Nothing prevents the term "product" from meaning the single entry of a particular product. The Appellate Body's own report demonstrates that this is a correct meaning of the term "product". In paragraph 109, the Appellate Body states: "Under this system, the United States collects security in the form of a cash deposit at the time a product enters the United States, and determines the amount of duty due on the entry at a later date". Here, the Appellate Body is clearly using "product" to refer to a single entry.

17. Furthermore, a reading of the term "product" in Article VI of the GATT 1994 as requiring the aggregation of multiple transactions does not reflect the ordinary meaning of the term in context. For example, that reading does not work in the context of Article VII of the GATT 1994. The panel in *US – Softwood Lumber V (Article 21.5)* observed that: **"[A]n analysis of the use of the words product and products throughout the *GATT 1994*, indicates that there is no basis to equate product with 'product as a whole' in the sense in which Canada uses that term in this proceeding. Thus, for example, when Article VII:3 of the GATT refers to 'the value for customs purposes of any imported product', this can only be interpreted to refer to the value of a product in a particular import transaction.**"[23] Similarly, that reading does not work in the context of Article II of the GATT 1994. Article II:2(b) specifically uses the term "product" in relation to "any anti-dumping or countervailing duty applied consistently with the provisions of Article VI". If, as the Appellate Body found, the term "product" for purposes of Article VI "clearly" means "product as a whole," then the term "product" for purposes of Article II would also mean "product as a whole". Yet that reading, if product as a whole in fact requires an examination of multiple transactions, simply does not work. "Product" is used several places in Article II. The Appellate Body's reading would mean, for example, that for purposes of the other two items listed in paragraph 2 of Article II – "a charge equivalent to an internal tax" and "fees or other charges commensurate with the cost of services rendered" – each Member would need to consider the "product as a whole". In other words, a Member would average the charges or fees applied to all the entries of a product to determine if the charge was equivalent to an internal tax or commensurate with the cost of services rendered. The result would be even more striking for the tariff treatment of a "product". Again, since the Appellate Body finds that "product" means "product as a whole," and if "product as a whole" requires consideration of multiple transactions, then in determining if a Member has abided by its tariff bindings, it would be necessary to consider the "product as a whole". It would be permissible to impose a tariff in excess of the bound rate of duty on particular entries so long as it was "offset" by the tariff on other entries such that the tariff for the "product as a whole" does not exceed the bound rate. The United States suspects that Members may have some difficulty with this reading of "product".

[22] *US – Zeroing (EC) (AB)*, para. 127.
[23] *US – Softwood Lumber V (Article 21.5)*, note 36.

"Margins of dumping"

18. With respect to the phrase "margins of dumping," the panel in *US – Softwood Lumber V (Article 21.5)* noted that, pursuant to the text of Article VI, dumping is essentially a price difference.[24] Pursuant to Article VI:1 and VI:2 of the GATT 1994, a margin of dumping exists when the price of a product is less than its normal value.[25] The panel found that this definition of the margin of dumping as a price difference could be applied to individual transactions and does not require an examination of export transactions at an aggregate level:

> In the absence of any definition of the phrase "margins of dumping" in Article 2.4.2, and in the absence of any obligation under the [transaction-to-transaction] methodology to ensure that "all comparable export transactions" are represented in a weighted average export price, we see no reason why a Member may not, when applying the transaction-to-transaction comparison methodology, establish the "margin of dumping" on the basis of the total amount by which transaction-specific export prices are less than the transaction-specific normal values. In such cases, the margin of dumping clearly would reflect the price difference for dumped, rather than non-dumped, exports of the product by a particular exporter. In our view, this would be a permissible interpretation of the relevant part of the first sentence of Article 2.4.2, even though it does not reflect the full results of all comparisons. In other words, when establishing the amount of dumping for the purpose of calculating a margin of dumping under the [transaction-to-transaction] comparison methodology, an investigating authority need not include in its calculations the results of comparisons where export price exceeds normal value.[26]

19. Thus, the analysis of the panel in *US – Softwood Lumber V (Article 21.5)* was based firmly on the text of the Anti-Dumping Agreement and the GATT 1994. By contrast, in *US – Zeroing (EC)*, the Appellate Body failed to address fully the terms of the covered agreements, in light of their context, and in light of the object and purpose of the agreements. Instead, the Appellate Body interpreted its own report language, removed from the context of the agreement provisions with respect to which the language was first coined, in order to achieve the result of requiring offsets in all contexts.

B. The Appellate Body's Erroneous Conclusion that the Margin of Dumping Cannot be Transaction-Specific

1. The Appellate Body Misinterpreted Article 6.10 of the Anti-Dumping Agreement

20. The Appellate Body compounded its error by finding that the margin of dumping cannot be calculated on a transaction-specific basis.[27] The Appellate Body relied on Article 6.10 of the Anti-Dumping Agreement to find that margins of dumping must invariably be established on an exporter- or producer-specific basis, which it assumed was inconsistent with calculating a margin of dumping on a transaction-specific basis.[28]

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[24] *US – Softwood Lumber V (Article 21.5)*, para. 5.27 ("While 'margins of dumping' is not defined by the *AD Agreement*, Article VI:2 of the *GATT 1994* provides that, for the purposes of Article VI, 'the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1' of Article VI.").

[25] *US – Softwood Lumber V (Article 21.5)*, para. 5.27 ("In other words, there is dumping when the export 'price' is less than the normal value. Given this definition of dumping, and the express linkage between this definition and the phrase 'price difference', it would be permissible for a Member to interpret the 'price difference' referred to in Article VI:2 as the amount by which the export price is less than normal value, and to refer to that 'price difference' as the 'margin of dumping'.") (footnote omitted; underscoring in original).

[26] *US – Softwood Lumber V (Article 21.5)*, para. 5.28 (footnote omitted; underscoring in original).

[27] *US – Zeroing (EC) (AB)*, paras. 128-30.

[28] *US – Zeroing (EC) (AB)*, para. 128.

21. The assumption is a *non sequitur* because the Appellate Body proceeds on the false premise that a margin of dumping cannot be both exporter-specific *and* transaction-specific. However, Article 6.10 simply provides that a Member must calculate a margin for each individual exporter or producer – as opposed to one margin for all exporters or producers (or, as it was described in *Mexico – Rice (AB)*, "company-specific" versus "country-wide").[29] This understanding of Article 6.10 is confirmed by the Spanish text of that article, which provides that the investigating authority must determine a margin of dumping "que corresponda a cada exportador" or "that corresponds to each exporter". A margin may correspond to an exporter while being based on one transaction – as long as that transaction is the exporter's. Article 6.10 says nothing about whether the margin must be based on more than one transaction, and it does not prohibit the calculation of a margin of dumping on a transaction-specific basis.

22. Indeed, in its 1960 report, the Group of Experts considered that the ideal method for imposing an anti-dumping duty is to make a determination of dumping with respect to *each single importation* of the product.[30] Therefore, under Article VI, a margin of dumping ideally would be *both* transaction-specific *and* calculated on an exporter-specific basis, and Article 6.10 of the Anti-Dumping Agreement does not provide to the contrary. The Appellate Body's conclusion that the margin of dumping cannot be transaction-specific because Article 6.10 requires the margin of dumping to be calculated for each exporter is without basis.

23. It should also be noted that a consequence of the Appellate Body's assertion that the margin of dumping cannot be calculated on a transaction-specific basis is that an investigating authority *must* calculate the margin of dumping based on all of the exporter's transactions. However, it is difficult to see how this can be done without aggregating multiple comparisons. In this sense, the Appellate Body's interpretation of Article 6.10 as precluding transaction-specific margins of dumping renders hollow its suggestion that authorities undertake multiple comparisons as a matter of choice.[31] In fact, the Appellate Body is effectively requiring the very aggregation of comparisons it insists must be accompanied by offsets. The difficulty with the Appellate Body's reference to "*if* a margin of dumping is calculated on the basis of multiple comparisons made at an intermediate stage"[32] is underscored by the fact that the Appellate Body never indicates what the alternative could be to using multiple comparisons.

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[29] Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice; Complaint with Respect to Rice*, WT/DS295/AB/R, adopted 20 December 2005, paras. 208, 217 ("*Mexico – Rice (AB)*").

[30] The Second Report of the Group of Experts on *Anti-Dumping and Countervailing Duties*, adopted on 27 May 1960, BISD 9S/194, para. 8.

[31] *See US – Zeroing (EC) (AB)*, para. 127. Further, even on its own terms, the Appellate Body's statement that Members "choose" to engage in "multiple comparisons" is simply incorrect, because, as a practical matter, it is difficult for authorities to avoid having to undertake multiple comparisons, whether in the form of multiple averaging of sub-groups or transaction-specific calculations. Here again, perhaps due to its lack of familiarity with the manner in which anti-dumping systems are actually administered, the Appellate Body removes from its original context a statement it made in an earlier report and applies that statement more broadly in a manner that makes no sense. Specifically, the Appellate Body's discussion of "choosing" multiple comparisons in the *Lumber* report was related to the choice of multiple averaging; *i.e.*, "multiple comparisons *at the subgroup level*." *US – Softwood Lumber V (AB)*, paras. 97-98 (emphasis added). However, in *US – Zeroing (EC)*, the Appellate Body characterizes its statement regarding "choosing" as applying to multiple comparisons, and not multiple averaging.

[32] *US – Zeroing (EC) (AB)*, para. 127.

2. The Appellate Body Appears to Have Exaggerated the Differences Between a Retrospective Assessment System and a Prospective Normal Value System

24. In its report, the Appellate Body states that a prohibition on zeroing would not "mean that liability for payment of anti-dumping duties may not be based on a prospective normal value as contemplated by Article 9.4(ii) of the *Anti-Dumping Agreement*".[33] In so stating, the Appellate Body appears to have been of the view that there are significant differences between prospective normal value systems and retrospective assessment systems, such as the system used by the United States. In fact, the differences that exist are largely ones of form.

25. Under the US retrospective assessment system, the export price for an individual export transaction is compared to a contemporaneous monthly average normal value. If the export price is lower than the monthly average normal value, a dumping margin exists. The understanding of the United States is that prospective normal value systems work on the same basic principles; *i.e.*, the export price of an individual export transaction is compared to a contemporaneous normal value, and if the export price is lower, a dumping margin exists. Under both systems, duties can be assessed in absolute amounts on specific transactions.[34]

26. Thus, both types of systems are essentially transaction-specific. The two major differences between the systems are entirely ones of form. First, in a retrospective system, the normal value and export price are determined *after* the transaction has taken place, whereas in a prospective normal value system, normal value and export price are determined *at or around* the time of importation. However, a normal value for the month of October 2004, should be the same regardless of whether it is determined in October 2005 (as might happen under a retrospective system), or in September 2004 (as might happen under a prospective normal value system).

27. Second, in a retrospective system, authorities may convert absolute duty amounts into *ad valorem* percentages. In the United States, approximately fifteen years ago the US Department of Commerce decided to cease assessing duties in the form of absolute amounts and to begin issuing assessment instructions in the form of *ad valorem* percentages. This was done with the objective of easing the burden on both administrators and private entities. However, as a matter of mathematics, the use of an *ad valorem* percentage results in exactly the same amount of anti-dumping duty liability as would be due if absolute amounts were used.

28. Therefore, given the fact that retrospective systems and prospective normal value systems are both essentially transaction-specific, it is difficult to understand the Appellate Body's apparent distinction between the two types of systems. If zeroing is prohibited in the case of a retrospective system, then it must also be prohibited in the case of a prospective normal value system. However, notwithstanding the Appellate Body's apparent assertion to the contrary in footnote 234 of its report, the United States fails to see how a prospective normal value system can operate if authorities do not use zeroing.[35]

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[33] *US – Zeroing (EC) (AB)*, note 234.

[34] In other words, if the difference between the normal value and the export price is $5, authorities can assess $5 on the transaction, as opposed to applying some *ad valorem* percentage.

[35] The Appellate Body states that the disallowance of zeroing "does [not] mean that liability for payment of anti-dumping duties may not be based on a prospective normal value as contemplated by Article 9.4.(ii) of the *Anti-Dumping Agreement*." *US – Zeroing (EC)*, note 234. However, as the United States explained in the First US Communication, prospective normal value assessment systems operate on a transaction-specific basis. If, as the Appellate Body posits, margins of dumping must be calculated for "the product as a whole," it would seem impossible for an authority to legitimately assess anti-dumping duties on a transaction-specific basis using a prospective normal value. The panel in *US – Softwood Lumber V (Article 21.5)*, para. 5.57, reached a similar conclusion, finding that the Appellate Body's interpretation of "margins of dumping" "makes no sense in the context of a prospective normal value duty assessment system,

3. The Consequences of the Appellate Body's Conclusion for Article 2.4.2

29. Further, this approach cannot be reconciled with the Appellate Body's assertion that it makes no finding with respect to the other two methodologies under Article 2.4.2.[36] The Appellate Body notes that Article 6.10 applies in investigations. However, the transaction-to-transaction and targeted dumping methodologies under Article 2.4.2 will, unless there is only one export transaction, always result in multiple comparisons. If, as the Appellate Body contends, Article 6.10 requires not simply the calculation of a margin of dumping for an individual exporter but rather a margin of dumping for an individual exporter based on all of that exporter's transactions, then it is impossible for a Member to calculate a margin of dumping without aggregating multiple comparisons.

30. The Appellate Body's reasoning has other perverse consequences for Article 2.4.2. For example, it renders the phrase "all comparable export transactions," as the Appellate Body has understood it, redundant. The Appellate Body has argued that Article 6.10 requires not just margins of dumping for individual exporters, but margins of dumping based on all of the exporter's transactions. If that is true, then it calls into question the meaning the Appellate Body ascribed to the phrase "all comparable export transactions" in *US – Softwood Lumber V (AB)*. If Article 6.10 requires consideration of all export transactions, and Article 2.1 requires offsets when making multiple comparisons of those transactions, then it is unclear why the Appellate Body in *US – Softwood Lumber V (AB)* considered the phrase "all comparable export transactions," in conjunction with the phrase "margins of dumping," to require the very same outcome. Indeed, it appears that the only way to escape the conclusion that the Appellate Body's analysis in *US – Zeroing (EC)* renders the phrase "all comparable export transactions" redundant or "inutile" (a result which the Appellate Body has otherwise indicated is to be disfavored) is to conclude that the US interpretation of the phrase "all comparable export transactions" in *US – Softwood Lumber V (AB)* was correct.[37]

31. The more logical interpretation of the Anti-Dumping Agreement is the one that panels have followed: that the requirement to provide offsets articulated in *US – Softwood Lumber V (AB)* is limited to the average-to-average comparison method in investigations based on the phrases "margins of dumping" and "all comparable export transactions" in the first sentence of Article 2.4.2; that no provision in the Anti-Dumping Agreement precludes the calculation of margins of dumping on a transaction-specific basis, consistent with Article VI of the GATT 1994 and the common understanding of that Article as expressed over forty-five years ago by the Group of Experts; and that Members are not obliged to give refunds on non-dumped transactions.

C. The Appellate Body's Conclusion that Article VI of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement Prohibit Zeroing

32. In the First US Communication, the United States noted the problematic nature of the Appellate Body's reliance in *US – Zeroing (EC)* on Article VI of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement.[38] Upon further reflection, our concern with this aspect of the Appellate Body's analysis has only increased.

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because . . . the 'margin of dumping' at issue is a transaction-specific price difference calculated for a specific import transaction." *See also* First US Communication, paras. 9-12.

[36] *US – Zeroing (EC) (AB)*, para. 203.

[37] In this regard, the US interpretation of Article 2.4.2 was as follows: "[A]rticle 2.4.2 provides no guidance as to how results of multiple comparisons are to be aggregated in order to calculate an overall margin of dumping for the product under consideration. . . . [I]n fact, 'Article 2.4.2 itself does not require that the results of those multiple comparisons be aggregated at all.'" *US – Softwood Lumber V (AB)*, para. 11.

[38] First US Communication, paras. 18-20.

33. As the United States noted previously, the text of Article VI did not change as a result of the Uruguay Round agreements, and the text of Article 2.1 of the Anti-Dumping Agreement mirrors the text of the Tokyo Round Anti-Dumping Code. However, while the pre-WTO incarnations of Article VI and Article 2.1 were in effect, two panels rejected challenges to zeroing. In *EC – Cotton Yarn*, the panel rejected an argument by Brazil that the EC's failure to make due allowances for negative margins was inconsistent with the Anti-Dumping Code.[39] In *EC – Audio Tapes*, the panel rejected a claim by Japan that the EC's "zeroing of negative margins" was inconsistent with Article 2.1 of the Anti-Dumping Code.[40] Consistent with these findings, the Uruguay Round negotiators actively discussed whether the use of "zeroing" should be restricted in what would become the WTO agreements.[41]

34. However, assuming for purposes of argument that the negotiators did agree to prohibit zeroing, it simply is not reasonable to conclude, as did the Appellate Body, that the negotiators chose to implement such an agreement *sub silentio* by leaving Article VI and Article 2.1 unchanged. First of all, such a conclusion is contrary to the normal inference one draws from the absence of a change in language, which is that the drafters intended no change in meaning.[42] Moreover, given that the negotiators elsewhere covered in great detail various aspects of dumping margin calculations, it is telling that they made no reference to the topic of "zeroing" in Article VI or Article 2.1.[43]

35. Second, the conclusion that the drafters secretly agreed to a reinterpretation of Article VI and Article 2.1 would imply that, through their use of zeroing, the EC, the United States, and Canada, among others, knowingly breached the GATT 1994 and the Anti-Dumping Agreement as soon as the WTO Agreement entered into force. However, absent an assumption of bad faith – which the Appellate Body has said is impermissible[44] – it cannot be credibly maintained that these Members, each of which was an active user of anti-dumping measures under the Anti-Dumping Code and an active participant in the Uruguay Round anti-dumping negotiations, agreed to a prohibition on zeroing in Article VI and Article 2.1 without any change in language to either provision – and then continued to use zeroing anyway. Nor can it credibly be maintained, in light of *EC – Cotton Yarn* and *EC – Audio Tapes*, that Article VI and Article 2.1 "clearly" support the notion that "dumping" is defined in relation to "the product as a whole".

36. In this vein, the United States recalls that Article 17.6(ii) of the Anti-Dumping Agreement provides that where a "relevant provision of the Agreement admits of more than one permissible

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[39] Panel Report, *EC – Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*, ADP/137, adopted 30 October 1995, para. 502.

[40] Panel Report, *EC – Anti-Dumping Duties on Audio Tapes in Audiocassettes Originating in Japan*, ADP/136, circulated 28 April 1995 (unadopted), para. 360.

[41] *See, e.g.*, *Communication from Japan*, MTN.GNG/NG8/W/30 (20 June 1988), item I.4(3), in which Japan expressed concern about a methodology wherein "negative dumping margins, i.e., the amount be which export price exceeds normal value, are ignored."

[42] Instructive in this regard is *US – Underwear*, in which the Appellate Body found that the disappearance in the *Agreement on Textiles and Clothing* of the earlier *Multi-Fibre Agreement* provision for backdating the operative effect of a restraint measure, "strongly reinforced the presumption that such retroactive application is no longer permissable [sic]." Appellate Body Report, *United States – Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24/AB/R, adopted 25 February 1997, page 15. The corollary, however, is that where a provision is not changed, there is a presumption that behaviour that previously was permissible remains permissible.

[43] *See* Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003, para. 99 (noting that the fact that "the treaty negotiators covered in great detail various aspects of the constructed value calculation, the omission of any reference to low-volume sales in the chapeau of Article 2.2.2 is telling" (footnote omitted)).

[44] Appellate Body Report, *Chile – Taxes on Alcoholic Beverages*, WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000, para. 74.

interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations". Two separate WTO panels composed of independent, impartial reviewers (many of whom have extensive experience in the trade remedies area) have found, with the exception of investigations using the average-to-average methodology[45], that the use of zeroing reflects a permissible interpretation of the Anti-Dumping Agreement. The Appellate Body's perfunctory conclusion that there is only one permissible interpretation simply has no persuasive force and cannot be reconciled with the appropriate standard of review.

[45] Specifically, the use of the average-to-average comparison method in anti-dumping investigations under the first sentence of Article 2.4.2 of the Anti-Dumping Agreement.