UNITED STATES – FINAL ANTI-DUMPING MEASURES ON STAINLESS STEEL FROM MEXICO: RECOURSE TO ARTICLE 21.5 OF THE DSU BY MEXICO

(WT/DS344)

FIRST WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

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I. INTRODUCTION

1. Proceedings under Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") are meant to address disagreements "as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings "of the Dispute Settlement Body ("DSB")." A panel composed under Article 21.5, therefore, begins with the recommendations and rulings of the DSB.

2. The United States welcomes Mexico's acknowledgment that the United States has complied with the DSB's recommendations and rulings in *US – Zeroing (Mexico)* concerning Mexico's "as applied" claims with respect to zeroing in investigations.[1] With respect to Mexico's claims regarding non-compliance with "as such" recommendations and rulings with respect to zeroing in administrative reviews, there is no dispute "as to the existence or consistency" of measures taken to comply. However, Mexico improperly attempts to expand the proper scope of this Article 21.5 proceeding by challenging the WTO-consistency of six administrative reviews (identified in the Annex to Mexico's panel request as case nos. 6 through 11), a 2005 sunset review (identified in the Annex as case no. 12), and the initiation notice for the 2010 sunset review (identified in the Annex as case. no. 13) that are not measures taken to comply,[2] as well as some unidentified "measures closely connected thereto," unidentified "future subsequent periodic reviews," and unidentified "instructions and notices issued pursuant thereto."[3]

3. It should be noted that, as part of the 2010 sunset review of the antidumping order at issue, the U.S. International Trade Commission ("ITC") voted on July 17 to revoke the order at issue in this dispute.[4] Under U.S. law, the antidumping duty order on *Stainless Steel Sheet and Strip in Coils from Mexico* will be revoked effective July 25, 2010, and all duties paid on entries on or after July 25, 2010 will be refunded in full, with interest.[5] Accordingly, the vast majority of duties paid on entries made after the expiry of the reasonable period of time to comply in this dispute have either already been liquidated or will be refunded as a result of the sunset review.

4. The United States has structured its first written submission as follows. First, the United States provides a brief overview of how its retrospective antidumping assessment system operates. Next, the United States addresses the specific measures challenged by Mexico in its

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[1] Mexico First Written Submission, para. 4 (acknowledging that the United States implemented DSB's recommendations and rulings concerning investigations). Mexico incorrectly refers to DSB "recommendations and rulings" concerning Mexico's "as such" claims relating to zeroing in investigations. The DSB made no such recommendation since the panel found that there was no purpose to making a recommendation in light of the fact that the United States abandoned the use of model zeroing in investigations in 2007. Panel Report in *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/R (Dec. 20, 2007) ("*US – Stainless Steel (Mexico) (Panel)*"), para. 7.50.

[2] Mexico First Written Submission, para. 93.

[3] Mexico First Written Submission, para. 93.

[4] U.S. International Trade Commission, News Release 11-079 (Inv. Nos. 701-TA0382 and 731-TA 798-803 (Second Review) (July 17, 2011), available at http://usitc.gov/press_room/news_release/2011/er0708jj2.htm. ("ITC Press Release") (Exhibit US-1).

[5] 19 U.S.C. §§ 1675(d)(2) and 1677g (Exhibits MEX-31, US-2); 19 C.F.R. § 351.222(i)(2)(I) (Exhibit MEX-48).

original request for the establishment of a panel, and the recommendations and rulings of the DSB. The United States then addresses the terms of reference of this Panel and requests that the Panel find that certain administrative reviews and "subsequent closely connected measures" are outside the terms of reference of this Article 21.5 proceeding. Finally, the United States explains why a variety of other arguments of Mexico should fail.

II. FACTUAL BACKGROUND

A. The U.S. Antidumping System

5. The United States maintains a retrospective antidumping duty assessment system. Pursuant to this system, at the time of importation, importers of products subject to an antidumping duty order post a security in the form of a cash deposit of the estimated amount of antidumping duties due.[6] On request, the U.S. Department of Commerce ("Commerce") determines the final amount of antidumping duties due through a proceeding commonly referred to as an administrative review.[7]

1. The Investigation

6. In an antidumping duty investigation, Commerce determines an individual margin of dumping for each exporter or producer of the subject merchandise that it investigates individually.[8] Commerce also determines an "all others" rate that applies to imports from those exporters or producers that were not investigated individually.[9]

7. If the margins of dumping determined by Commerce are above *de minimis*, and the ITC determines that the domestic industry is being materially injured, or is threatened with material injury, because of the dumped imports, Commerce will publish an antidumping duty order.[10]

2. Administrative Reviews

8. Interested parties may request an administrative review of the antidumping duty order each year in the anniversary month of the publication of the order.[11] Through these

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[6] 19 U.S.C. § 1673e(a)(3) (Exhibit MEX-29).

[7] 19 C.F.R. § 351.213(a) (Exhibit MEX-46). There are several different types of reviews in the U.S. system. The U.S. antidumping statute identifies periodic reviews of the amount of duty, reviews based on changed circumstances, five-year (or sunset) reviews, and new shipper reviews. *See* 19 U.S.C. § 1675 (Exhibit US-MEX-31). In this submission, the United States uses the term "administrative review" to refer to the periodic review of the amount of duty. *See* 19 U.S.C. § 1675(a)(1) (Exhibit MEX-31).

[8] 19 U.S.C. § 1677f-1(c)(1) (Exhibit MEX-36).

[9] 19 U.S.C. § 1673d(c)(5)(A) (Exhibit MEX-28).

[10] 19 U.S.C. § 1673e (Exhibit MEX-29).

[11] 19 C.F.R. § 351.213(b)(1) (Exhibit MEX-46).

administrative reviews, for each of the exporters or producers for whom an administrative review has been requested, Commerce determines the amount of dumping that occurred with respect to the sales made by an exporter or producer of the subject merchandise during the twelve months preceding the most recent anniversary month.[12]

9. The results of the administrative review serve as the basis for the calculation of the assessment rate for each importer of the subject merchandise covered by the administrative review.[13] The results also establish new estimated antidumping duties on imports going forward.[14] Any prior estimated antidumping duties for the exporters or producers reviewed would be withdrawn. If no administrative review is requested, no examination of sales made during the period of review is conducted by Commerce, and the final antidumping duties are assessed in the amount of the estimated duties that were required at the time of importation.[15] Commerce communicates the results of its determinations to U.S. Customs and Border Protection ("CBP") by issuing what are referred to as "instructions."

3. Sunset Reviews

10. Every five years after the publication of an antidumping duty order, Commerce and the ITC will conduct a "sunset review"[16] to determine whether revocation of the antidumping duty order would be likely to lead to a continuation or recurrence of dumping,[17] and the recurrence or continuation of material injury.[18] The United States will revoke an antidumping duty order unless both Commerce and the ITC make an affirmative finding of likelihood in a sunset review.[19]

4. Company-Specific Revocations

11. As discussed below, respondent companies may request that the order be revoked with respect to a particular respondent pursuant to Commerce regulations.[20] A request for a company-specific revocation must be accompanied by certifications and the company requesting revocation must agree to in writing to its immediate reinstatement in the order, as long as any

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[12] 19 C.F.R. § 351.213(b)(1) (Exhibit MEX-46); 19 C.F.R. § 351.213(e)(1)(i) (Exhibit MEX-46).
[13] 19 U.S.C. § 1675(a)(2)(C) (Exhibit MEX-31); 19 C.F.R. § 351.212(b)(1) (Exhibit MEX-45).
[14] 19 U.S.C. § 1675(a)(2)(C) (Exhibit MEX-31).
[15] 19 C.F.R. § 351.212(c)(1) (Exhibit MEX-45).
[16] 19 U.S.C. § 1675(c)(1) (Exhibit MEX-31).
[17] 19 U.S.C. § 1675a(c)(1) (Exhibit MEX-32).
[18] 19 U.S.C. § 1675a(a)(1) (Exhibit MEX-32). We note that Mexico argues that *both* Commerce and the ITC determined that the revocation of the anti-dumping duty order would be likely to lead to continuation or recurrence of dumping and continued the order. Mexico First Written Submission, para. 187. This is incorrect. Under the U.S. law, the ITC determines whether the revocation of the antidumping duty order is likely to lead to continuation or recurrence of *material injury*, not dumping.
[19] 19 U.S.C. § 1675(d)(2) (Exhibit MEX-31).
[20] *See infra* section IV.B.1.

exporter or producer is subject to the order, if the company sells merchandise at less than normal value after its revocation.

B. Original Dispute

1. Mexico's Original Claims

12. Mexico challenged U.S. laws, regulations, and administrative procedures for determining dumping in original investigations and administrative reviews as inconsistent "as such," with the *Marrakesh Agreement Establishing the World Trade Organization* ("Marrakesh Agreement"), the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), and the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement").[21] Mexico also challenged U.S. law, regulations, and administrative procedures for determining dumping in one original investigation and five administrative reviews (cases 1 through 5 in Mexico's September 8, 2010 panel request) as inconsistent "as applied," with the Marrakesh Agreement, the GATT 1994, and the AD Agreement.[22] For all of these claims, Mexico argued that, in calculating a margin of dumping, the United States must provide offsets for non-dumped sales. The U.S. approach of not providing offsets is commonly referred to as "zeroing."

2. Panel Proceedings

13. On December 20, 2007, the original panel issued its report finding that Commerce's use of its "model zeroing"[23] methodology in investigations was "as such" inconsistent with Article 2.4.2 of the AD Agreement.[24] However, the panel also found that the "as such" measure at issue, the so-called model zeroing procedures, "expired on 22 February, 2007."[25] Accordingly, the panel refrained from making recommendations regarding this expired measure.[26] The panel further found that, "as applied," the United States acted inconsistently with Article 2.4.2 by using model zeroing in the antidumping investigation of stainless steel from Mexico.[27]

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[21] Request for the Establishment of a Panel by Mexico, *United States – Final Antidumping Measures on Stainless Steel From Mexico*, pp. 1-3, WT/DS344/4 (Oct. 16, 2006) ("Mexico Panel Request").

[22] Mexico Panel Request, pp. 3-8.

[23] "Model zeroing" refers to zeroing in average-to-average comparisons. Panel Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/R (Dec. 20, 2007) ("*US – Stainless Steel (Mexico) (Panel)*"), paras. 6.7-6.9.

[24] *US – Stainless Steel (Mexico) (Panel)*, para. 6.62.

[25] *US – Stainless Steel (Mexico) (Panel)*, para. 7.45.

[26] *US – Stainless Steel (Mexico) (Panel)*, para. 7.50 ("We shall refrain from making recommendations even if we find this measure to be inconsistent with the United States' WTO obligations since we have found that the United States abandoned the practice of model zeroing in investigations as from 22 February, 2007"). We note that Mexico did not appeal these findings and they were adopted by the DSB.

[27] *US – Stainless Steel (Mexico) (Panel)*, para. 6.63.

14. With respect to the use of "simple zeroing"[28] in administrative reviews, the panel found that simple zeroing was "as such" consistent with Articles 2.1, 2.4 and 9.3 of the AD Agreement and Articles VI:1 and VI:2 of the GATT 1994.[29] The panel rejected Mexico's "as applied" claim with regard to the five administrative reviews.[30]

3. Appellate Body Proceedings

15. Mexico appealed the panel's findings and conclusions that, in administrative reviews, Commerce's use of a model zeroing methodology was not inconsistent, "as such" and "as applied," with the WTO agreements.[31]

16. On April 30, 2008, the Appellate Body reversed the panel's findings and found that simple zeroing in administrative reviews is "as such" inconsistent with Article VI:2 of the GATT 1994 and Article 9.3 of the AD Agreement.[32] Next, the Appellate Body found that the United States acted inconsistently, "as applied," with Article VI:2 of the GATT 1994 and Article 9.3 of the AD Agreement by applying simple zeroing in the five administrative reviews.[33] With regard to Mexico's claim that the panel acted inconsistently with Article 11 of the DSU by failing to address certain arguments in support of Mexico's claim concerning Article 2.4 of the AD Agreement, the Appellate Body found it unnecessary to make a finding.[34]

4. Implementation of the DSB Recommendations and Rulings

17. On May 20, 2008, the Dispute Settlement Body ("DSB") adopted its recommendations and rulings in this dispute.[35] At the following DSB meeting, on June 2, 2008, the United States informed the DSB of its intention to comply with its WTO obligations in this dispute.[36] On August 11, 2008, Mexico requested that a reasonable period of time ("RPT") be established by

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[28] "Simple zeroing" refers to zeroing in average-to-transaction or transaction-to-transaction comparisons. *US – Stainless Steel (Mexico) (Panel)*, paras. 6.7-6.9.

[29] *US – Stainless Steel (Mexico) (Panel)*, para. 6.149.

[30] *US – Stainless Steel (Mexico) (Panel)*, para. 6.149.

[31] Notification of an Appeal by Mexico, *United States – Final Anti-Dumping Measures on Stainless Steel From Mexico*, WT/DS344/7 (Jan. 31, 2008) ("Mexico Notification of Appeal"), paras. 1-3.

[32] Appellate Body Report, *US – Final Anti-Dumping Measures On Stainless Steel From Mexico*, WT/DS344/AB/R (May 20, 2008) ("*US – Stainless Steel (Mexico) (AB)*"), para. 165(a). The Appellate Body declined to make an additional finding on Mexico's claim that simple zeroing in administrative reviews was inconsistent, "as such," with Article VI:1 of the GATT 1994 and Articles 2.1 and 2.4 of the AD Agreement. *US – Stainless Steel (Mexico) (AB)*, paras. 135, 144.

[33] *US – Stainless Steel (Mexico) (AB)*, para. 165(b). The Appellate Body declined to make an additional finding on Mexico's claim under Article VI:1 of the GATT 1994 and Articles 2.1 and 2.4 of the AD Agreement. *US – Stainless Steel (Mexico) (AB)*, paras. 140, 144.

[34] *US – Stainless Steel (Mexico) (AB)*, para. 144.

[35] *See* Action by Dispute Settlement Body; Appellate Body Report and Panel Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/10 (May 23, 2008).

[36] WT/DSB/M/251, para. 9

means of binding arbitration, pursuant to Article 21.3(c) of the DSU.[37] An arbitrator was appointed, and on October 31, 2008, the arbitrator informed the DSB that he had determined that the RPT for the United States to implement the DSB recommendations and rulings was 11 months and ten days, that is, until April 30, 2009.[38]

18. On December 9, 2008, Commerce advised interested parties that it was initiating a proceeding under Section 129 of the Uruguay Round Agreements Act ("URAA")[39] in connection with this dispute.[40] On January 12, 2009, the Department issued its preliminary results, in which it recalculated the weighted-average dumping margins from the investigation by applying the methodology described in *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77722 (Dec. 27, 2006).[41]

19. On March 31, 2009, Commerce issued its final Section 129 determination.[42] On April 23, 2009, the U.S. Trade Representative instructed Commerce to implement its determination under Section 129 of the URAA, after consultations with Commerce and the appropriate congressional committees.[43] On April 29, 2009, Commerce published a notice of implementation of determination under Section 129 of the URAA, in which it recalculated the margins.[44] As a result, the margin for ThyssenKrupp Mexinox S.A. de C.V. ("Mexinox") and the "all others rate" has changed from 30.85 percent to 30.69 percent.[45]

20. On May 18, 2009, Mexico and the United States entered into an agreement concerning procedures for the resolution of the dispute under Articles 21 and 22 of the DSU.[46]

C. Mexico's Request for the Establishment of a Panel Under Article 21.5

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[37] *See* Request by Mexico for Arbitration under Article 21.3(c) of the DSU, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/13 (August 14, 2008).

[38] Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Award of the Arbitrator Florentino P. Feliciano, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/15 (October 31, 2008).

[39] 19 U.S.C. § 3538 (Exhibit US-3).

[40] *Implementation of the Findings of the WTO Dispute Settlement Panel and Appellate Body in United States - Final Anti-Dumping Measures on Stainless Steel from Mexico: Notice of Determination Under Section 129 of the Uruguay Round Agreements Act*, 74 Fed. Reg. 19527, 19527 (Dep't of Commerce April 29, 2009) (Exhibit MEX-15).

[41] *See id.* at 19527-28.

[42] *See id* at 19527.

[43] *See id.* at 19528.

[44] *See id.*

[45] *See id.*

[46] Understanding between Mexico and the United States Regarding Procedures under Articles 21 and 22 of the DSU, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/17 (May 20, 2009).

21. On September 10, 2010, Mexico submitted its request for the establishment of a panel under Article 21.5 of the DSU. In its Article 21.5 panel request, Mexico states that the United States had recalculated the dumping margin in the investigation without model zeroing, but Mexico contends that "the United States has taken no action" concerning the five administrative reviews which the DSB found to be inconsistent "as applied."[47] Mexico contends that, although the United States indicated that it was "'conferring with Mexico about the steps that the United States has taken to comply'... no other action has been taken by the United States."[48] Moreover, Mexico contends that the United States has "continued to use simple zeroing in a series of closely connected measures."[49]

22. In its panel request, Mexico contends that the United States acts inconsistently with Articles 17.14, 21.1 and 21.3 of the DSU, Articles 2.1, 2.4 and 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 "by continuing to maintain and use the simple zeroing measures in periodic reviews as a measure of general and prospective application and failing otherwise to implement the DSB's recommendations and rulings with respect to this measure."[50] Mexico also contends that the United States "has failed to adopt any measures by the end of the RPT or thereafter to implement the DSB's recommendations and rulings regarding the use of "simple zeroing" in the five administrative reviews.[51]

23. Mexico's Article 21.5 panel request includes eleven administrative reviews and two five-year sunset reviews, listed in the annex to its request. Along with the five administrative reviews from Mexico's original panel request, the annex includes six additional administrative reviews that were not included in Mexico's original request (including revocation determinations made in the context of two administrative reviews),[52] as well as two sunset reviews that were not included in Mexico's original request.[53] Mexico contends that these five additional administrative reviews and two sunset reviews are "closely connected." Mexico's Article 21.5 panel request also makes reference to instructions and notices related to the eleven administrative reviews and

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[47] Recourse to Article 21.5 of the DSU by Mexico, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/20 (September 8, 2010) ("Mexico 21.5 Panel Request"), pp. 2-3.

[48] Mexico 21.5 Panel Request, p. 3.

[49] Mexico 21.5 Panel Request, p. 3.

[50] Mexico 21.5 Panel Request, p. 3.

[51] Mexico 21.5 Panel Request, p. 4.

[52] *Compare* Mexico Panel Request, Annex, Specific Case Nos. 2- 6, *with* Mexico 21.5 Panel Request, Annex, Case Nos. 1-5. The eight additional administrative reviews and sunset reviews are: Case No. 6, Stainless Steel Sheet and Strip in Coils from Mexico (July 1, 2004- June 30, 2005), Case No. 7, Stainless Steel Sheet and Strip in Coils from Mexico (July 1, 2005- June 30, 2006), Case No. 8, Stainless Steel Sheet and Strip in Coils from Mexico (July 1, 2006- June 30, 2007), Case No. 9, Stainless Steel Sheet and Strip in Coils from Mexico (July 1, 2007- June 30, 2008), Case No. 10, Stainless Steel Sheet and Strip in Coils from Mexico (July 1, 2008- June 30, 2009), Case No. 11, Stainless Steel Sheet and Strip in Coils from Mexico (July 1, 2009- June 30, 2010), Case No. 12, Stainless Steel Sheet and Strip in Coils from Mexico (1st Sunset Review), Case No. 13, Stainless Steel Sheet and Strip in Coils from Mexico (2nd Sunset Review).

[53] Mexico 21.5 Panel Request, Annex. The sunset reviews are Case nos. 12 and 13.

two sunset reviews. Mexico raises claims under Articles 2.1, 2.4, 9.3, 11.2 and 11.3 of the AD Agreement and Article VI:2 of the GATT 1994."[54]

III. STANDARD OF REVIEW AND BURDEN OF PROOF

24. Under Article 11 of the DSU, a panel must "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability and conformity with the relevant covered agreements."[55] Moreover, under Article 19.2 of the DSU, the Panel's findings and recommendations may not add to or diminish the rights and obligations of Members under the covered agreements.

25. Mexico has the burden of proof as to its claims in this dispute. As the Appellate Body explained in *US – Corrosion-Resistant Steel CVD*:

> {t}he complaining Member bears the burden of proving its claim. In this regard, we recall our observation in *US – Wool Shirts and Blouses* that:
>
> > … it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that *the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence*.[56]

26. In *US – Shrimp AD (Ecuador)* the panel explained the relationship between Article 11 and the burden of proof. There, the panel correctly stated that in accordance with its obligations under Article 11 of the DSU, it had to satisfy itself that, even though the responding party did not contest Ecuador's claims, Ecuador had established a *prima facie* case by presenting evidence and arguments to identify the measure being challenged and explaining the basis for the claimed inconsistency of zeroing with a WTO provision.[57] The panel stated that:

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[54] Mexico 21.5 Panel Request, p. 5.

[55] This Panel, where relevant, must also follow the standard of review under Article 17.6(ii) of the AD Agreement. That provision states: "the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. 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." The question under Article 17.6(ii) is whether an investigating authority's interpretation of the AD Agreement is a permissible interpretation. Article 17.6(ii) confirms that there are provisions of the Agreement that "admit{} of more than one permissible interpretation." Where that is the case, and where the investigating authority has relied upon one such interpretation, a panel is to find that interpretation to be in conformity with the Agreement. *See Argentina – Poultry (Panel)*, para. 7.341 and n. 223.

[56] *US – Corrosion-Resistant Steel CVD (AB)*, paras. 156-157 (footnote omitted) (emphasis added).

[57] *US – Shrimp AD (Ecuador) (Panel)*, paras. 7.10-7.11 (quoting *US – Gambling (AB)*, para. 141).

> {T}he fact that the United States does not contest Ecuador's claims is not sufficient basis for us to summarily conclude that Ecuador's claims are well-founded. Rather, we can only rule in favour of Ecuador if we are satisfied that Ecuador has made a *prima facie* case.[58]

27. Accordingly, the burden in this dispute is on Mexico to prove that the United States failed to implement the DSB's recommendations and rulings. The Appellate Body's findings in the original proceeding do not excuse Mexico from meeting the burden of proof on all aspects of its claims in this proceeding.

IV. ARGUMENT

A. Mexico's "As Such" Claim

28. Mexico claims that the United States has failed to comply with the DSB's recommendations and rulings that zeroing in administrative reviews is "as such" inconsistent with Article VI:2 of the GATT 1994 and Article 9.3 of the AD Agreement.[59] Mexico states that the United States "has taken no final action to implement the DSB's recommendations" with respect to simple zeroing "as such" in administrative reviews.[60] There is no disagreement as to the "existence" of any such measure taken to comply. The United States has never claimed to have taken such final action and does not dispute that to be the case.

29. In its submission, Mexico refers to the proposed rule and proposed modification published by Commerce on December 28, 2010 that concerns zeroing in administrative reviews ("Proposed Modification").[61] Mexico correctly points out that the Proposed Modification is exactly that – proposed – and "makes no change in policy or practice."[62] The Proposed Modification is not a "measure taken to comply," and Mexico appears to acknowledge this fact in stating that the United States has taken no final action to comply. Nor is the Proposed Modification within the Panel's terms of reference – as a simple proposal that is not final and has not been adopted, it is not a "measure" let alone a "measure taken to comply" and was not "specifically identified" by Mexico in its request for the establishment of this Panel. Mexico's characterizations of the Proposed Modification if "implemented in its proposed form" are not relevant to this proceeding and appear instead to be calling for statements that would be *obiter dicta*.[63] The United States therefore respectfully requests the Panel not to address Mexico's

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[58] *US – Shrimp AD (Ecuador) (Panel)*, para. 7.9.
[59] Mexico First Written Submission, paras. 116-117.
[60] Mexico First Written Submission, para. 68.
[61] Mexico First Written Submission, paras. 70-77 (citing *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings*, 75 Fed. Reg. 81,533 (Dept. Commerce Dec. 28, 2010) (Exhibit MEX-17)).
[62] Mexico First Written Submission, paras. 72.
[63] Mexico First Written Submission, paras. 73.

discussion of the Proposed Modification contained in paragraphs 73-77 of its First Written Submission.

B. Administrative Reviews 1-5

30. In the underlying dispute, Mexico obtained DSB recommendations and rulings with respect to five administrative reviews (identified by Mexico as case nos. 1 through 5). As Mexico is aware, all entries have been liquidated in accordance with U.S. law prior to the end of the RPT. Likewise, cash deposit requirements determined pursuant to these five administrative reviews were not applied to entries after the end of the RPT.

31. Mexico argues that the United States has failed to comply with the recommendations and ruling because these five administrative reviews allegedly had prospective effect on subsequent revocation decisions in Administrative Reviews 7 and 9 and the two subsequent sunset reviews (2005 and 2010).[64] In light of the foregoing, Mexico argues that "the United States has an obligation to bring these measures into compliance with the DSB's findings and recommendations."[65] As a legal matter, however, Mexico's arguments are unfounded.

32. Reviews 1-5 are expired measures. When a measure has been found to be WTO-inconsistent, the DSU calls for the Member to "withdraw" or "remove" the measure. In this case, there simply is no longer any measure to be "withdrawn" or "removed" within the meaning of Articles 3.7 and 22.8 of the DSU. Mexico's concept that a Member must somehow "correct" an expired measure due to the potential that a subsequent measure may refer to or rely upon it (what Mexico terms the "prospective effect" of the expired measure) is therefore in error.

33. What Mexico is really arguing is that a measure that was affected by zeroing would be WTO-inconsistent, and so Mexico would need to bring a challenge under the DSU to <u>that</u> measure, <u>not</u> Administrative Reviews 1-5. Indeed, Mexico's approach would prove too much. Suppose there were a measure taken, and that expired, prior to the entry into force of the WTO that would have been WTO-inconsistent if the WTO had applied at that time. Under Mexico's approach, that measure would suddenly be WTO inconsistent and would need to be "brought into compliance" if a subsequent measure referenced or relied upon it. But any inconsistency would accrue to that subsequent measure, not to the pre-WTO measure.

34. Furthermore, as demonstrated below, as a factual matter zeroing that occurred in Administrative Reviews 1 through 5 had no prospective effect on any subsequent measures.

1. Zeroing in Administrative Reviews 1 Through 5 Did Not Have Prospective Effect on Revocation Decisions in Administrative Reviews

[64] Mexico First Written Submission, paras. 120-129.
[65] Mexico First Written Submission, para.129.

7 and 9

35. Mexico argues that the United States has failed to comply in this dispute because "the margins of dumping calculated in prior reviews have been, and may in the future be taken into account in subsequent review proceedings considering requests for revocation" under Commerce's regulations.[66] As noted above, Mexico's legal approach is wrong.

36. Furthermore, as an initial matter, and as discussed below, there were no DSB recommendations and rulings related to a decision not to revoke. Mexico does not even claim that the decision not to revoke was WTO-inconsistent or is governed by any WTO obligations. Rather, Mexico's references to "prospective effect" appear to be an attempt to bring indirectly within the terms of reference of an Article 21.5 proceeding measures for which there would otherwise not be any basis to challenge. Accordingly, the United States has not failed to comply with recommendations and rulings regarding these revocation decisions because such recommendations and rulings do not exist.

37. In addition, as a factual matter, the margins of dumping calculated in Administrative Reviews 1 through 4 (identified by Mexico as cases no. 1 through 4) were not considered in the revocation decisions made in connection with either Administrative Reviews 7 or 9.[67] Mexico has therefore failed to provide any evidentiary basis supporting its assertion regarding the alleged effect of these administrative reviews on the "revocation decisions." While Commerce did decline to revoke the order as it applied to Mexinox in both Administrative Reviews 7 and 9, the zeroing in Administrative Reviews 1 through 5 was not determinative of either of those decisions.

38. With regard to the revocation determination in Administrative Review 7, Mexico alleges that Commerce denied a revocation request from a Mexican respondent, in part, based on the margin calculated in Administrative Review 5.[68]

39. Commerce's decision regarding partial revocation was made in response to a revocation request. That determination was separate and distinct from other determinations, such as a determination of the assessment rate, which are made pursuant to a separate request, the request for administrative review.

40. Mexico's claim with respect to revocation is premised on the misunderstanding that a weighted average dumping margin calculated with offsets would have qualified the exporter for

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[66] Mexico First Written Submission, para. 123.

[67] Mexico also notes several U.S. court cases on whether a judicial review is moot under U.S. law, if entries were liquidated. These cases are not pertinent. Neither the judicial review under U.S. law nor mootness are at issue in this dispute.

[68] Mexico First Written Submission, para. 124. As a factual matter, the results of Administrative Review 5 were not considered in the revocation decision in the context of Administrative Review 9.

revocation. However, contrary to Mexico's claim, in Administrative Review 7 a zero (or *de minimis*) weighted average dumping margin calculated with offsets did not suffice to qualify an exporter for revocation pursuant to the terms of Commerce's regulation. Commerce instead looked to see if there was an absence of sales at less than normal value. The regulation does not require Commerce to rely on the dumping margin. Accordingly, regardless of the method for calculating the dumping margin, because the exporter at issue made sales at less than normal value, it was disqualified from revocation. In other words, recalculation of the weighted average dumping margin in Administrative Review 5 with offsets would not change the fact that the exporter did make sales during the relevant period at less than fair value and did not qualify.[69]

41. Here, Commerce found that Mexinox sold merchandise for less than normal value in subsequent administrative reviews (*i.e.*, Administrative Reviews 6 and 7), a finding that disqualified an exporter from revocation, *regardless* of its behavior during the time period covered by Administrative Review 5.[70] Accordingly, zeroing in Administrative Review 5 had no effect on Commerce's decision not to grant the revocation requested in Administrative Review 7.

42. As to the revocation determination Commerce made in Administrative Review 9, the United States would simply note that the margins calculated in Administrative Reviews 1 through 5 are irrelevant, as only sales covered by Administrative Reviews 7, 8, and 9 were considered. And as a factual matter Commerce denied the revocation request in Administrative Review 9 based on evidence of sales of less than normal value in Administrative Reviews 7, 8, and 9.[71]

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[69] *See e.g., Stainless Steel Sheet and Strip in Coils from Mexico*, 74 Fed. Reg. 39622, 39623 (August 7, 2009) (preliminary results) (Exhibit US-4), unchanged in the final by 75 Fed. Reg. 6627 (Feb. 10, 2010), as amended by, 75 FR 17122 (April 5, 2010) ("Mexinox's certification is based on the contention that the Department should offset sales made at less than NV with the sales that were made at not less than NV. In other words, Mexinox suggests that it had sales of the subject merchandise at less than NV during the relevant time period. However 19 C.F.R. 351.222(E)(1)(ii) requires the company to certify that the company sold the subject merchandise at not less than NV during each of the past three consecutive years. Therefore, we preliminarily find that Mexinox has sold subject merchandise at less than NV within the period of at least three consecutive years.").

[70] For example, in Administrative Review 6, pursuant a remand order by a NAFTA panel, Commerce revised its determination to eliminate zeroing and adopted a calculation methodology comparable to assessment methodologies under a prospective normal value system. *See* Remand Determination Pursuant to NAFTA Panel: *Stainless Steel Sheet and Strip in Coils from Mexico*, USA-MEX-2007-1904-O1, at 24 (Aug. 27, 2010) ("Administrative Review 6 Remand Results") (Exhibit US-5). The revised determination again demonstrated that during the relevant period, the exporter in question made multiple sales of the merchandise at less than normal value. In the revised determination, Commerce explained that the U.S. law permitted it to take into account the results of transaction-specific comparisons between export price and normal value in determining whether Mexinox "sold the merchandise at not less than normal value" for purposes of revocation under section 351.222 of its regulations. *See* Administrative Review 6 Remand Results, AT 27 (Exhibit US-5).

[71] *See Stainless Steel Sheet and Strip in Coils from Mexico*, 74 Fed. Reg. 39622, 39623 (August 7, 2009) (preliminary results) (Exhibit US-3), unchanged in the final by 75 Fed. Reg. 6627 (Feb. 10, 2010), as amended by, 75 FR 17122 (April 5, 2010).

2. Zeroing in Administrative Reviews 1-5 Did Not Have Prospective Effect on 2005 and 2010 Sunset Reviews

43. Mexico further argues that the United States has failed to comply with the DSB's recommendations and rulings concerning administrative reviews 1 through 5 because the results of those administrative reviews affected the 2005 and 2010 sunset reviews.[72] Mexico is mistaken.

44. As an initial matter, we would note that Mexico is incorrect to contend that the 2005 and 2010 sunset reviews "will continue to have a legal impact on all subsequent sunset reviews."[73] As discussed previously, the ITC has now voted to revoke the order,[74] and no further sunset reviews will take place. This situation highlights why Mexico's claims regarding measures that were unknown at the time of the panel request should be denied as falling outside the Panel's terms of reference.

a. The 2005 Sunset Review

45. In the 2005 sunset review, Commerce considered the dumping margins determined in administrative reviews 1 through 3 only.[75] However, in Administrative Reviews 2 and 3, by Mexico's own calculations, even with providing offsets there was dumping at above *de minimis* levels (1.83 and 4.96 percent respectively).[76] In this instance, this would have been sufficient for Commerce to determine that dumping was likely to continue or recur if the order were to be revoked. Thus, the result of the 2005 sunset review would have been the same with or without the use of offsets. Accordingly, Commerce's finding of the likelihood of continuation or recurrence of dumping in the 2005 sunset review was not dependent on any use of zeroing, and thus the zeroing that took place in Administrative Reviews 1-3 had no effect on the final results of the 2005 sunset review.

b. The 2010 Sunset Review

46. With respect to the 2010 sunset review, as noted that review has led to a decision to terminate the antidumping order, so there is no basis for Mexico to complain. Moreover, to the extent that Mexico suggests that Commerce relied upon dumping margins from administrative

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[72] Mexico First Written Submission, paras. 125-129.

[73] Mexico First Written Submission, para. 125.

[74] ITC Press Release (Exhibit US-1).

[75] *See Stainless Steel Sheet and Strip in Coils from Mexico*, 70 Fed. Reg. 6620 (February 8, 2005)(sunset review) and accompanying Issues and Decision Memorandum at Comment 1 (Exhibit MEX-13). Commerce did not consider dumping margins from Administrative Reviews 4 and 5 in the 2005 sunset review, a point Mexico acknowledges. Mexico First Written Submission, para. 126.

[76] In any proceeding other than original investigations, a *de minimis* margin is the weighted-average dumping margin that is less than 0.5 percent. *See* 19 C.F.R. 351.106(b) and (c) (US-Exhibit MEX-41).

reviews 1 through 5, Mexico is mistaken.[77] Rather, Commerce relied on the five most recently completed reviews (*i.e.*, Administrative Reviews 6-10) and the margin from the investigation as modified by the Section 129 determination."[78]

47. Moreover, the margin in Administrative Review 10 would be above *de minimis* regardless of whether zeroing is used.[79] When dumping continued with the discipline of the antidumping duty order in place, Commerce would find that dumping is likely to continue or recur in the absence of the order. Accordingly, even under Mexico's own analysis, the results of the 2010 sunset review were not dependent on any zeroing (much less zeroing in Administrative Reviews 1-5).

c. Import Volumes

48. In any event, regardless of the margins of dumping determined in prior administrative reviews, in both the 2005 and 2010 sunset reviews, Commerce found that there was an independent WTO-consistent ground for finding that the dumping is likely to continue or recur. Even if dumping had been completely eliminated (which it was not), the likelihood of continuation or recurrence of dumping determination in the 2005 and 2010 sunset reviews, is still supported by the finding that import volumes for the subject merchandise declined significantly after the antidumping duty order was imposed.[80] Thus, zeroing had no effect on the

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[77] *See* Mexico First Written Submission, para. 128.

[78] *See Stainless Steel Sheet and Strip in Coils from Mexico*, 76 Fed. Reg. 25668 (February 8, 2005)(sunset review) and accompanying Issues and Decision Memorandum at Comment 1 (Exhibit MEX-13). We note that there is no dispute that "the United States implemented the DSB's recommendations and Rulings Concerning Zeroing on 22 February 2007 (prospective change in policy for newly initiated investigations) and 20 May 2009 (redetermination of original investigation margin for the order under review pursuant to Section 129)." *See* Mexinox First Written Submission at 4. To the extent that in footnote 8 of its First Written Submission, Mexico argues that the revised 30.69% margin determined without zeroing in the section 129 proceeding did not become prospectively the new estimated duty for Mexinox, Mexico is correct. However, the United States notes that Mexinox's estimated duty is lower than 30.69% rate determined without zeroing.

[79] *See Issues and Decisions Memorandum of the Full Sunset Review on Certain Stainless Steel Sheet and Strip in Coils from Mexico; Final Results*,(April 28, 2011)(sunset review) (Exhibit MEX-14-B) ("{T}he record demonstrates that even under Mexinox's own calculations with offsets for non-dumped sales, the margin in the most recent review is above *de minimis*."); *see also* Mexico's First Written Submission at para. 130 (Table II).

[80] *See Stainless Steel Sheet and Strip in Coils from Mexico*, 70 Fed. Reg. 6620 (February 8, 2005)(sunset review) and accompanying Issues and Decision Memorandum at Comment 4 (finding that according to official import statistics and Mexinox's own data import values have decreased from the pre-order levels and that Mexinox's relative market share was also below the pre-order levels) (Exhibit MEX-13); *Stainless Steel Sheet and Strip in Coils from Mexico*, 76 Fed. Reg. 25668 (May 5, 2011)(sunset review) and accompanying Issues and Decision Memorandum at Comment 2 ("Even if we were to conclude that Mexinox eliminated dumping in the administrative reviews at issue, the Department would find that the dumping is likely to continue or recur, if the order is revoked. Even where dumping is eliminated after the issuance of the order, where import volumes for the subject merchandise declined significantly, the Department considers it to be evidence that the existence of the order is disciplining the occurrence of dumping. Accordingly, the Department could find a likelihood of dumping based upon the significant decline in import volumes over the period of the sunset review, even if a respondent completely eliminated dumping.

likelihood findings in these sunset reviews.

C. This Panel Should Not Reach the Merits of Mexico's Claims Concerning the Subsequent Administrative Reviews (Administrative Reviews 6-11)

49. Mexico claims that six "closely connected subsequent periodic reviews" (Administrative Reviews 6-11) are within the terms of reference of the Panel.[81] These periodic reviews cover entries of stainless steel from July 1, 2004 through June 30, 2010. The entries covered by Administrative Reviews 6-10 were entered prior to the expiry of the RPT on April 30, 2009 except for two months worth of entries made during Administrative Review 10. The entries covered by Administrative Review 11 entered post-RPT. Administrative Reviews 6-10 are currently the subject of separate NAFTA Chapter 19 dispute settlement panels, and none of the duties paid on the entries covered by Administrative Reviews 6 through 10 have been liquidated.[82] In contrast, Administrative Review 11 was rescinded and the entries liquidated in accordance with U.S. law.[83] Mexico identified Administrative Reviews 6-9 in its request for this Panel, but did not do so for Administrative Review 10, which was not completed until after Mexico submitted its panel request, or Administrative Review 11, which was never completed.[84]

50. Mexico claims that a "sufficiently close nexus" in terms of nature, effects, and timing, exist between these six administrative reviews and the measures covered by the original panel request (the original investigation and the first five administrative reviews) so that these "closely connected subsequent periodic reviews" are properly considered within the terms of reference of this Panel.[85]

51. The United States disagrees. Specifically, the United States maintains that the date of entry is the relevant date for assessing implementation, and that the fact that due to judicial review liquidation may take place after the expiry of the RPT does not change this conclusion. As such, all entries covered by Administrative Reviews 6-10 fall outside the Panel's terms of reference except for the last two months of entries covered by Administrative Review 10. Moreover, the United States also maintains that Administrative Reviews 10 and 11 fall outside

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Mexinox does not dispute the factual finding that the import volumes of the subject merchandise declined significantly from the preorder levels.") (citations omitted) (Exhibit MEX-14).

[81] Mexico First Written Submission, section III.E.

[82] The United States and Mexico are both parties to the NAFTA. Under Chapter 19 of the NAFTA, "each Party shall replace judicial review of final antidumping and countervailing duty determinations with binational panel review." NAFTA, Art. 1904(1) (Exhibit US-6). Accordingly, the United States has replaced the review by the Court of International Trade with binational panel review in cases involving Canada or Mexico. Pursuant to 19 U.S.C. §1516a(g)(1) and 1516a(g)(3), NAFTA panels have *some* of the exclusive original jurisdiction granted to the Court of International Trade under 19 U.S.C.§ 1516a(a). (Exhibit US-7)

[83] *See Stainless Steel Sheet and Strip in Coils from Mexico, Rescission of Antidumping Duty Administrative Review*, 76 Fed. Reg. 18518 (Dept. Commerce April 4, 2011) (Exhibit MEX-12).

[84] *See* Mexico Panel Request, Annex.

[85] *See* Mexico First Written Submission, section III.E.2.

the Panel's terms of reference as neither was specifically identified as a measure in Mexico's panel request as required by DSU Article 6.2. The United States further maintains that the Panel should reject Mexico's claims with regard to Administrative Review 11 as the review has been rescinded.

52. The United States recognizes that the Appellate Body previously disagreed with many of these U.S. positions in *US – Zeroing (Japan) (21.5)*. However, as explained below and as noted in Section III, above, the United States remains of the view that these findings were incorrect, that there are important factual differences between the disputes (such as the fact that one of the measures at issue was rescinded), and the Panel is not obliged to adhere to the findings of the Appellate Body in another dispute.

1. Implementation Is Determined by the Date of Entry

53. Implementation of the DSB's recommendations and rulings applies only on a prospective basis. In the context of antidumping duties, the date of entry, rather than the date the duties are collected, is determinative in determining compliance. Therefore, under a correct understanding of the covered agreements, the post-RPT actions Mexico challenges with respect to Administrative Reviews 6-9 do not constitute a failure to comply with the DSB's recommendations and rulings in this dispute, because none of these administrative reviews served as the basis for the assessment of duties on entries made after the end of the RPT. The same holds true for all of the entries covered by Administrative Review 10 except for those entries made in the last two months of the review period.

54. Mexico's position would require the United States to adopt retroactive compliance measures and create inequality between prospective and retrospective assessment systems where there should be none. The AD Agreement is neutral between antidumping systems and does not favor one system over the other. Moreover, and as discussed below, this analysis does not change even if liquidation of the duties paid on those entries happen after the expiry of the RPT.

a. Implementation of the DSB's Recommendations and Rulings Applies Only Prospectively

55. The WTO dispute settlement system requires that implementation be determined on a *prospective* basis. The starting point is Article 21.5 of the DSU, which provides for a dispute settlement proceeding "where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings {of the DSB}." The focus in an Article 21.5 proceeding is on whether, as of the time of panel request, a measure taken to comply exists, and if so, whether that measure is consistent with the covered agreements. A Member's compliance with the DSB's recommendations and rulings is therefore determined on a prospective basis – has compliance been achieved as of the date of the Article 21.5 panel request.

56. As discussed below, the United States demonstrates that several provisions of the GATT 1994 and the AD Agreement provide textual support for the view that implementation is determined by the date of entry of the subject merchandise. The contrary approach unfairly disadvantages Members who have adopted retrospective duty assessment systems. Finally, we discuss how determining implementation by the date of entry provides the same relief in both retrospective and prospective systems and preserves the equality between the systems.

i. Several Provisions in the GATT 1994 and AD Agreement Demonstrate that Implementation Is Determined by the Date of Entry

57. When considering whether relief is "retroactive" or "prospective" in the context of antidumping duties, provisions contained in both the GATT 1994 and the AD Agreement support the position that the date of entry, as opposed to the date that final duties are collected, is determinative. The text of the GATT 1994 and the AD Agreement confirms that it is the legal regime in existence at the time that an import enters the Member's territory that determines whether the import is liable for the payment of antidumping duties.

58. Article VI:2 of the GATT 1994 provides: "In order to offset or prevent dumping, a contracting party may *levy* on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product."[86] Article VI:6(a) of the GATT 1994 reflects the fact that the levying of an antidumping duty generally takes place on "the importation of any product." Nonetheless, Ad Note, paragraphs 2 and 3 of Article VI states:

> As in many other cases in customs administration, a contracting party may require reasonable security (bond or cash deposit) for the payment of anti-dumping or countervailing duty pending final determination of the facts in any case of suspected dumping or subsidization.[87]

59. The Ad Note clarifies that, even for duties that are generally levied at the time of importation, Members may instead require a cash deposit or other security, in lieu of the duty, pending final determination of the relevant information. The liability, however, is incurred at the time of entry. Consistent with the Ad Note, assessment and collection in the U.S. system occurs after the date of importation. Indeed, a Commerce determination in an administrative review normally covers importations of the subject merchandise during the 12 months prior to the month in which the administrative review is initiated.

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[86] Emphasis added.
[87] GATT 1994, Ad Article VI, paras. 2 & 3.

60. Several provisions of the AD Agreement further support the proposition that the date of entry is the relevant date for determining whether implementation occurred, regardless of when the administering authority determines the amount of dumping duty liability and collects the duties. Article 10.1 of the AD Agreement states that provisional measures and antidumping duties shall be applied only to "products which *enter for consumption* after the time" when the provisional or final determination enters into force, subject to certain exceptions.[88] This limitation applies even though the dumping activity that forms the basis for the dumping and injury findings necessarily occurs *prior* to the time that the determination enters into force. As Article 10.1 demonstrates, the critical factor for determining whether particular entries are liable for the assessment of antidumping or countervailing duties is the fact that liability for these duties is incurred on the date of entry.

61. Similarly, Article 8.6 of the AD Agreement states that if an exporter violates an undertaking, duties may be assessed on products "*entered for consumption* not more than 90 days before the application of . . . provisional measures, except that any such retroactive assessment shall not apply to imports *entered* before the violation of the undertaking."[89] Once again, the critical factor for determining the applicability of the provision is the date of entry. And the reference to "retroactive" assessment makes clear that this is an exception and would be "retroactive," in other words, a "retroactive" approach is not the norm.

62. In addition, Article 10.6 of the AD Agreement states that when certain criteria are satisfied, "{a} definitive anti-dumping duty may be levied on products which were *entered for consumption* not more than 90 days prior to the date of application of provisional measures."[90] However, under Article 10.8, "{n}o duties shall be levied retroactively pursuant to paragraph 6 on products *entered for consumption* prior to the date of initiation of the investigation."[91] As with Articles 8.6 and 10.1, whenever the AD Agreement specifies an applicable date for an action, the scope of applicability is based on entries occurring on or after that date.

63. In the U.S. view, previous reports have erroneously dismissed these textual arguments because they were based in the AD Agreement and the GATT 1994 rather than the DSU. Yet the DSU does not exist in a vacuum, but must be read in light of the rights and obligations contained in the covered agreements.[92] Here, the United States had the underlying obligation to comply with the substantive obligations covered by the DSB's recommendations and rulings. In this dispute, the recommendations and rulings pertained to the AD Agreement and the GATT

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[88] Emphasis added.
[89] Emphasis added.
[90] Emphasis added.
[91] Emphasis added.
[92] DSU, Article 3.2; *US – OCTG from Argentina (Article 21.5) (Panel)*, n.39 ("the provisions of the DSU and the Anti-Dumping Agreement must be read together in a coherent manner"); *US – OCTG from Argentina (Article 21.5) (AB)*, para. 173 ("We believe also that the provisions of the DSU should not be read as altering the disciplines of Articles 11.3 and 11.4" of the AD Agreement).

1994. The focus in the Article 21.5 panel proceeding is on the existence, or consistency with the AD Agreement or the GATT 1994, of measures taken to comply with the recommendations and rulings concerning the AD Agreement and the GATT 1994. Accordingly, these agreements, along with the DSU, are crucial to determining whether the United States complied with the DSB's recommendations and rulings, including what the United States was required to do in order to implement those recommendations and rulings.

64. The general understanding that implementation obligations are triggered by the date of entry has also been recognized by previous panels.[93] In *US – Section 129*, for example, the panel acknowledged that U.S. implementation of adverse WTO reports concerning antidumping or countervailing duties applies only to entries occurring after the end of the RPT, and that such implementation obligations would not apply to prior entries.[94]

ii. The Contrary Approach Unfairly Disadvantages Members with Retrospective Antidumping Systems

65. Under the AD Agreement, the different systems of duty assessment provided for in Article 9.3 – retrospective duty assessment, prospective duty assessment, and prospective normal value systems – are afforded equal treatment. The Appellate Body has confirmed that the AD Agreement does not favor one system over the other, or place one system at a disadvantage.[95] Therefore, a proper interpretation of implementation requires that retrospective duty assessment, prospective duty assessment, and prospective normal value systems be placed on a "level playing field."

66. Previous reports have found that the United States had compliance obligations with respect to importer-specific assessments made on merchandise entering *prior* to the end of the RPT because the United States collected duties on some of this merchandise *after* the end of the RPT.[96] Determination of final liability and collection at some point after importation is a principal feature of a retrospective system. Indeed, that is the main distinction between retrospective and prospective systems, as reflected in the text of Article 9.3.1 and 9.3.2. Article 9.3.1 provides:

> When the amount of the anti-dumping duty is assessed on a

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[93] Although the terms "implementation obligations" and "compliance obligations" are sometimes used as a convenient shorthand for the steps that must be taken in order to comply with DSB recommendations and rulings, the usage of such terms does not imply that DSB recommendations and rulings create *new* obligations that are substantively different from, or in addition to, the obligations under the covered agreements themselves that are the subject of the DSB recommendations and rulings. *See US – Zeroing I (EC) (Article 21.5) (AB)*, para. 298.

[94] *US – Section 129 (Panel)*, para. 5.52.

[95] *US – Zeroing (Japan) (AB)*, para. 163.

[96] *See US – Zeroing (Japan) (21.5) (Panel)*, paras. 7.154, 8.1(a) ("The Anti-Dumping Agreement is neutral as between different systems for levy and collection of anti-dumping duties.").

> retrospective basis, the determination of the *final* liability for payment of anti-dumping duties shall take place as soon as possible . . . after . . . a request for a final assessment . . . has been made.[97]

67. By contrast, Article 9.3.2 contains no reference to "final liability." Instead, it states:

> When the amount of the anti-dumping duty is assessed on a prospective basis, provision shall be made for a prompt refund . . . of any duty paid in excess of the margin of dumping.

68. In the U.S. retrospective system, duties are not *assessed* at the time of entry.[98] Thus, only in retrospective systems does entry of merchandise trigger *potential* liability, because only in retrospective systems is *final* liability determined and collected at a later date. Panels have recognized that this feature is unique to retrospective systems.[99]

69. The United States maintains that there is no textual justification for the view that the Panel need not ensure neutrality among differing antidumping systems. If a Member maintaining a retrospective system must act with respect to entries that occurred prior to the end of the RPT compliance for retrospective systems would be very different and more extensive than for prospective duty assessment and prospective normal value systems. By contrast, recognizing that it is the date of entry that controls for purposes of compliance would maintain neutrality among the divergent systems.

iii. Determining Implementation Based on Date of Entry Provides the Same Relief as Is Available Under a Prospective Antidumping System

70. An approach based on the date of entry would ensure equal treatment between retrospective and prospective dumping systems. The concept that implementation obligations apply only to future entries (*i.e.*, entries occurring after the RPT) is not unique to retrospective systems. Focus on the date of entry as the appropriate date for implementation is consistent with the effect that a finding of inconsistency would have on an antidumping measure in a prospective antidumping system. Under such systems, the Member collects the amount of antidumping duties at the time of importation. If an antidumping measure is found to be inconsistent with the AD Agreement, the Member's obligation is to modify the measure as it applies at the border to imports occurring on or after the end of the RPT. The Member need not remedy the measure

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[97] Emphasis added.

[98] *See, e.g., US – Zeroing (EC) (Panel)*, para. 2.4 (generally describing how duty assessment occurs under the U.S. retrospective system).

[99] *See, e.g., US – Zeroing (EC) (Panel)*, para 2.4; *EC – Salmon (Panel)*, para. 7.744.

with respect to imports that occurred prior to the end of the RPT. In other words, the Member is under no obligation to revise any antidumping duties assessed on importations occurring prior to the end of the RPT. In this dispute, finding that the operative date for implementing the DSB's recommendations and rulings is entries occurring after the end of the RPT produces no different effect than that available under a prospective antidumping system, such as the European Union's ("EU") system. Indeed, while the EU has asserted that Members have obligations regarding measures that precede the RPT in previous disputes related to zeroing, they have taken the opposite view when implementing recommendations and rulings pertaining to their own measures.[100] Under the U.S. approach, the AD Agreement's neutrality would be preserved.

b. The Panel Should Apply the Proper Interpretation of Implementation Based on the Date of Entry and Reject Mexico's Attempt to Include Administrative Reviews Whose Entries Entered Prior to the Expiry of the RPT

71. As the United States demonstrated above, the determinative fact for establishing whether a Member has complied with the DSB's recommendations and rulings by the time of the Article 21.5 panel request is the date merchandise enters that Member's territory. A Member must comply with the DSB's recommendations and rulings when assessing duties on merchandise entering *after* the end of the RPT. As such, the Panel should not make findings as to Administrative Reviews 6, 7, 8, and 9, as well as with regard to the first ten months of entries covered by Administrative Review 10.

c. The Fact that Liquidations With Respect to Administrative Reviews 6-10 Will Occur After the End of the RPT as a Result of Judicial Review Can Not Support a Finding of Non-Compliance

i. The Issue of Post-RPT Liquidation

72. As noted previously, Administrative Reviews 6 through 10 were all appealed to NAFTA Chapter 19 panels and the entries covered by these administrative reviews have not been liquidated. Under U.S. law, the liquidation of entries will occur in accordance with the final decision of the court, or, in this case, the NAFTA binational panel. Accordingly, the amount of duties levied through any future liquidation actions may be determined in a manner consistent

[100] *See* Commission Implementing Regulation (EU) No. 620/2011 of 24 June 2011, O.J. L 166/16 (stating that implementing measure "cannot provide interpretative guidance for classification of goods which have been released for free circulation prior to" the expiry of the reasonable period of time) (Exhibit US-8). *See also EC – Chicken Cuts*, where the EC specifically declined to refund excess duties or otherwise correct the breach of Article II:1(a) and II:1(b) that the DSB had found to exist with respect to entries prior to the expiration of the RPT while also asserting that its measure achieved full compliance the DSB recommendations. WT/DS269/15/Add.1, WT/DS286/17/Add.1, circulated July 4, 2006.

with the recommendations and rulings of the DSB in the underlying dispute. In fact, with respect to Administrative Review 6, the NAFTA binational panel has already ordered Commerce to eliminate zeroing, and Commerce responded with a new calculation that does not use zeroing. The litigation remains pending and these steps described are not final; any conclusion that Commerce's original results for Administrative Review 6 will necessarily be the basis for liquidation would be unwarranted. Moreover, in light of the NAFTA binational panel's order to recalculate margins without zeroing in Administrative Review 6 and similar challenges pending with respect to Administrative Reviews 7 through 10, any assertion that future liquidation instructions will necessarily result in antidumping duties levied on the basis of zeroing is mere speculation.

73. In any event, Commerce normally issues liquidation instructions to Customs within 15 days of the publication of the final results of antidumping administrative reviews and Customs liquidates entries to the greatest extent practicable within 90 days of such instructions. However, U.S. courts may issue injunctions, which prevent liquidation during the pendency of all court proceedings. In the context of NAFTA proceedings, there are no injunctions, but there is an administrative suspension of liquidation procedure which requires Commerce to suspend the liquidation of entries if a NAFTA case is filed and a request for such suspension of liquidation is received. Here, Administrative Reviews 6, 7, 8, 9, and 10 are subject to NAFTA panel review.[101] If judicial review had not occurred here, the majority of entries covered by Reviews 6, 7 and 8 would have been liquidated before the end of the RPT on April 30, 2009.[102]

ii. Liquidation After the RPT Due to Domestic Judicial Proceedings Cannot Support a Finding That a Member Has Failed to Comply

74. Article 13 of the AD Agreement requires Members to provide for independent judicial review.[103] A Member that maintains a system that provides for judicial review and judicial remedies for the review of administrative actions should not be subject to findings that it failed to comply based on a delay that is a consequence of judicial review. What the United States must do to comply is determined by the covered agreements, in this case, the AD Agreement and the DSU.

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[101] *See supra* n.82.

[102] For example, the final results for Administrative Review 6 were issued in on December 22, 2006. Commerce would have issued liquidation instructions 41 days later, or February 1, 2007, and liquidations would have occurred no later than June 2007.

[103] AD Agreement, Art. 13. Similarly, Article X:3(b) of the GATT 1994 provides in part: "Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers. . . ."

75. The AD Agreement itself recognizes that judicial review may cause a delay in meeting certain obligations. Articles 9.3.1 and 9.3.2 impose time limits for assessing antidumping duties. However, footnote 20 to Article 9.3.1 expressly recognizes that observance of the time limits required in Articles 9.3.1 and 9.3.2 may not be possible where the product in question is subject to judicial review proceedings.[104] Thus, it is clear that if a particular time limit is not observed due to pending judicial review, the delay caused by the judicial review is not inconsistent with the AD Agreement. Likewise, a delay in liquidation until after the RPT as a result of judicial review should not serve as a basis to find that a Member has failed to comply with the recommendations and rulings of the DSB, since but for judicial proceedings, the Member would have liquidated prior to the end of the RPT.

76. As a systemic matter and as discussed in the preceding section, WTO obligations do not create inequalities between Members operating retrospective antidumping systems as compared to Members operating prospective antidumping systems. However, a finding that a Member failed to comply because liquidation was suspended until after the RPT due to litigation would give private litigants the ability to control compliance by Members operating retrospective antidumping systems. This is because such a litigant could delay liquidation of an entry for many years to ensure that entries were only liquidated after the expiry of the RPT.[105] This result would not occur in a prospective system, where the duty collection occurs on importation, *i.e.*, at the time of entry.

77. The United States notes that the extent of challenges and appeals made in domestic litigation is largely under the control of private litigants. If post-RPT liquidation that was suspended due to judicial review could support a finding of non-compliance, then private parties would have perverse incentives to manufacture domestic litigation and prolong liquidation past the RPT to obtain what amounts to retroactive relief. In other words, private litigants would attempt to control what the United States must do to comply with the DSB's recommendations and rulings.

78. For the above reasons, the Panel should find that future liquidation of the entries covered by Administrative Reviews 6, 7, 8, 9, and 10, which has not occurred, does not demonstrate that the United States failed to comply with the recommendations and rulings of the DSB because these liquidations would have occurred prior to the conclusion of the RPT but for the delay caused by judicial review. Moreover, the calculation methodology for any such future liquidations is unknown.

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[104] AD Agreement, Art. 9.3.1. & n. 20.

[105] These concerns are even greater in the context of NAFTA binational review, because the United States NAFTA Secretariat cannot form a panel to hear the case without Mexico timely proposing its own panelists and agreeing to the panelists proposed by the United States.

2. Administrative Reviews 10 and 11 Fall Outside the Panel's Terms of Reference Because They Were Not in Existence at the Time of Mexico's Request for a Panel

79. Under Article 6.2, a panel request must identify the "*specific measures* at issue" in the dispute,[106] and a panel's terms of reference under Article 7.1 are limited to those specific measures. In its Article 21.5 panel request Mexico identifies the "preliminary results" in Administrative Review 10 and the "initiation" of Administrative Review 11. However, neither of these measures were completed at the time of Mexico's panel request (and Administrative Review 11 was never completed), and Mexico does not identify in its panel request the same "measures" that it complains about in its first submission.[107] Rather, Mexico argues that both administrative reviews are within the terms of reference because both Administrative Reviews 10 and 11, and associated liquidation instructions, have a "close nexus" with preceding measures.[108] Mexico's view has no basis in the text of the DSU, however.

80. Articles 6.2 and 7.1 of the DSU do not permit a panel to examine measures that were not identified in a panel request simply because they may be part of a so-called "continuum" of similar measures that were identified. Nor does the DSU allow for the inclusion of future measures within a panel's terms of reference merely because the process which resulted in the measure had been initiated at the time of the panel request. Rather, under Article 6.2 of the DSU, a panel request must *identify* the *specific* measures at issue, and under Article 7.1, a panel's terms of reference are limited to those specific measures. Here, the final results of each individual administrative review serve as the basis for the calculation of the assessment rate for each importer of the specific entries of subject merchandise covered by the administrative review. Each administrative review is separate and distinct, and under Article 6.2, Mexico had to identify each such measure in its panel request.[109] Indeed, Mexico also recognized the distinctiveness of separate reviews – its own panel request listed each administrative review as a separate and distinct measure.[110]

81. Mexico's identification of "subsequent closely connected measures" in its panel request was inadequate to meet the requirement under Article 6.2. If a measure does not yet exist, it is not possible to identify it as a "specific" measure as required under Article 6.2. Nor could a non-

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[106] Emphasis added.

[107] *Compare* Panel Request, Annex (referencing the preliminary results for Administrative Review 10 and the notice of initiation for Administrative Review 11), *with* Mexico's First Submission, para.129, Table 2, and n.192 (referencing the final results of Administrative Review 10 and associated documents).

[108] Mexico First Written Submission, paras. 148-155.

[109] In *US – Zeroing I (EC) (Article 21.5)*, the Appellate Body considered that successive administrative review determinations (as well as successive changed circumstances and sunset review determinations) are "separate and distinct measures," and that for that reason, they cannot be considered as mere amendments to reviews identified in a panel request, even if such subsequent reviews are "connected stages" under the same antidumping duty order. *See US – Zeroing I (EC) (Article 21.5) (AB)*, paras. 192-93 (citing to *Chile – Price Band System (AB)*).

[110] *See* Mexico Panel Request, Annex I.

existent measure be "affecting" the operation of a covered agreement, and so be subject to a consultations request, as required by Article 4.2 of the DSU.

82. Other panels have found measures not yet in existence at the time of the panel request to be outside the panel's terms of reference. In particular, the *US – Upland Cotton* panel, relying on DSU Article 3.3, found that the challenged "legislation could not have been impairing any benefits accruing to the complainant because it was not in existence at the time of the request for the establishment of a panel."[111]

83. In addition, the United States believes that systemic considerations militate against taking a contrary position. Article 21.5 proceedings are meant to resolve disagreements over the existence or consistency with the covered agreements of a measure taken to comply. A compliance panel examines a complaining party's claims as to whether a Member has complied with the DSB's recommendations and rulings at the time of the panel request. The WTO dispute settlement system does not contemplate that parties will make new legal claims on new or amended measures midway through a compliance panel proceeding.

84. For the above reasons, the Panel should find that Administrative Reviews 10 and 11 are outside the Panel's terms of reference. Under Article 6.2 of the DSU, Mexico was required to list each separate and distinct measure in its panel request. Mexico did not do so with regard to these administrative reviews, and could not, because the final results from these two administrative reviews were not yet in existence at the time of the panel request, and such future measures cannot form part of a Panel's terms of reference.[112]

3. With Respect to Administrative Review 11, The Panel Must Reject Mexico's Claims Pursuant to Article 9.3 of the AD Agreement, Article VI:2 of the GATT 1994, and Articles 21.1, 21.3 of the DSU

85. With regard to Administrative Review 11, Mexico argues that "the United States has failed in any manner to implement DSB's recommendations and ruling with respect to the use of simple zeroing and has continued to apply simple zeroing, in a continuing series of subsequent closely connected measures including . . . the rescinded periodic review under the same order (identified in the Annex as POR 11), and any amendments thereto, any measures closely

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[111] *US – Upland Cotton (Panel)*, para. 7.160. DSU Article 3.3. states:

> {t}he prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements *are being impaired* by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.

[112] This analysis applies equally to the other "subsequent closely connected measures" that Mexico has claimed the United States has taken but declines to specify. Mexico's Panel Request, para. 10(iii)(c), (d).

connected thereto, and future subsequent periodic reviews, and the United States' instructions and notices issued pursuant thereto."[113] It is unclear what specific "measures" Mexico refers to, and Mexico provided no evidence that such "measures" exist, let alone established that they are not consistent with the covered agreements. Accordingly, the Panel should reject Mexico's claim in this respect as speculative and unfounded.

86. Moreover, as Mexico acknowledges, Administrative Review 11 was rescinded (*i.e.*, terminated) and no dumping calculations were performed as part of that rescinded review. Accordingly, no "amendments thereto" or "measures closely connected thereto" will come to pass. The same is true for Mexico's alleged "continuing series of determinations," "future subsequent periodic reviews," and "instructions and notices issued pursuant thereto," which are unlikely to occur after the ITC's decision to revoke the order in the 2010 sunset review.

87. In any event, Mexico only identified the initiation notice of Administrative Review 11 in its panel request. As such, Mexico did not identify in its panel request any WTO inconsistency in the now rescinded Administrative Review 11. The WTO Agreements do not prohibit Members from initiating an administrative review or a refund proceeding, when such an administrative review or refund proceeding is requested, and from rescinding the administrative review or a refund proceeding, if a request is withdrawn. If no review or refund proceeding is requested for the relevant entries, under both prospective and retrospective system, the antidumping duties are collected on each transaction and no offsets are provided between transactions.[114]

4. Mexico's Claims That the United States Failed to Comply by Not Revoking the Order in Administrative Reviews 7 and 9 Are Unfounded

88. Mexico argues that the United States failed to bring itself into compliance with the DSB's recommendations and rulings by not revoking the antidumping order in Administrative Reviews 7 and 9.[115] Mexico argues that the denial of these revocation decisions were based on margins "inflated" by zeroing, rendering Mexinox ineligible for revocation.[116] As discussed above in Section IV.A.2, Mexico is incorrect.

89. As an initial matter, the original dispute was not about any revocation decision by Commerce. Commerce's decisions not to revoke the order as to Mexinox does not demonstrate that the United States failed to comply with the DSB's recommendations and rulings. To the contrary, Commerce's decision was made because Mexinox failed to meet the revocation

[113] Mexico First Written Submission, para. 93.

[114] *US-Zeroing (Mexico)(AB)*, para. 120-121; *US – Zeroing (Japan) (Panel)*, para. 7.201; *See also US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.53.

[115] Mexico First Written Submission, paras. 176-185.

[116] Mexico First Written Submission, para. 179.

requirements under the U.S. law, as discussed in Section IV.A.2.

90. As discussed above, Mexinox sold subject merchandise at less than normal value in three consecutive years leading up to the revocation determinations in both Administrative Reviews 7 and 9.[117] Accordingly, Mexinox was not eligible for revocation with or without zeroing, and there is no WTO obligation that provides otherwise.

D. This Panel Should Reject Mexico's Claims Concerning the Liquidation Instructions for Administrative Reviews 6 Through 11

1. Mexico's Claims Concerning Liquidation Instructions in Administrative Reviews 6 Through 10 Should be Rejected as Premature

91. Mexico argues that for the entries covered by Administrative Reviews 6 though 10, Commerce "expressed its *intention* to issue liquidation instructions" and that such instructions, if and when they are issued at some point in the future, would be WTO inconsistent.[118] Mexico's claims are speculative in nature because liquidation instructions have not been sent, and will not be sent until the NAFTA binational panel litigation is concluded for administrative reviews 6 through 10. The Panel does not need to make any factual findings and reach the merits of Mexico's claims regarding these instructions, except for finding that no instructions concerning the entries covered by these administrative reviews have been issued.

2. This Panel Must Reject Mexico's Claims Under Article 9.3 of the AD Agreement Regarding Liquidation Instructions

92. Mexico's claim that the issuance of liquidation instructions in Administrative Reviews 6 through 10 is inconsistent with Article 9.3 of the AD Agreement is also incorrect. Because liquidation instructions have not been issued, neither the Panel nor the parties can know whether "the amount of the anti-dumping duty... exceed{s} the margin of dumping." Moreover, the liquidation instructions do not determine the margin of dumping.

93. Mexico's claim that Commerce's issuance of liquidation instructions issued in Administrative Review 11 is also inconsistent with Article 9.3 of the AD Agreement must also be rejected, because the rates included in the instructions were not based on margins determined in the administrative review. Administrative Review 11 was rescinded, and thus no dumping margins were calculated. Pursuant to Commerce's regulations, Commerce issued liquidation

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[117] *Stainless Steel Sheet and Strip in Coils from Mexico; Final Results of Antidumping Duty Administrative Review*, 75 Fed. Reg. 6627 (Feb. 10, 2010) (Exhibit MEX-10); *see also Stainless Steel Sheet and Strip in Coils From Mexico; Preliminary Results of Antidumping Duty Administrative Review and Intent Not to Revoke Order in Part*, 74 Fed. Reg. 39622 (August 7, 2009) ("Intent Not to Revoke Order in Part") (Exhibit MEX-10).

[118] Mexico First Written Submission, para. 131 (emphasis added).

instructions to CBP, instructing it to liquidate at the rate in effect at the time of entry.[119] Therefore, there was no violation of Article 9.3 because Commerce did not determine dumping margins in Administrative Review 11, and the liquidation instructions were not based on margins calculated in Administrative Review 11.

94. Automatic assessment under Commerce's regulations is similar to prospective normal value systems, that is expressly permitted by Article 9.4(ii) of the AD Agreement.[120] Under such a system, the amount of liability for payment of antidumping duties is determined at the time of importation on the basis of a comparison between the price of the individual export transaction and the prospective normal value.[121] For example, an importer who imports a product the export price of which is equal to or higher than the prospective normal value cannot incur liability for payments of antidumping duties. The converse is also true. A liability for a dumped sale would be determined by comparing the price of an individual export transaction with a prospective normal value and the prices of other transactions have no relevance to this determination.[122] Members operating prospective normal value systems do not provide an offset to dumped transactions in the absence of an importer's request for a refund proceeding/administrative review.

95. These facts are substantially similar to what occurs in a prospective normal value system when an importer does not request an administrative review/refund procedure. In this case, a Mexican producer/exporter could have requested an administrative review of its entries during the relevant period of review, but did not. Presumably Mexican producers/exporters did not make this request because such request was against their interests (most likely because they were dumping at higher levels during the relevant period than the rates in place at the time of entry).[123] The Appellate Body explained that duty assessment on entries at the time of importation in a prospective normal value systems does not represent the margin of dumping, but that such margin would be calculated if a refund proceeding for such entries was requested.[124] What is permissible under prospective normal value system when an exporter does not request an

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[119] 19 C.F.R. §351.212(c) (Exhibit MEX-45); Mexico First Written Submission, para. 162.

[120] *US – Zeroing (Japan) (Panel)*, para. 7.201.

[121] *US – Zeroing (Japan) (Panel)*, para. 7.201; *See also US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.53.

[122] *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.53 ("Under a prospective normal value duty assessment system, anti-dumping duties are assessed as individual import transactions occur, by comparing a transaction-specific export price against a prospective normal value. . . . In the context of such transaction-specific duty assessment, it makes no sense to talk of a margin of dumping being established for the product as whole, by aggregating the results of all comparisons, since there is only one comparison at issue.").

[123] We also note that Mexinox's margin from the original investigation (as modified by Section 129 determination to eliminate zeroing) reflects that Mexinox was dumping at a level that was many times higher than the amounts collected as the cash deposits of estimated duties required at the time of entry. Likewise, even under Mexico's own calculations (without zeroing) Mexinox was dumping at a higher level in the immediately preceding administrative review than the amounts of estimated duties at issue.

[124] *US – Zeroing (Mexico)(AB)*, para. 120-121.

administrative review/refund, should also be permissible under the retrospective system operated by the United States when an exporter also does not request an administrative review/refund. As the Appellate Body recognized, the WTO agreements do not favor one system over the other.[125] Accordingly, there can be no violation of Article 9.3 of the AD Agreement or any other relevant provision, because the exporter did not request Commerce to review of the amount of the estimated antidumping duties for its entries in the relevant period, thus, there was no obligation on the United States to determine antidumping duty margins and the amount of duties as part of that unrequested administrative review.

3. The Panel Must Reject Mexico's Claims Concerning Liquidation Instructions Pursuant to Article II of the GATT 1994 and Articles 21.1 and 21.3 of the DSU

96. Mexico's claim that the United States has acted inconsistently with GATT Article II concerning liquidation instructions in Administrative Reviews 6 through 11 must be rejected because Mexico's claim concerning Article II is properly raised only under Article VI of the GATT 1994.

97. Article II:2(b) of the GATT 1994 expressly provides that "nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product . . . any anti-dumping or countervailing duty applied consistently with the provisions of Article VI." The United States has imposed the antidumping duty order following the less than fair value investigation (as modified by the section 129 determination) consistently with the provisions of Article VI of the GATT 1994.

98. Although Mexico concedes that liquidation has been suspended, it nevertheless states that "the assessment rates determined in those periodic reviews using simple zeroing and the associated liquidation instructions continue to have legal effects."[126] Because liquidation instructions have not been issued, Mexico speculates about something that does not exist.

99. In addition, Mexico's claim that the United States has acted inconsistently with its obligations under Articles II:1(a) and (b) of the GATT 1994 because it applied simple zeroing in Administrative Review 11 should also be rejected because Administrative Review 11 was rescinded before any antidumping calculations took place.[127] Accordingly, there is no legitimate basis for Mexico to argue that Administrative Review 11 is WTO inconsistent.

100. Finally, Mexico claims that the United States has acted inconsistently with Articles 21.1

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[125] *US – Zeroing (Mexico)(AB)*, para. 121.
[126] Mexico First Written Submission, para. 157.
[127] Mexico First Written Submission, para. 164.

and 21.3 of the DSU.[128] Mexico has failed to show how the alleged U.S. failure to implement within the RPT amounts to a breach of either of these DSU articles. Article 21.1 merely states why "prompt compliance" is "essential" to the WTO dispute settlement system. This article imposes no substantive obligation.[129] In addition, Article 21.3 provides a Member with the *right* to a "reasonable period of time" in which to comply with the DSB's recommendations and rulings if it is impracticable for that Member to comply immediately. It does not impose any *obligation* on Members, apart from the obligation to inform the DSB of the Member's intention regarding implementation.

E. Mexico's Claims Concerning the Sunset Reviews Are Unfounded

1. The 2005 Sunset Review

101. As discussed in section IV.B.2.a, Mexico contends that the 2005 sunset review is within the terms of reference of this Panel.[130] Mexico is incorrect.

102. DSU Article 3.7 provides that the "aim of the dispute settlement mechanism is to secure a positive solution to a dispute." If the 2005 sunset review was indeed necessary to secure a positive solution to the dispute concerning administrative reviews 1 through 5, Mexico should have included it in the original dispute, but it did not. The original dispute had nothing to do with the 2005 sunset review, and there were no findings made in connection with the 2005 sunset review. There were no DSB recommendations and rulings regarding sunset reviews and so the 2005 sunset review is not a "measure taken to comply." Mexico's claim that the 2005 sunset review is essential for compliance with the DSB's recommendations and rulings in the original dispute is contradicted by Mexico's own decision to exclude this sunset review from the original dispute.

2. The 2010 Sunset Review

103. Mexico similarly argues that the 2010 sunset review is within this Panel's terms of reference.[131] However, at the time of Mexico's panel request, neither Commerce nor the ITC had published their respective final determinations regarding 2010 sunset review. Accordingly, the 2010 sunset review falls outside the Panel's terms of reference for all the reasons discussed above in section VI.C. Moreover, given that the ITC made a negative determination – voting to revoke the antidumping order – it is unclear exactly what "measure" Mexico is now claiming is a measure taken to comply and why that measure is inconsistent with the DSB recommendations

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[128] Mexico First Written Submission, para. 134.

[129] Not all WTO provisions impose obligations on Members. For example, Article 1 of the SCM Agreement, which defines a subsidy for purposes of the SCM Agreement, does not.

[130] Mexico First Written Submission, paras. 189-195.

[131] Mexico First Written Submission, paras. 189-195.

and rulings.[132] The United States considers that Mexico's claim is now misplaced.

104. Finally, as the United States explained in Section B (2) of this submission, the findings of the likelihood of recurrence or continuation of dumping in 2005 and 2010 sunset reviews are consistent with the WTO Agreements.

[132] Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006, and Corr. 1, paras. 372-375.