"Article 9.2, which has remained unchanged since it was negotiated in the Kennedy Round, is a predecessor to the more detailed rules set out in Article 6.10, which was added to the

individual anti-dumping duties and … the requirement to name suppliers that are subject to imposition and collection of anti-dumping duties should be interpreted as a requirement to specify duties for each supplier."[17]

17. In *( )* , the Appellate Body discussed whether the exception in the third sentence of Article 9.2 would justify imposition of country-

in excess of the relevant margin of dumping, and to provide for duty refund in cases where excessive anti-dumping duties would otherwise be collected. Our understanding that Article 9.3 is concerned primarily with duty assessment is confirmed by the fact that the broadly equivalent provision in the [illegible] (i.e., Article 19.4) refers to the 'lev[ying]' of duties, and footnote 51 to that provision states that ' "levy" shall mean the definitive or final legal [illegible] of a duty or tax' (emphasis added).[22] When viewed in this light, it is not obvious that – as Brazil effectively argues – Article 9.3 prohibits variable anti-dumping duties by ensuring that anti-dumping duties do not exceed the margin of dumping established during 'the investigation phase' pursuant to Article 2.4.2. Neither the ordinary meaning of Article 9.3, nor its context (i.e., sub-paragraphs 1-3), supports that view. If Article 9.3 were designed to prohibit the use of variable customs duties, presumably that prohibition would have been clearly spelled out."[23]

22. The Panel also pointed to Article 9.3.1 dealing with retrospective duty assessment as support for its view that duties may be collected on the basis of a margin of dumping established after the end of the investigation.[24] Similarly, the Panel considered that the Article 9.3.2 refund mechanism in the case of a prospective duty assessment would include refunds of anti-dumping duties paid in excess of the margin of dumping prevailing at the time the duty is collected and drew the following conclusions:

"This therefore further undermines Brazil's argument that the only margin of dumping relevant until such time that there is an Article 11.2 review is the margin established during the investigation. If the basis for duty is the margin of dumping prevailing at the time of duty collection, we see no reason why a Member should not use the same basis for duty . Brazil has noted that refunds do not imply modification of the duty, and are only available if requested by the importer. While these points may be correct, they do not change the fact that the refund mechanism operates by reference to the margin of dumping prevailing at the time of duty collection. It is this aspect of the refund mechanism that renders it contextually relevant

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replaced by updated, 'actual' margins of dumping established for those same exporters. Nor did Canada use normal values determined for those exporters in establishing a duty rate for imports of new models or types of the product from those exporters. Rather, the CBSA established a duty rate for such imports from these two exporters based on data collected during the original investigation from a different exporter. The CBSA thereby failed to preserve the fundamental link, established by the

been made deciding to impose anti-dumping or countervailing duties."[30] The Appellate Body concluded that these provisions:

> "[P]ermit agencies to require that duties be on a product—in the sense that a final determination be made, following an original investigation, with respect to the anti-dumping/countervailing duty liability for entries of such product— as a condition of the right to a refund or review of duties … Where duties , and the remaining conditions of

> circumvent the prohibition of zeroing in original investigations that applies under the first sentence of Article 2.4.2 of the . This is because, in the first periodic review after an original investigation, the duty assessment rate for each importer will take effect from the date of the original imposition of anti-dumping duties. Consequently, zeroing would be introduced although it is not permissible in original investigations. We further note that, if no periodic review is requested, the final anti-dumping duty liability for all importers will be assessed at the cash deposit rate applicable to the relevant exporter. When the initial cash deposit rate is calculated in the original investigation without using zeroing, this means that the mere act of conducting a periodic review would introduce zeroing following imposition of the anti-dumping duty order."[38]

34. The Panel in *1* examined Viet Nam's claims regarding the use of zeroing in a periodic review. The Panel "recall[ed] that the findings of Appellate Body in and addressed the very same question which is now before us, i.e. the consistency with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 of the zeroing methodology, as such, in the context of administrative reviews. Following an objective assessment of the matter, and a thorough review of the abovementioned reasoning expressed by the Appellate Body, we agree with that reasoning and adopt it as our own."[39] The Panel found that the US zeroing methodology, as such, as it relates to the use of simple zeroing in periodic reviews, is inconsistent with Article 9.3 and Article VI:2.

35. The Appellate Body in (held that the United States' application of "zeroing" in certain administrative reviews was inconsistent with Article 9.3 and GATT Article VI:2; the Appellate Body noted that Article 9.3 "refers to the margin of dumping as established under Article 2."[40] Referring to its prior Appellate Body decisions on (/ and / , indicating that, under the Anti-Dumping Agreement and GATT Article VI, "dumping" and "margins of dumping" "must be established for the product under investigation as a whole",[41] the Appellate Body found that under Article 9.3 and Article VI:2, the amount of the assessed anti-dumping duties shall not exceed the margin of dumping as established "for the product as a whole."[42] It then noted that under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994, the margin of dumping established for an exporter or foreign producer is the as a for the total amount of anti-dumping duties that can be levied on the entries of the subject product (from that exporter) co0 g0 G0 G[(d)-3(u)-6(mp)9(i)-7(n)-6(g)-3( )-234(d)-3(u)6(t)-5(i)t-6(g)-3(

The Panel stated that, in a prospective normal value system, 'liability for payment of anti-dumping duties is incurred only to the extent that prices of individual export transactions are below normal value.' Therefore, Article 9.4(ii) 'confirms that the concept of dumping can apply on a transaction-specific basis to prices of individual export transactions below the normal value.' The Panel also stated that '[i]f in a prospective normal value system individual export transactions at prices less than normal value can attract liability for payment of anti-dumping duties, without regard to whether or not prices of other export transactions exceed normal value', there is no reason why duties may not be similarly assessed under the United States' retrospective duty assessment system.

Under transaction

individual importers. Instead, these provisions reinforce the notion that a single margin of dumping is to be established for each individual exporter investigated.

...

... we disagree with the proposition that importers 'dump' and can have 'margins of dumping'. Dumping arises from the pricing practices of exporters as both normal values and export prices reflect their pricing strategies in home and foreign markets. The fact that 'dumping' and 'margin of dumping' are exporter-specific concepts under the is not altered by the fact that the export price may be the result of negotiation between the importer and the exporter. Nor is it altered by the fact that it is the importer that incurs the liability to pay anti-dumping duties."[51]

We also disagree with the proposition that the term 'margin of dumping' has a different or special meaning in the context of Article 9.3 of the ... Although transaction-based multiple comparisons may be necessary in periodic reviews to calculate an importer's liability for payment of anti-dumping duties, this cannot impart a different or special meaning to the term 'margin of dumping' in Article 9.3."[52]

42. In the Appellate Body stated that: "A proper determination as to whether an exporter is dumping or not can only be made on the basis of an examination of

46. The Panel in *(*

established by calculating a 'weighted average margin of dumping established' with respect to those exporters or producers who investigated. However, the clause beginning with 'provided that', which follows this sub-paragraph, qualifies this general rule. This qualifying language mandates that, 'for the purpose of this paragraph', investigating authorities ' ', first, zero and margins and, second, 'margins established under the circumstances referred to in paragraph 8 of Article 6.' ."[64]

> "We note that Article 9.4 applies only in cases where investigating authorities have used 'sampling', that is, where investigating authorities have, in accordance with Article 6.10 of the Anti-Dumping Agreement, limited their investigation to a select group of exporters or producers. In such cases, the anti-dumping duty rate applied by an investigating authority to those exporters and producers who were not included in the investigated sample is referred to as the 'all others' rate. We also note that Article 9.4 does not prescribe a particular method that WTO Members must use to determine the 'all others' rate; rather, it simply identifies a maximum limit, or ceiling, which investigating authorities 'shall not exceed' in establishing an 'all others' rate."[73]

61. The Panel then noted the parameters within which an "all others" rate may be set. The Panel considered that subparagraph (i) of Article 9.4 constrains the discretion of investigating authorities by imposing a ceiling that the "all others" rate "shall not exceed" and by requiring investigating authorities to disregard, for the purposes of paragraph 4, any zero, , and "facts available" margins. The Panel also considered that, by requiring investigating authorities to disregard "facts available" margins, Article 9.4 seeks to prevent exporters who were not asked to cooperate in the investigation from being prejudiced by gaps or shortcomings in the information supplied by the investigated exporters:

> "Subparagraph (i) of Article 9.4 sets out the general rule that the relevant ceiling is to be established by calculating a 'weighted average margin of dumping established' with respect to those exporters or producers who were 'selected' or investigated. However, this general rule is qualified by the proviso that, 'for the purpose of this paragraph', investigating authorities 'shall disregard', first, zero and margins and, second, 'margins established under the circumstances referred to in paragraph 8 of Article 6'. Thus, the provision constrains the discretion of investigating authorities in two ways: first, by imposing a ceiling that the 'all others' rate '

exceeded the ceiling for the "all others" rate inconsistently with Article 9.4(i). Rather, the issue was whether the investigating authority's determination of the ceiling for the "all others" rate was consistent with the proviso to Article 9.4 of the Anti-Dumping Agreement:

> "We also note the United States' argument that Korea's claim fails because 'Korea has not even alleged what the cap was' in the determination at issue. Nothing in the record suggests that the USDOC calculated a ceiling for the 'all others' rate separately from the 'all others' rate of 60.81 percent assigned to Iljin, Iljin Electric, and LSIS. Rather, we consider that the determination of the ceiling for the 'all others' rate was implicit in the USDOC's determination of the 'all others' rate to be applied. The issue before us is not whether the USDOC improperly exceeded the ceiling for the 'all others' rate inconsistently with subparagraph (i) of Article 9.4, but, instead, whether the USDOC's determination of the ceiling for the 'all others' rate is consistent with the proviso to Article 9.4 of the Anti-Dumping Agreement."[77]

64. In [illegible] *5* [illegible], the Appellate Body considered how to interpret "margins established under the circumstances referred to in Article 6.8" in Article 9.4. The Appellate Body found that even margins calculated partially on the basis of the facts available were "established under the circumstances referred to" in Article 6.8, and further reasoned that the purpose of Article 9.4 is to prevent exporters who were not asked to cooperate in the investigation from being prejudiced by gaps or shortcomings in the information supplied by the investigated exporters:

> "To read Article 9.4 in the way the United States does is to overlook the many situations where Article 6.8 allows a margin to be calculated, , using facts available. Y

purposes of that paragraph, does not imply that the investigating authorities' discretion to apply duties on non-investigated exporters is unbounded. The lacuna that the Appellate Body recognized to exist in Article 9.4 is one of a specific . Thus, the absence of guidance in Article 9.4 on what particular methodology to follow does not imply an absence of any obligation with respect to the 'all others' rate applicable to non-investigated exporters where all margins of dumping for the investigated exporters are either zero, , or based on facts available."[80]

67. The Panel in *1* examined claims regarding the "all others" rate in a situation: two admi

normal value, but did not modify any other provisions in the Agreement, such as Article 9.4. The Panel found:

assessment of the contextual relevance o