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THE WTO DISPUTE SETTLEMENT REPORTS

The *Dispute Settlement Reports* of the World Trade Organization (the "WTO") include panel and Appellate Body reports, as well as arbitration awards, in disputes concerning the rights and obligations of WTO Members under the provisions of the *Marrakesh Agreement Establishing the World Trade Organization*. The *Dispute Settlement Reports* are available in English. Volumes comprising one or more complete cases contain a cumulative list of published disputes. The cumulative list for cases that cover more than one volume is to be found in the first volume for that case.

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

Report of the Appellate Body

WT/DS344/AB/R

*Adopted by the Dispute Settlement Body
on 20 May 2008*

Mexico, *Appellant*
United States, *Appellee*
Chile, *Third Participant*
China, *Third Participant*
European Communities, *Third Participant*
Japan, *Third Participant*
Thailand, *Third Participant*

Present:
Ganesan, Presiding Member
Bautista, Member
Sacerdoti, Member

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<i>EC – Bed Linen</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India</i> , WT/DS141/AB/R, adopted 12 March 2001, DSR 2001:V, 2049
<i>EC – Bed Linen</i>	Panel Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India</i> , WT/DS141/R, adopted 12 March 2001, as modified by Appellate Body Report, WT/DS141/AB/R, DSR 2001:VI, 2077
<i>EC – Bed Linen (Article 21.5 – India)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, 965
<i>EC – Chicken Cuts</i>	Appellate Body Report, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts</i> , WT/DS269/AB/R, WT/DS286/AB/R, and Corr.1, adopted 27 September 2005, DSR 2005:XIX, 9157
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<i>EEC – Cotton Yarn</i>	Panel Report, <i>European Economic Community – Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil</i> , ADP/137, adopted 30 October 1995, BISD 42S/17

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<i>US – Shrimp (Ecuador)</i>	Panel Report, <i>United States – Anti-Dumping Measure on Shrimp from Ecuador</i> , WT/DS335/R, adopted on 20 February 2007
<i>US – Softwood Lumber V</i>	Appellate Body Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/AB/R, adopted 31 August 2004, DSR 2004:V, 1875

Short Title	Full case title and citation
<i>US – Softwood Lumber V</i>	Panel Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/R, adopted 31 August 2004, as modified by Appellate Body Report, WT/DS264/AB/R, DSR 2004:V, 1937
<i>US – Softwood Lumber V (Article 21.5 – Canada)</i>	Appellate Body Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS264/AB/RW, adopted 1 September 2006
<i>US – Stainless Steel (Mexico)</i>	Panel Report, <i>United States – Final Anti-Dumping Measures on Stainless Steel from Mexico</i> , WT/DS344/R, circulated to WTO Members 20 December 2007
<i>US – Zeroing (EC)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")</i> , WT/DS294/AB/R, adopted 9 May 2006, and Corr.1
<i>US – Zeroing (EC)</i>	Panel Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")</i> , WT/DS294/R, adopted 9 May 2006, as modified by Appellate Body Report, WT/DS294/AB/R
<i>US – Zeroing (Japan)</i>	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews</i> , WT/DS322/AB/R, adopted 23 January 2007
<i>US – Zeroing (Japan)</i>	Panel Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews</i> , WT/DS322/R, adopted 23 January 2007, as modified by Appellate Body Report, WT/DS322/AB/R

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
1960 Group of Experts Report	GATT Second Report of the Group of Experts, Anti-Dumping and Countervailing Duties, GATT Document L/1141, adopted 27 May 1960, BISD 9S/194
<i>Anti-Dumping Agreement</i>	<i>Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994</i>
DSB	Dispute Settlement Body
DSU	<i>Understanding on Rules and Procedures Governing the Settlement of Disputes</i>
GATT 1947	<i>General Agreement on Tariffs and Trade 1947</i>
GATT 1994	<i>General Agreement on Tariffs and Trade 1994</i>
<i>Kennedy Round Anti-Dumping Code</i>	<i>Kennedy Round Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade</i> TN.64/98, 20 June 1967
Panel	Panel in <i>United States – Final Anti-Dumping Measures on Stainless Steel from Mexico</i>
Panel Report	Panel Report, <i>United States – Final Anti-Dumping Measures on Stainless Steel from Mexico</i> , WT/DS344/R
SAA	Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103-316 (1994), reprinted in 1994 USCAAN 3773, 4040 (Public Law No. 103-465, 108 Stat. 4809 (1994), <i>United States Code</i> , Title 19, Section 3501)
Tariff Act	United States Tariff Act of 1930, Public Law No. 1202-1527, 46 Stat. 741, <i>United States Code</i> , Title 19, as amended
<i>Tokyo Round Anti-Dumping Code</i>	<i>Tokyo Round Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade</i> , BISD 26S/171, entered into force 1 January 1980
T-T	Transaction-to-transaction (comparison) in original investigations
USDOC	United States Department of Commerce

Abbreviation	Description
USITC	United States International Trade Commission
<i>Vienna Convention</i>	<i>Vienna Convention on the Law of Treaties</i> , done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
<i>Working Procedures</i>	<i>Working Procedures for Appellate Review</i> , WT/AB/WP/5, 4 January 2005
W-T	Weighted average-to-transaction (comparison) in original investigations
WTO	World Trade Organization
<i>WTO Agreement</i>	<i>Marrakesh Agreement Establishing the World Trade Organization</i>
W-W	Weighted average-to-weighted average (comparison) in original investigations

I. INTRODUCTION

1. Mexico appeals certain issues of law and legal interpretations developed in the Panel Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico* (the "Panel Report").¹ The Panel was established to consider a complaint by Mexico concerning the calculation of margins of dumping by the United States Department of Commerce (the "USDOC") based on a methodology that does not fully reflect export prices that are above normal value.²

2. Before the Panel, Mexico claimed that:

- (a) "model zeroing in investigations"³ is, as such, inconsistent with Articles VI:1 and VI:2 of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"), Articles 2.1, 2.4, 2.4.2, and 18.4 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "Anti-Dumping Agreement"), and Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization* (the "WTO Agreement")⁴;
- (b) model zeroing, as applied in the original investigation at issue in this dispute⁵, is inconsistent with Articles VI:1 and VI:2 of the GATT 1994, Articles 2.1, 2.4, 2.4.2, and 18.4 of the *Anti-Dumping Agreement*, and Article XVI:4 of the *WTO Agreement*⁶;

¹ WT/DS344/R, 20 December 2007.

² Panel Report, para. 2.1.

³ According to Mexico's description, "model zeroing in investigations" occurs when the investigating authorities compare the weighted average normal value and the weighted average export price for each model of the product under consideration and treat as zero the results of model-specific comparisons where the weighted average export price exceeds the weighted average normal value, when aggregating comparison results in order to calculate a margin of dumping for the product as a whole. (See *Ibid.*, paras. 2.1 and 7.7)

⁴ *Ibid.*, para. 3.1(2).

⁵ USDOC, Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils from Mexico, *United States Federal Register*, Vol. 64, No. 109 (8 June 1999) 30790, subsequently amended as Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Stainless Steel Sheet and Strip in Coils From Mexico, *United States Federal Register*, Vol. 64, No. 143 (27 July 1999) 40560 (Exhibit MEX-5.A submitted by Mexico to the Panel). See also Panel Report, para. 2.2.

⁶ Panel Report, para. 3.1(1).

- (c) "simple zeroing in periodic reviews"⁷ is, as such, inconsistent with Articles VI:1 and VI:2 of the GATT 1994, Articles 2.1, 2.4, 9.3, and 18.4 of the *Anti-Dumping Agreement*, and Article XVI:4 of the *WTO Agreement*⁸; and
- (d) simple zeroing, as applied in the five periodic reviews at issue in this dispute⁹, is inconsistent with Articles VI:1 and VI:2 of the GATT 1994, Articles 2.1, 2.4, 9.3, and 18.4 of the *Anti-Dumping Agreement*, and Article XVI:4 of the *WTO Agreement*.¹⁰

3. In the Panel Report, circulated to Members of the World Trade Organization (the "WTO") on 20 December 2007, the Panel found that "model zeroing in investigations" is, as such, inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*¹¹, and that the USDOC acted inconsistently with this provision by using model zeroing in the original investigation at issue.¹² However, the Panel found that "simple zeroing in periodic reviews" is not, as such, inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4, and 9.3 of the *Anti-Dumping Agreement*, and that, accordingly, the USDOC did not act incon-

⁷ According to Mexico's description, "simple zeroing in periodic reviews" occurs when the authorities compare the prices of individual export transactions against monthly weighted average normal values and treat as zero the results of comparisons where the export price exceeds the monthly weighted average normal value, when aggregating comparison results in order to calculate a margin of dumping for the product as a whole. (See *Ibid.*, paras. 2.1 and 7.7)

In our discussion, we use the term "periodic review" to describe the "periodic review of the amount of [anti-dumping] duty" as required by Section 751(a) of the United States Tariff Act of 1930 (the "Tariff Act"). That provision requires the USDOC to review and determine the amount of any anti-dumping duty at least once during each 12-month period beginning on the anniversary of the date of publication of an anti-dumping duty order if a request for such a review has been received. However, in the case of the first assessment proceeding following the issuance of the Notice of Anti-dumping Duty Order, the period of time may extend to a period of up to 18 months in order to cover all entries that may have been subject to provisional measures.

⁸ Panel Report, para. 3.1(3).

⁹ The five periodic reviews challenged by Mexico are listed in Exhibits MEX-5.B through MEX-5.F submitted by Mexico to the Panel; further details may be found in Panel Report, para. 2.2.

¹⁰ Panel Report, para. 3.1(4).

¹¹ Panel Report, para. 8.1(a). However, the Panel did not recommend to the Dispute Settlement Body that it request the United States to bring its model zeroing procedures into conformity with its WTO obligations under the covered agreements because of its earlier finding that the United States had abandoned that practice as from 22 February 2007. (*Ibid.*, para. 7.45) The Panel explained that it "fail[ed] to see what purpose would be served by a recommendation relating to a measure that no longer exists." (*Ibid.*, para. 7.50) The Panel exercised judicial economy in relation to Mexico's claims under Articles VI:1 and VI:2 of the GATT 1994, Articles 2.1, 2.4, and 18.4 of the *Anti-Dumping Agreement*, and Article XVI:4 of the *WTO Agreement* regarding "model zeroing in investigations". (*Ibid.*, para. 8.2(a))

¹² *Ibid.*, para. 8.1(b).

sistently with these provisions by using simple zeroing in the five periodic reviews at issue.¹³

4. On 31 January 2008, Mexico notified the Dispute Settlement Body (the "DSB") of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to Article 16.4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), and filed a Notice of Appeal¹⁴ pursuant to Rule 20 of the *Working Procedures for Appellate Review*¹⁵ (the "*Working Procedures*"). On 7 February 2008, Mexico filed an appellant's submission.¹⁶ On 25 February 2008, the United States filed an appellee's submission¹⁷, and Chile, the European Communities, Japan, and Thailand each filed a third participant's submission.¹⁸ On the same day, China notified its intention to attend the oral hearing as a third participant.¹⁹

5. By letter dated 8 February 2008, Mexico requested authorization from the Appellate Body to correct a clerical error in its appellant's submission, and two clerical errors in the executive summary of that submission, pursuant to Rule 18(5) of the *Working Procedures*. On 12 February 2008, the Appellate Body Division hearing the appeal invited the United States and the third participants to comment on Mexico's request. No objections to Mexico's request were received and, on 14 February 2008, the Division authorized Mexico to correct the identified clerical errors.

¹³ *Ibid.*, para. 8.1(c) and (d). The Panel exercised judicial economy in relation to Mexico's claims under Article 18.4 of the *Anti-Dumping Agreement* and Article XVI:4 of the *WTO Agreement* regarding "simple zeroing in periodic reviews". (*Ibid.*, para. 8.2(b))

¹⁴ WT/DS344/7 (attached as Annex I to this Report).

¹⁵ WT/AB/WP/5, 4 January 2005.

¹⁶ Pursuant to Rule 21 of the *Working Procedures*. Along with its appellant's submission, which it filed in Spanish, Mexico provided a courtesy English translation and an English executive summary of its appellant's submission. On 8 February 2008, Mexico provided an executive summary of its appellant's submission in Spanish to the Appellate Body and to the United States and the third participants. In view of the fact that Mexico filed the appellant's submission in Spanish and the executive summary in English on the due date, and that the Spanish executive summary was filed after the deadline for filing an appellant's submission, the Appellate Body Division hearing the appeal informed the participants and the third participants that it considered the Spanish version of the executive summary to be a courtesy translation.

¹⁷ Pursuant to Rule 22 of the *Working Procedures*.

¹⁸ Pursuant to Rule 24(1) and (3) of the *Working Procedures*. On 29 February 2008, the participants and the third participants were provided a courtesy English translation, prepared by the WTO Language Services and Documentation Division, of Chile's third participant's submission originally filed in Spanish on 25 February 2008.

¹⁹ Pursuant to Rule 24(2) of the *Working Procedures*.

6. The oral hearing in this appeal was held on 6 March 2008. The participants and the third participants, with the exception of China, made oral statements and responded to questions posed by the Members of the Division hearing the appeal.

7. During the course of the appeal, the Division received a request pertaining to a procedural matter. By letter dated 3 March 2008, the European Communities requested the Appellate Body to clarify whether the United States' appellee's submission was considered to be filed with the Appellate Body within the meaning of Rule 18(1) of the *Working Procedures*. The European Communities pointed out that the Working Schedule for this appeal, communicated to the parties on 1 February 2008, provided for the United States' appellee's submission to be filed by Monday, 25 February 2008, at 5:00 p.m. However, the electronic version of the United States' appellee's submission was sent to the Appellate Body by e-mail only at 7:56 p.m., and the European Communities presumes that printed copies were delivered to the Appellate Body after that time. As a result, the United States "had significant time to examine the filings of the Third Participants and eventually adjust its own submission prior to filing."²⁰ At the oral hearing, the European Communities reiterated its request that the Appellate Body clarify whether it considers the United States' appellee's submission to be filed within the meaning of Rule 18(1) of the *Working Procedures*, and what the consequences are, if any, of a late filing.²¹

II. ARGUMENTS OF THE PARTICIPANTS AND THE THIRD PARTICIPANTS

A. *Claims of Error by Mexico – Appellant*

1. *Simple Zeroing, As Such, in Periodic Reviews*

- (a) Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1 and 9.3 of the *Anti-Dumping Agreement*

8. Mexico submits that the Panel erred in finding that simple zeroing in periodic reviews is not, as such, inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1 and 9.3 of the *Anti-Dumping Agreement*. Mexico requests the Appellate Body to reverse this finding and to find, instead, that sim-

²⁰ Letter from the European Communities to the Appellate Body Secretariat, dated 3 March 2008, p. 2. (emphasis omitted)

²¹ This issue is addressed at, *infra*, paras. 163 and 164.