BEFORE THE WORLD TRADE ORGANIZATION

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

(DS344)

MEXICO'S RESPONSES TO THE PANEL'S QUESTIONS FROM THE FIRST SUBSTANTIVE MEETING

Geneva
15 June 2007

Questions from the Panel to the Parties in connection with the First Substantive Meeting of the Panel

25 May 2007

These questions are intended to facilitate the work of the Panel, and do not in any way prejudge the Panel's findings on the matter before it. Nor does the fact that the Panel has placed these questions under certain headings prejudge the Panel's findings on the matter before it.

Please note that the term "model zeroing" as used in these questions refers to the practice described in paragraph 15 of Mexico's First Written Submission and "simple zeroing" to the practice described in paragraph 21 of Mexico's First Written Submission. These terms are used for ease of reference only; they do not in any way reflect the Panel's legal opinion on their WTO-compatibility.

Parties are reminded that their responses are due on Wednesday, 13 June 2007.

Each party is free to respond to or comment on questions posed to the other party.

I. JURISIDICTIONAL ISSUE

MEXICO

1. The Panel notes the United States' assertion that Mexico's panel request is limited to model zeroing in investigations and simple zeroing in duty assessment proceedings, More specifically, the United States argues that Mexico has not raised a claim regarding the single "Zeroing Procedures" irrespective of the proceeding in which such procedures are used and irrespective of the type of comparison carried out between the normal value and the export price.

a) Please comment. Please refer the Panel to the relevant parts of Mexico's panel request where measures other than model zeroing in investigations and simple zeroing in duty assessment proceedings have been identified.

1. In its First Written Submission, Mexico refers to "Zeroing Procedures" used by the United States that artificially inflate the margins of dumping in all procedural contexts. Mexico reiterates that this dispute refers to one specific issue: the Zeroing Procedures used by the United States.[1] The Zeroing Procedures represent a single rule or norm of general and prospective application. This characterization stems from the report of the Appellate Body in *US – Zeroing (Japan)*, a report that was issued after Mexico filed its request for the establishment of a panel in this dispute. In that report, the Appellate Body stated:

> [T]he "zeroing procedures" under different comparison methodologies, and in different stages of anti-dumping proceedings, do not correspond to separate rules or norms, but simply reflect different manifestations of a single rule or norm.[2]

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[1] Or the "Zeroing" as these terms shall be used synonymously herein.

[2] Appellate Body Report, *US – Zeroing (Japan)*, para. 88.

2. The position of Mexico is that Zeroing in all of its procedural manifestations is inconsistent with the GATT 1994 and the *Anti-dumping Agreement*. Mexico also expresses its concern that the United States has not yet eliminated Zeroing in all of its manifestations. However, Mexico recognizes that, notwithstanding the Appellate Body's confirmation that Zeroing Procedures are a single rule or norm, its claims in this dispute are limited by the language of its request for the establishment of a panel (WT/DS344/4). Accordingly, as clarified in its oral responses to the questions from the Panel, Mexico's claims are limited to the two manifestations of the Zeroing Procedures that are described in its request— (1) the use of model zeroing in original investigations; and (2) the use of simple zeroing in periodic reviews. Mexico emphasizes, however, that the structure of its challenge in no way diminishes the unitary nature of the zeroing measure at issue. Indeed, the substantive content of the measure is identical in both procedural contexts specifically challenged by Mexico, *i.e.*, pursuant to the challenged measure the USDOC systematically and invariably disregards comparison results where the export price exceeds normal value.

3. It is relevant that Zeroing is a single measure as found by the Appellate Body in *US – Zeroing (Japan)* and that a series of Appellate Body reports has prohibited zeroing in all of its manifestations. Indeed, although additional procedural settings are not the subjects of Mexico's current challenge, Mexico notes that the substantive content of the single zeroing measure in these other settings also is identical to the content in the procedural contexts specifically challenged by Mexico. Zeroing takes place at the second step in the margin calculation when the investigating authority aggregates the results of intermediate price comparisons and, in doing so disregards or treats as zero negative price comparison results. As a result, the unitary zeroing measure is not at all conditioned by the intermediate comparison methodology employed or the procedural context. It is the same in all of these contexts, as the Appellate Body found in *US – Zeroing (Japan)*. It is accordingly Mexico's position that Zeroing Procedures in all manifestations are inconsistent with the GATT 1994 and the *Anti-dumping Agreement*. Therefore, each of the manifestations viewed in isolation—including the two manifestations that are the subject of this dispute— are inconsistent with the relevant agreements and part of the same measure. The claim-specific arguments presented for each of Mexico's claims should be viewed in this light.

<u>Model Zeroing in Original Investigations</u>

4. For the Panel's reference, Mexico notes that the factual and evidentiary aspects of Mexico's claim against model zeroing in original investigations are set out in paragraphs 42 to 78 of Mexico's first written submission. Mexico's legal arguments involving this claim are set out in Sections VI and VII its first written submission (Paras. 170 to 232).

5. This claim is limited to the "model zeroing" comparison methodology used in original investigations and does not encompass other comparison methodologies. Model zeroing involves weighted average-to-weighted average intermediate comparisons of normal value and export price as described in Mexico's request for the establishment of a panel and in Mexico's first written submission.

6. Mexico has made "as such" and "as applied" claims with respect to this manifestation of the Zeroing Procedures.

<u>Simple Zeroing In Periodic Reviews</u>

7. For the Panel's reference, Mexico further notes that the factual and evidentiary aspects of Mexico's claim against simple zeroing in periodic reviews are set out in paragraphs 79 to 115 of Mexico's first written submission. Mexico's legal arguments involving this claim are set out in Sections VI and VIII of its first written submission (Paras. 170 - 192 and Paras. 233-263.)

8. Mexico has made "as such" and "as applied" claims with respect to this manifestation of the Zeroing Procedures.

BOTH PARTIES

b) What significance, if at all, should the Panel attach to the fact that the word "review" is preceded by the word "periodic" in each instance it is used in Mexico's panel request?

9. As noted above in response to Question 1, Mexico's challenge in the current dispute is limited to the following two manifestations of the single zeroing measure: (1) the use of model zeroing in original investigations; and (2) the use of simple zeroing in periodic reviews. Therefore, the fact that the word "review" always is preceded by the word "periodic" reflects the fact that Mexico's challenge with respect to "reviews" is limited to "periodic reviews" (*i.e.*, it does not include five-year ("sunset") reviews, new shipper reviews, changed circumstances reviews, etc.). Mexico nevertheless notes its view that the use of Zeroing in all other types of "reviews" is equally inconsistent with the relevant provisions of the *Anti-Dumping Agreement*, although Mexico has not requested a determination on those manifestations in this proceeding.

MEXICO

2. The scope of Mexico's request for findings and recommendations is not entirely clear to the Panel. The Panel notes for instance that in the introductory parts of its First Written Submission, Mexico challenges the "Zeroing Procedures" in all procedural contexts, including investigations, periodic reviews and sunset reviews, and irrespective of the comparison methodology used, i.e. the weighted average-to-weighted average ("WA-WA"), transaction-to-transaction ("T-T") and weighted average-to-transaction ("WA-T") methodologies. There are also other instances in Mexico's First Written Submission where Mexico cites measures that go beyond model zeroing in investigations and simple zeroing in duty assessment proceedings. It seems to the Panel, however, that the bulk of Mexico's argumentation is based on model zeroing in investigations and simple zeroing in periodic reviews. Unlike the claims relating to model zeroing in investigations and simple zeroing in periodic reviews, Mexico's First Written Submission does not seem to contain a section devoted to explaining why zeroing is WTO-inconsistent outside the context of these two claims. The "Conclusion" section of Mexico's First Written Submission does not mention proceedings other than investigations and periodic reviews although it mentions all comparison methodologies used in investigations and periodic reviews. Finally, the Panel also notes Mexico's statement in paragraph 35 of its Oral Statement that Mexico is challenging the use of zeroing in investigations and periodic reviews. Please clarify the scope of Mexico's case by referring to the relevant parts of Mexico's panel request and its First Written Submission. Please explain what specific finding(s) Mexico is expecting from the Panel in these proceedings.

10. With regard to this question, Mexico first would refer the Panel to its responses to Question 1(a) above. As detailed therein, Mexico challenges the single zeroing measure as it manifests in two contexts: model zeroing in original investigations and simple zeroing in periodic reviews.

11. As stated in Mexico's First Written Submission,[3] Mexico respectfully requests that the Panel find that:

(1) Model zeroing, as applied in the original investigation of *Stainless Steel Sheet and Strip in Coils from Mexico*, is inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4, 2.4.2, and 18.4 of the *Anti-Dumping Agreement*; and Article XVI:4 of the WTO Agreement;

(2) Model zeroing in original investigations is, as such, inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4, 2.4.2, and 18.4 of the *Anti-Dumping Agreement*; and Article XVI:4 of the WTO Agreement;

(3) Simple zeroing in periodic reviews is, as such, inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4, 9.3, and 18.4 of the *Anti-Dumping Agreement*, and Article XVI:4 of the WTO Agreement; and

(4) Simple zeroing, as applied in the five listed periodic reviews of *Stainless Steel Sheet and Strip in Coils from Mexico*, is inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1, 2.4, 9.3, and 18.4 of the *Anti-Dumping Agreement*, and Article XVI:4 of the WTO Agreement.

3. The Panel notes the United States' comment that the reason why Mexico widened the scope of the measure at issue in its First Written Submission compared with its panel request is because the Appellate Body decision on US-Zeroing (Japan) was issued after the date of Mexico's panel request but before the filing of its First Written Submission, implying that having read this report Mexico decided to advance the same description of the measure that the Appellate Body used in the mentioned case. Could Mexico please comment on this allegation?

12. Mexico disagrees with the United States' characterization of the measure at issue in Mexico's First Written Submission. As detailed above, Mexico challenges the manifestation of the single measure – Zeroing – in two procedural settings: (1) model zeroing in original investigations; and (2) simple zeroing in periodic reviews. However, the structure of Mexico's challenge in no way diminishes the unitary nature of the measure at issue. The language cited by Mexico in its First Written Submission from the Appellate Body decision in *US – Zeroing (Japan)* merely provides further confirmation that regardless of procedural setting (including the two settings specifically challenged by Mexico in this dispute), Zeroing is a single measure. Therefore, contrary to the United States' assertion, Mexico has not widened the scope of the measure at issue in this dispute.

II. IDENTIFICATION OF "ZEROING PROCEDURES" AS A MEASURE

8. The Panel notes the following statements in paragraphs 45 and 46 of the United States' First Written Submission:

> ***"45. In addition, Mexico's own argumentation contradicts its assertion that there is a "single zeroing measure." Mexico divides its presentation into two separate sections. One deals with "USDOC Zeroing Procedures in Original Investigations" and another deals with "USDOC Zeroing Procedures in Periodic Reviews." This division, and the use of the plural, is in itself probative that there is no one single measure.***

[3] Mexico's First Written Submission, para. 264.

46. Finally, as noted above, the United States is providing offsets when calculating margins of dumping on the basis of average-to-average comparisons in antidumping investigations. This further demonstrates that there is no one "single zeroing measure.""

a) What is Mexico's reaction to these arguments?

13. The cited statements simply describe different manifestations of the Zeroing Procedures. The statement in paragraph 46 is indicative that the United States may have partially abandoned zeroing in one of the manifestations.

14. The Zeroing Procedures and their different manifestations are discussed in Mexico's response to Question 1(a). The apparent partial abandonment of zeroing in one manifestation is discussed in Mexico's response to Question13.

UNITED STATES

b) Could these arguments be interpreted to mean that although there is no single "Zeroing Measures" under US law, there may be "Zeroing Measures" specific to certain types of zeroing, such as model zeroing in investigations and simple zeroing in periodic reviews? Please elaborate.

15. Mexico's position is that the appropriate characterization of US zeroing is that articulated by the Appellate Body in US – Zeroing (Japan), whereby the Zeroing Procedures represent a single rule or norm of general and prospective application. Applications of zeroing in specific contexts are simply manifestations of this single measure (see Mexico's response to Question 1(a)).

10. The Panel notes Mexico's assertion in paragraph 163 of its First Written Submission that "zeroing is a deliberate policy that has been, and continues to be, systematically applied by the USDOC, without exception, in all original investigations and periodic reviews." The Panel also notes that part of the evidence presented by Mexico on the issue of the alleged consistent application of zeroing in investigations and periodic reviews is the findings of past panels and the Appellate Body.[4]

a) Please explain – by referring to the relevant treaty provisions and jurisprudence – whether this Panel can take note of, and base its decision partly on, the factual findings made by past panels and the Appellate Body regarding the USDOC's use of zeroing in the past.

16. The above-noted assertion in paragraph 163 of Mexico's first written submission is documented in the evidence referred to in Sections III.B.2 and III.B.3 of the submission and associated exhibits. The factual findings of past panels and the Appellate Body referred to in Sections III.B.2(b)(iv)(3) and III.B.3(b)(iv)(3) are presented to corroborate the large body of direct evidence documented in these two sections. These factual findings are not necessary to meet the burden of proof for Mexico's claims against the two manifestations of the Zeroing Procedures that are the subject of this dispute. Rather, they provide further support for the prima facie case that Mexico has presented. They also provide factual context for the substantive findings of the Appellate Body that are relevant to this proceeding and that Mexico is requesting this Panel to adopt.

17. While this Panel is not bound by previous panel and Appellate Body reports, such reports create legitimate expectations among WTO Members. In US – Oil Country Tubular Goods Sunset

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[4] See, for instance, First Written Submission of Mexico, para. 164.

Reviews, the Appellate Body highlighted the importance of following its conclusions in earlier disputes, especially where the issues are the same, as they are in this dispute. It is proper for a Panel to use past substantive findings of the Appellate Body as a tool for its reasoning.

18. The factual findings underlie the substantive findings in a report. To that extent, this Panel can appropriately take note and base its decision partly on the factual findings made by past panels and the Appellate Body when adopting the substantive findings of the Appellate Body regarding the Zeroing Procedures.

MEXICO

11. The Panel notes that in paragraphs 46 and 84 of its First Written Submission, Mexico states that Exhibits MEX-1 through MEX-9 contain evidence regarding the specific content of the Zeroing Procedures applied by the USDOC. The Panel also notes that Exhibits MEX-2 and MEX-3 contain excerpts from the US statutes and regulations, respectively.

> ***a) The Panel would like to know whether, in Mexico's view, the Zeroing Procedures have any legal basis under US law, including more specifically the statutory and regulatory provisions submitted in the above-quoted exhibits. Please elaborate.***

19. As Mexico has previously described to the Panel, the USDOC, until recently, publicly maintained that the terms of the U.S. statute and regulations require zeroing of the negative results of intermediate price comparisons in both original investigations and periodic reviews.[5] The United States has specifically explained its view that zeroing is permitted under U.S. law as a reasonable interpretation of the text of Sections 771(35)(A) and (B) of the Tariff Act of 1930, as amended, 19 U.S.C. §§ 1677(35)(A), (B), defining "dumping margin" and "weighted average dumping margin," respectively.

20. For example, in Timken Co. v. United States, 354 F.3d 1334 (Fed. Cir. 2004), the binding U.S. judicial opinion addressing and upholding the application of simple zeroing applied in periodic reviews, the U.S. Court of Appeals for the Federal Circuit explained that this provision was the statutory basis for the U.S. legal position on zeroing:

> Turning to the words of the statute, 19 U.S.C. § 1677(35)(A) defines "dumping margin" as "the amount by which the normal value *exceeds* the export price or constructed export price of the subject merchandise". 19 U.S.C. § 1677(35)(emphasis added). Timken and the United States both argue that the use of the word "exceeds" limits the definition of "dumping margin" to positive numbers.[6]

21. The Court of Appeals did not agree with the USDOC that the use of the term "exceeds" in 19 U.S.C. § 1677(35)(A) requires treating only positive comparison results as "dumping margins" within the meaning.[7] However, the Court of Appeals nevertheless found that the USDOC's interpretation of Section 771(35)(A) was reasonable, and therefore permissible under the U.S.

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5 First Written Submission of Mexico, para. 36 (citing

6 *See* Exhibit MEX-6(G).

7 *Timken*, 354 F.3d at 1341-42 ("Accordingly, we conclude that Congress's use of the word "exceeds" does not unambiguously require that dumping margins be positive numbers.") , Exhibit MEX-6(G).

doctrine of judicial deference.8 The companion binding judicial opinion of the Court of Appeals addressing and upholding the application of model zeroing used in original investigations, Corus Staal BV v. Department of Commerce, 395 F.3d 1343 (Fed. Cir. 2005), was to the same effect, similarly determining that zeroing is based upon a reasonable construction of Section 771 (35) of the Tariff Act. 9

22. At least until its change in policy with respect to zeroing in original investigations using average-to-average comparisons effective February 22, 2007, the USDOC generally cited to Section 771(35)(A) and the Corus Staal opinion and its acceptance of USDOC's interpretation of Section 1677(35) as legal support for the continued application of zeroing in original investigations. For example, in last year's decision in Diamond Sawblades and Parts Thereof from the Republic of Korea, the USDOC explained its decision to apply model zeroing in that investigation as follows:

> Section 771 (35)(A) of the Act defines "dumping margin" as the "amount by which the normal value *exceeds* the export price and constructed export price of the subject merchandise." (Emphasis added). Commerce interprets this statutory definition to mean that a dumping margin exists only when NV is greater than EP or CEP. As no dumping margins exist with respect to sales where NV is equal to or less than EP or CEP, Commerce will not permit these non-dumped sales to offset the amount of dumping found with respect to other sales. The U.S. Court of Appeals for the Federal Circuit (CAFC) has held that this is a reasonable interpretation of the statute. *Timken Co. v. United States*, 354 F.3d 1334, 1342 (Fed. Cir.), *cert. denied sub nom*., *Koyo Seiko Co. v. United States*, 543 U.S. 976 (2004). S*ee also Corus Staal BV v. Department of Commerce*, 395 F.3d 1343, 1347 (Fed. Cir. 2005), *cert. denied*, 126 S. Ct. 1023, 163 L. Ed. 2d 853 (January 9, 2006).[10]

23. The USDOC also continues to cite to the Court of Appeals decision and its acceptance of USDOC's interpretation of Section 1677(35) as legal support for the continued application of zeroing in periodic reviews. This was, for example, how the USDOC justified continued application of model zeroing in the most-recently completed periodic review of the anti-dumping order on stainless steel sheet and strip in coils from Mexico in which the USDOC stated.

> Section 771(35)(A) of the Tariff Act defines "dumping margin" as the "amount by which the normal value *exceeds* the export price and constructed export price of the subject merchandise." (Emphasis added). The Department interprets this statutory definition to mean that a dumping margin exists only when NV is greater than the EP or CEP. As no dumping margins exist with respect to sales where NV is equal to or less than export or constructed export price, the Department will not permit these non-dumped sales to offset the amount of dumping found

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8 *Id.* at 1343 ("According Commerce its proper deference, we hold that reasonably interpreted § 1677(35)(A) to allow zeroing."). , Exhibit MEX-6(G).

9/ *Corus Staal*, 395 F.3d 1343, 1347 ("Our decision in *Timken* addressed Commerce's interpretation of section 1677(35); it is of no consequence that it was decided in the context of a review."). , cross-referenced in Exhibit MEX-6(M).

10 71 FR 29310 (May 22, 2006)(Issues and Decision Memorandum: Comment 11). , Exhibit MEX-6(M).

> with respect to other sales. The U.S. Court of Appeals for the Federal Circuit has held that this is a reasonable interpretation of the statute. *See Timken*, 354 F. 3d at 1342; *Koyo Seiko Co. v. United States*, 543 U.S. 976 (2004); *Corus Staal BV v. Department of Commerce*, 395 F. 3d 1343, 1347,(Fed. Cir. 2005) *cert. denied*, 126 S. Ct. 1023, 163 L. Ed. 2d 853 (January 9, 2006).
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> Mexinox's reliance of the WTO settlement report in *US – Zeroing (EC)* is misplaced. In *US – Zeroing (EC)*, the United States has not yet gone through the statutorily mandated process of determining whether or how to implement the report. *See* 19 U.S.C. 3533 and 3538. As such, the Appellate Body's report in *US – Zeroing (EC)* does not have any bearing on whether the Department's denial of offsets in this administrative determination is consistent with U.S. law. *See Corus Staa*l Fed. Cir. 2005, 395 F. 3d at 1347-49; *Timken* 354 F. 3d at 1342. Accordingly, the Department will continue in this case to deny offsets to dumping based on export transactions that exceed NV.[11]

24. As described above, the statutory basis for zeroing under U.S. law as interpreted by the USDOC, is found in the definition of "margin of dumping" contained in Section 771(35)(A) of the Tariff Act of 1930, as amended. This interpretation has been sustained by the U.S. courts, applying a deferential standard of review under U.S. law. The Court of Appeals has upheld Commerce's interpretation of this provision of the statute as permissible, but not required.

25. While the zeroing measure at issue in this WTO dispute settlement proceeding is based on USDOC's interpretation of Section 771(35) as described above, the zeroing measure itself is an unwritten rule or norm pursuant to which the USDOC, based upon this interpretation of this provision of US law, invariably ignores or treats as zero intermediate comparison results where the export price exceeds the normal value. The measure is the rule or norm and should not be confused with the legal basis from which USDOC claims to have derived authority for the measure under U.S. law.

BOTH PARTIES

b) Does, in your view, a measure have to be rooted in the law of the relevant Member in order to be susceptible to an "as such" challenge in the WTO dispute settlement proceedings? Please elaborate by referring to the relevant treaty provisions and jurisprudence.

26. For purposes of WTO dispute settlement proceedings, the relevant nexus between a "measure" and a "Member" is found in Article 3.3 of the DSU:

> "The 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" [emphasis added]

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[11] 71 FR 76978 (Dec. 22, 2006), Exhibit MEX-5(G).

27. A measure does not have to be rooted in the law of the relevant Member in order to be susceptible to an "as such" challenge in WTO dispute settlement proceedings. The reason is that, in the context of WTO dispute settlement, the term "measures" in Article 3.3 of the DSU has been interpreted broadly to include any acts or omissions attributable to a WTO Member.

28. In *U.S. – Corrosion-Resistant Steel Sunset Review*, the Appellate Body stated that:

> "In principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings. The acts or omissions that are so attributable are, in the usual case, the acts or omissions of the organs of the state, including those of the executive branch."[12]

29. Thus, a measure can be challenged as part of the dispute settlement process even if it is not set out (i.e., rooted) in a Member's laws and regulations. Further support for this view is found in the Appellate Body's recognition that an "as such" challenge can, in principle, be brought against a measure that is not expressed in the form of a written document..[13]

30. The scope of measures that may be challenged "as such" is discussed in paragraphs 150-153 of Mexico's first written submission.

31. In practice, most acts or omissions of government officials will be rooted in the law of a Member in some way, albeit possibly remotely through legislation that broadly empowers the officials to act.

III. ZEROING IN INVESTIGATIONS

MEXICO

13. The Panel notes the United States' statement that it abandoned the practice of model zeroing in investigations as of 22 February 2007. Although Mexico acknowledges that — as evidenced in the documents contained in Exhibits MEX-l0 and MEX-11 — the United States did in fact change its methodologies in this regard, it nevertheless raises concern as to whether the United States' new policy has actually been implemented in any new investigation completed before the filing of Mexico's First Written Submission in these proceedings. The Panel notes the United States' statement that the new method was applied in at least one investigation. The Final Determination pertaining to the mentioned investigation — submitted in Exhibit US-3 — seems to demonstrate that the new methodology was applied in this investigation. In light of these observations, could the Panel, in Mexico's view, accept as a matter of fact that the United States abandoned the use of model zeroing in investigations as of 22 February 2007? If Mexico does not agree, please elaborate.

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[12] Appellate Body Report, United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan, WT/DS244/AB/R, adopted 9 January 2004, at para. 81. See also Appellate Body Report, United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"), WT/DS294/AB/R, adopted 9 May 2006, para. 188 and Appellate Body Report, United States – Measures Relating to Zeroing and Sunset Reviews, WT/DS322/AB/R, adopted 23 January 2007, para. 74

[13] Appellate Body Report, *United States – Laws, Regulations and Methodologies for Calculating Dumping Margins*, WT/DS294/AB/R, adopted 9 May 2006, at paras. 193-197.

32. Mexico does not agree that the United States fully abandoned the use of "model zeroing" in investigations as of February 22, 2007. The USDOC published a notice in the *Federal Register* on December 26, 2006 (the "*Zeroing Notice*") stating that the USDOC will no longer apply Zeroing in original investigations where comparisons are made on an average-to-average basis.[14] By subsequent notice, the effective date for this modification in methodology was established as February 22, 2007.[15] The USDOC stated that in its *Zeroing Notice* that the change in policy would be applied to "all current and future antidumping investigations as of the effective date."[16] Mexico also agrees that the USDOC has, since February 22, 2007, issued at least one final anti-dumping determination consistent with the *Zeroing Notice* applying average-to-average comparisons without applying the Zeroing Procedures.[17] Mexico further notes that the *Zeroing Notice* was expressly intended to implement the findings of the Panel Report in *US – Zeroing (EC 1)* in which the Panel determined that "model zeroing" used in original investigations is a rule or norm of general and prospective effect that is a "as such" inconsistent with the *Anti-Dumping Agreement*.

33. The United States' statement that it intends to abandon model zeroing only in original investigations pending or initiated on or after February 22, 2007, coupled with the fact that zeroing has been applied in all previous original investigation determinations, means that every existing anti-dumping order issued prior to that date based on model zeroing remains unaffected by the USDOC's stated change in policy and the deposit and assessment of anti-dumping duties under those orders continues to be directly affected and determined by the zeroing applied in those original determinations. Moreover, it is apparent that the status of such existing orders will remain unaffected by the purported abandonment of model zeroing unless, or until, dispute settlement proceedings are brought before the WTO to enforce full compliance. This fact was recently demonstrated when the United States undertook to implement the panel decision in *US – Zeroing (EC 1)* by issuing amended final determinations with respect to twelve final anti-dumping determinations in investigations involving imports from the European Union, fully or partially revoking several of them.[18]

34. Mexico submits that where, as here, a finding has been made that model zeroing in original investigations is "as such" inconsistent with the *Anti-Dumping Agreement*, full compliance with that finding requires the United States to revise *all* existing measures that are based upon original investigations in which the unlawful methodology was applied. This means that *all* original investigation margins must be recalculated, all existing orders amended and fully or partially revoked if applicable, and corresponding "all others" rates revised as reflected in the results of those amended determinations. Anything short of this is not "abandonment" of model zeroing,

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[14] *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation: Final Modification*, 71 FR 77722 (26 December 2006).

[15] *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation: Change in Effective Date of Final Modification*, 72 FR 3783 (26 January 2007).

[16] *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation: Change in Effective Date of Final Modification*, 72 FR 3783 (26 January 2007).

[17] Mexico notes that the final determination at issue, *Certain Activated Carbon from the People's Republic of China* was published on March 2, 2007, after Mexico submitted its First Written Submission to the panel. *See Certain Activated Carbon from the People's Republic of China*, 72 FR 9508 (2 March 2007).

[18] *Implementation of the Findings of the WTO Panel in US--Zeroing (EC): Notice of Determinations Under Section 129 of the Uruguay Round Agreements Act and Revocations and Partial Revocations of Certain Antidumping Duty Orders*, 72 FR 75261 (4 May 2007).

nor is it full compliance with the "as such" finding concerning "model zeroing" in original investigations. Therefore, Mexico does not agree that the manifestation of zeroing in original investigations has been fully "eliminated" as of February 22, 2007.

IV. ZEROING IN PERIODIC REVIEWS

14. The Panel notes Mexico's description, in paragraphs 79-83 of its First Written Submission, of the method through which the USDOC calculates the margin of dumping in periodic reviews.

BOTH PARTIES

b) Please explain whether the above-mentioned methodology was used by the USDOC in the five periodic reviews cited in Mexico's First Written Submission?

35. Mexico confirms that the methodology described in paragraphs 79-83 of its First Written Submission was used by the USDOC in the five periodic reviews being challenged in this dispute.[19]

c) Please explain whether the above-mentioned methodology is the same as the methodology challenged in US Zeroing (EC) and US-Zeroing (Japan)? If your response is in the negative, please explain the reasons for it.

36. Mexico confirms that the above-mentioned methodology is the same as the methodology challenged in *US – Zeroing (EC 1)* and *US – Zeroing (Japan).*

15. The Panel notes the United States' argument that — absent zeroing — the targeted dumping methodology provided for under Article 2.4.2 of the Anti-Dumping Agreement would yield the same mathematical result as the WA-WA methodology. According to the United States, therefore, interpreting the Agreement as prohibiting zeroing in connection with this exceptional methodology would render this part of Article 2.4.2 inutile. In connection with this issue, could the Parties please comment on the following finding by the Appellate Body in US-Zeroing (Japan):

> ***". . . The emphasis in the second sentence of Article 2.4.2 is on a "pattern", namely a "Pattern of export prices which differs significantly among different purchasers, regions or time periods." The prices of transactions that fall within this pattern must be found to differ significantly from other export prices. We therefore read the phrase '"individual export transactions"' in that sentence as referring to the transactions that fall within the relevant pricing pattern. This universe of export transactions would necessarily be more limited than the universe of export transactions to which the symmetrical comparison methodologies in the first sentence of Article 2.4.2 would apply. In order to unmask targeted dumping, an investigating authority may limit the application of the W-T comparison methodology to the prices of export transactions falling within the relevant pattern."***

[19] *See* Mexico's First Written Submission, Exhibits MEX-5.B.-5.F.

37. The Analysis of the Appellate Body in Paragraph 135 of its Report in US – Zeroing (Japan) addresses contextual arguments relating to the second sentence of Article 2.4.2 drawn by the Panel in US – Zeroing (Japan) to support its finding that zeroing is permitted under the transaction-to-transaction (T-T) comparison methodology in original investigations. In this report, the Appellate Body overturned the finding of the Panel.

38. In addressing the Panel's contextual arguments, the Appellate Body observed that "the Panel's reasoning appears to assume that the universe of export transactions to which these two comparison methodologies apply is the same, and that these two methodologies differ only in that, under the W-T comparison methodology, a normal value is established on a weighted average basis, while it is established on a transaction-specific basis under the T-T comparison methodology".20 In paragraph 135 of its report, the Appellate Body explains why it disagrees with this assumption. In the Appellate Body's view, the universe of export transactions to which the two comparison methodologies would apply would not be the same.

39. The Appellate Body emphasized that the analysis in paragraph 135 of its report is confined to addressing the contextual arguments drawn by the Panel from the second sentence of Article 2.4.2.[21]

The United States' Mathematical Equivalence Argument

40. In its report in US – Zeroing (Japan), the Appellate Body directly addresses the "mathematical equivalence" argument.22 It summarizes its reasons for rejecting this argument in its earlier report in US – Softwood Lumber V (Article 21.5 – Canada).[23] In paragraphs 134-135 of its report in US – Zeroing (Japan), the Appellate Body simply adds further reasoning to support its prior rejection of the mathematical equivalence argument.

41. In this dispute, the United States refers to the arguments it made to previous panels regarding mathematical equivalence and it acknowledges that these arguments have been rejected by the Appellate Body.[24] The Appellate Body's reasons for rejecting these arguments are summarized in Mexico's First Written Submission.[25] The United States has not put forward any documentation before this Panel to substantiate its mathematical equivalence arguments, namely, that the targeted dumping methodology provided for under Article 2.4.2 –in the absent of zeroing- would yield the same mathematical result as the WA-WA methodology.

42. Thus, with respect to this element of its affirmative defence to Mexico's claims—i.e., the mathematical equivalence defence— the United States has not met its burden to present a prima facie case. In this regard, Mexico would like to recall the statement of the Appellate Body in the case US – Shirts and Blouses:

> *"[I]t 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,*

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20 Appellate Body Report, *US – Zeroing (Japan)*, paragraph 134.
21 *Id*., para. 136.
22 *Id*., paras. 132-133.
23 *Id*., para. 133.
24 First Written Submission of the United States, paras. 59-64.
25 First Written Submission of Mexico, para. 206.

> *whether complaining or defending, who asserts the affirmative of a particular claim or defence."*[26](emphasis added).

43. In this context, it is clear that the United States has not satisfied its burden of proof concerning its mathematical equivalency defence. The simple fact that such arguments have been made to past panels does not meet this burden, particularly when such arguments have been explicitly considered and rejected by the Appellate Body.

V. SUGGESTION FOR IMPLEMENTATION

MEXICO

16. The Panel notes Mexico's request that the Panel '"suggest the United States to implement the recommendation by eliminating both "as such" and "as applied" the Zeroing Procedures in all antidumping procedural contexts." Please explain the exact scope of Mexico's request for a suggestion on implementation. More specifically, please explain whether Mexico requests the Panel to suggest revocation of: a) the zeroing measures challenged by Mexico "as such" in these proceedings, and b) the revocation of the anti-dumping duty on Stainless Steel from Mexico at issue.

44. Mexico requests that the Panel suggest termination of the single measure – Zeroing – challenged "as such" by Mexico in two contexts: model zeroing in original investigations and simple zeroing in periodic reviews. Mexico also requests that the Panel suggest that zeroing be eliminated from the periodic review results of the reviews mentioned in Mexico's request for Panel.

45. Mexico does not request that the Panel suggest revocation of the anti-dumping duty on Stainless Steel from Mexico at issue in the current dispute. In this regard, Mexico recognizes that a withdrawal of the inconsistent measure would not necessarily lead to withdrawal of the antidumping order, given that in the absence of zeroing in the conduct of the original investigation, the margin of dumping in the investigation of Stainless Steel from Mexico would be above the de minimis threshold.

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[26] Appellate Body Report, *United States – Measure affecting imports of woven wool shirts and blouses from India* (DS33), at 14.