TIMELINE OF MAJOR EVENTS IN THE CASE

In this case, United States — Final Anti-Dumping Measures on Stainless Steel from Mexico [later referred to in the project as US – Stainless Steel (Mexico)], the Complainant is Mexico and the Respondent is the United States of America.
26th May 2006 Mexico requests for Consultations with the United States on methods of anti-dumping determination used by the US Department of Commerce in relation to imports of stainless steel sheet and strips from Mexico.

9th June 2006 Japan requests to join the Consultations.

12th October 2006 Mexico requests for establishment of a panel.

26th October 2006 DSU establishes panel.

China, the European Communities, Chile, Thailand and Japan reserve their third party rights.

20th December 2006 Director General composes the panel.

20th December 2007 Panel report is circulated among the members.

31st January 2008 Mexico notifies its decision to appeal to the Appellate Body on certain issues of law and interpretation covered by the Panel.

30th April 2008 Appellate Body report is circulated among the member nations.

20th May 2008 DSU adopts the Appellate Body report as well as the Panel report, as modified by the Appellate Body Report.

2nd June 2008 US notifies the DSU that it intends to comply with its WTO obligations and seeks a reasonable time period for that.

11th August 2008 Mexico requests reasonable time period be determined through binding arbitration.

29th August 2008 The Director General appoints an arbitrator.

31st October 2008 Arbitration award is circulated among the members and the reasonable time period was set till 30th April 2009.

18th May 2009 Mexico and US informs DSU of an Agreement Regarding Procedure under Article 21 and 22 of DSU.

19th August 2009 Mexico requests consultations under Article 21.5 of DSU.

7th September 2010 Mexico requests for establishment of a compliance panel.

31st May 2011 Compliance Panel is composed.

8th April 2013 Mexico and US notifies DSU that the parties have reached a mutually satisfactory solution.

6th May 2013 The compliance panel circulates its report consisting of a brief description of the case and reporting the solution that has been reached, among the member nations.

INCEPTION OF DISPUTE AND REQUEST FOR CONSULTATION

Bothered by the methods of anti-dumping determination used by the US Department of Commerce in relation to imports of stainless steel sheet and strips from Mexico from January 1999 to June 2004, Mexico
requested for consultations with the United States of America on 26th May 2006. It, further, addressed certain amended sections of the US Tariff Act, 1930, the Statement of Administrative Action that accompanied the Uruguay Round Agreements, along with specific sections of US Department of Commerce’s regulations codified at title 19 of the US Code of Federal Regulations, the 1997 edition of the Import Administration Anti Dumping Manual and the methodology employed by the US Department of Commerce to evaluate the overall margin of dumping for the product subject to the original investigation and administrative reviews, where the Department disregarded the negative dumping margin. Mexico considered these regulations, laws and administrative practices both “as such” and “as applied” in determining the anti-dumping margin which results in the impairment and nullification of benefits directly or indirectly accruing to Mexico as per the WTO Agreement and other agreements annexed thereto. Specifically, Mexico contends that US practices that are in question are at least inconsistent with –

i. Article VI:1 and VI:2 of GATT 1994

ii. Article 1, 2.1, 2.4, 2.4.2, 5, 6.10, 9 (including 9.3), 11 and 18 of the Anti-Dumping Agreement

iii. Article XVI:4 of the WTO Agreement.

Japan joined as a third party to the consultations on 9th June 2006.

ESTABLISHMENT OF PANEL AND FINDINGS OF THE PANEL

Mexico requested the Dispute Settlement Body for establishment of a panel and it was established on 26th October 2006. The European Communities, Japan, Chile, China and Thailand reserved their third party rights. On the request of Mexico, the panel was constituted by the Director-General on 20th December 2006. A year later, on 20th December 2007, the Panel report was circulated to among the members.

RULING OF THE PANEL

After hearing the arguments from both the sides, the panel ruled that the zeroing method used by the US is “as such” inconsistent with Article 2.4.2 of the Anti-Dumping Agreement and by using model zeroing the United States Department of Commerce (USDOC) acted inconsistently with the Anti-Dumping Agreement while investigating Stainless Steel Sheet and Strips in coil from Mexico. However, simple zeroing in periodic review was held not be “as such” inconsistent with Article VI:1 and VI:2 of the GATT 1994 and Article 2.1, 9.3 and 2.4 of Anti-Dumping Agreement, thus the USDOC did not act inconsistently with GATT 1994 and the Anti-Dumping Agreement by using the simple zeroing method in its five periodic reviews.

APPEAL TO THE APPELLATE BODY

On 31st January 2008, Mexico appealed to Appellate Body regarding certain issues of law decided by the panel and certain legal interpretations done by the panel. On 30th April 2008, the Appellate Body Report was circulated among the members.

ISSUES FRAMED:

1. Whether simple zeroing in periodic reviews is “as such”, inconsistent with GATT 1994 (Articles VI:1 and VI:2) and Anti-Dumping Agreement (Articles 2.1 and 9.3).

2. Whether the USDOC violated GATT 1994 and Anti-Dumping Agreement by using simple zeroing as an anti-dumping measure.

3. Whether the Panel failed to fulfill its obligations under Article 11 of the DSU.
BROAD ARGUMENTS BY MEXICO:

• Mexico distinguished between model zeroing in investigations and simple zeroing in periodical reviews. The panel had decided that dumping margin and dumping should not be calculated as per a model or category. Mexico argued that the panel is incorrect in finding that simple zeroing is not inconsistent with VI:1 and VI:2 of the agreement.

• Mexico reasoned that during investigation, dumping and dumping margin should be calculated for the product as a whole and not as per model or category or specific type.

• The second argument was that the dumping margin should not be calculated as per the pricing behaviors of the importers but as per the pricing behavior of the exporters.

• Thirdly, that for calculating the margin of dumping, the individual transaction should be looked at and not the total sales made by the exporter. According to Mexico, it is precisely because the amount of duties collected from importers under a prospective normal value system may differ from the actual ‘margin of dumping’ of the exporter or producer, that Article 9.3.2 requires an opportunity for a review.

BROAD ARGUMENTS BY US:

• They tried to support the panel’s decision that zeroing was not inconsistent with VI:1 and VI:2 of GATT 1994.

• Their first contention was that first sentence of Article 2.4.2 of anti dumping agreement does not provide a basis for prohibiting zeroing in periodic reviews, but only prohibits the zeroing in W-W transactions with the principle of effective treaty interpretation, because it would render useless and redundant the remaining text of Article 2.4.2 of the Anti-Dumping Agreement, which provides for an alternative targeted dumping comparison methodology.

• That Mexico’s contention regarding dumping and dumping margin being connected to the product as a whole will make a blanket prohibition on all contexts. The meaning of ‘product as a whole has no textual foundation in the agreement.

• US further explains that the word ‘product’ can be taken to have either a collective meaning or an individual meaning, ‘but it cannot mean product as a whole’ ‘Margin of dumping’ any margins arising from individual transactions or individual importers are not “margins of dumping” per se but, instead, represent only inputs to be taken into account for calculating an aggregate. According to the United States, the text and the context of the agreements lend support to a transaction-specific meaning for the term margin of dumping’.

• US further contended that ‘product as a whole was not accepted by Kennedy Round Anti-Dumping Code, the Tokyo Round Anti- Dumping Code, the GATT 1994, and the Anti-Dumping Agreement. Article 9.3 of the Anti-Dumping Agreement requires investigating authorities to aggregate the results of all comparisons when calculating the overall “margin of dumping” in periodic reviews.

• US further submit that if at all the meaning of the provision is inconsistent, supplementary meanings should be looked at- the negotiating history of the Uruguay rounds and panel reports in dispute settlement proceedings. These meanings would demonstrate that no consensus could ever be reached on prohibition of zeroing.

• US also submitted that there is a difference between the terms dumping and dumping margin which have been read as one by various appellate body reports.
POSITION OF BOTH PARTIES ON ARTICLE 11 OF DSU:

Article 11 of DSU reads:

“The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.”

Mexico: Mexico alleged that not following a precedent is against article 11 of the DSU for two reasons

1. First, that it will affect the predictability of the decisions given by the DSU
2. Second, that it interferes with the prompt settlement of the dispute, and thus hinders the effective functioning of WTO.

United States: United States cited Japan – Alcoholic Beverages II, to contend that the appellate body reports are not binding on the panel. Moreover, the panel took all the precedents into consideration and then arrived at the decision that they were not applicable. Thus this was, according to the US, a decision which was under the panel’s discretion.

POSITION OF BOTH PARTIES ON ARTICLE 2.4 OF THE ANTI DUMPING AGREEMENT

Article 2.2.4 reads

“Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison”

Mexico: Mexico argued that the panel had erred in not inconsistent with article 2.4 of the anti dumping agreement as simple zeroing was inherently biased. The method of simple zeroing artificially inflates the difference between the dumping margin and the fair comparison criterion gets violated.

United States: The US argued that Panel’s decision should be upheld- that simple zeroing is not inconsistent with article 2.4. The fair comparison requirement does not encompass a broad range mandate but only a specific one for the determination of fairness. Taking examples from the Uruguay and Kennedy negotiations, US emphasized that fair comparison has never been interpreted to mean a free standing obligation.

THIRD PARTY SUBMISSIONS:

Chile, Japan and Thailand supported Mexico’s contention. They all argued that the dumping and dumping margin should be calculated according to the whole product and not a model or subset of low priced transactions. The EC and Japan contended that the panel’s departure from prior Appellate Body rulings
violated the DSU, while Chile and Thailand, though less forcefully, criticized the panel for having undermined predictability and security.

DECISION BY THE APPELLATE BODY

After the Appellate Body listened to the arguments of both the parties and considered the panel findings, it ruled:

ON THE ISSUES OF DUMPING AND ZEROING

The appellate body observed that the US had discontinued the practice of model zeroing in investigations in 2007 and they now calculate the overall weighted average dumping margin. If this margin is below de minimus, there is no dumping. For a period review, all sales of the exporter are assessed and the going forward cash deposit rate will be calculated. The issues formed at the appellate stage were

- Whether dumping and margin of dumping were export or import related concepts?
- Can dumping and margin of dumping be calculated transaction specific or importer specific under article 9.3 of the agreement?
- Should the excess amount between the export price and the normal value be disregarded (simple zeroing be allowed?)

The appellate body ruled that dumping and margin of dumping are export specific concepts. The decision on this issue was based on the fact that article 5.8 specifically provides for termination of investigation against an exporter when the margin in de minimus. Similarly, article 6.10 and 9.5 also use the words exporter and exporting country. These provisions, according to the appellate body, induce a notion that a single margin of dumping is to be accepted. Next, the AB also decided that dumping and margin of dumping have the same meaning throughout the agreement. Injurious dumping is to be checked and not dumping per se. Dumping and margin of dumping cannot be different terms and margin of dumping just checks the degree of dumping. Thus the AB held that importers dump cannot have marginal dumping.

The AB ruled on the second issue explaining that dumping of margin of dumping cannot be calculated as per transactions but should be calculated as per the entire export happening in the period of investigation. If the contrary is assumed, there will be different margins for different transactions and products and it would become difficult to apply the provisions of the anti dumping agreement on them.

Regarding simple zeroing, the AB was of the view that the excess in dumping should not be disregarded when the export price increases the normal value. Article 2.2.1 is the only article which disregards the excess. The AB cited the case of Softwood Lumber V, to explain that multiple averaging can be done while calculating dumping but this will not be called margin of dumping. If the excess value is disregarded, three consequences will flow –

i. The disregarded transactions which pertain to a model, may be considered as dumped for the original investigation but disregarded for the final assessment leading to a mismatch

ii. this treatment is inconsistent with the manner in which injury was determined in the original investigation, where transactions that occurred at above the normal value were taken into account in order to calculate the volume of dumped imports for purposes of injury determination

iii. This would lead to zeroing at investigation stage as well by the WTO members.
Thus, the Appellate Body reversed the Panel’s finding that simple zeroing used in the periodic review is “as such” inconsistent with Articles VI:1 and VI:2 of GATT 1994 and Articles 2.1, 2.4 and 9.3 of Anti-Dumping Agreement, but is rather inconsistent “as such” with Article VI: 2 of GATT 1994 and Article 9.3 of Anti-Dumping Agreement.

ON ARTICLE 11 OF THE DSU

Regarding the jurisprudence of binding judgments, the panel had held that though the judgments are not binding, they should be taken into account when they are relevant to any issue. The panel cited the panel reports that the appellate body had reversed. Article 11 of the DSU has two sentences - the first that establishes the role of the panel to assist the DSB and the second that mandates that the panel should conduct its own analysis while reaching a conclusion.

The AB interpreted article 11’s second condition as an addition to the first sentence as the word ‘accordingly’ has been used. Hence, the crux of the article is to maintain the coherence in the judgments first and then application of proper reasoning by the panel to conclude a matter.

The AB observed that in practice, the panel pays due regard to the finding of the appellate body. This ensures ‘security and predictability’ under article 3.2 of the DSU. Not following an appellate body report undermines the coherency in the dispute resolution system. It was decided that the flaw in panel’s judgment was in the wrong understanding of the legal provisions and not the fact that it was in violation of article 11 of the DSU. The AB made no judgment in this regard as the panel’s findings were already reversed. But they did show a ‘deep concern’ over panel’s departure from the established principles of the appellate body reports.

AFTERMATH OF THE APPELLATE BODY DECISION

Around a month later, on 20th May 2008 the DSB adopted the Appellate Body report and the panel report modified in accordance with the Appellate Body report.

COMPLIANCE WITH THE REPORT

On 2nd June 2008, US notified the DSB that it intended to comply with the WTO provisions and said that a reasonable time period will be required by them for implementing their new policies. Mexico requested that the reasonable time period should be determined through binding arbitration in accordance with Article 21.3(c) of the DSU and requested the Director-General to appoint an arbitrator. Mr. Feliciano was appointed as arbitrator on 29th August and on 31st October the arbitration award was circulated among the members, where the reasonable time period was determined to be 11 months plus 10 days from the date of adoption of the Appellate Body and panel report.

On 18th May 2009, Mexico and US informed the DSB of an Agreement Regarding Procedures under Articles 21 and 22 of DSU. In August 2009, Mexico requested consultations under Article 21.5 OF DSU and also requested for establishment of a compliance panel. Soon after, Japan requested to join the consultations and Japan, along with China, the European Community, Korea and Brazil. Since 27th April 2012, Mexico kept requesting the compliance panel to suspend their work. On 8th April 2013, Mexico and US notified the DSB that they have reached a mutually satisfactory solution in accordance with Article 3.6 of the DSU and finally on 6th May 2013, the panel circulated its report among the members, giving a brief description of the dispute and reporting that a solution has been reached.

IMPACT AND ANALYSIS OF THE CASE

While the Appellate Body has pointed out that adherence to prior Appellate Body rulings by WTO panels is “appropriate” and “expected”, the status of these reports as formally nonbinding has left the scope for panels
to depart from settled Appellate Body decisions as a matter of simple disagreement.

In the first instance, US- Stainless Steel (Mexico) may seem like a replica of prior cases dealing with the issue of ‘zeroing’ – the same legal claims were raised against the US and the same conclusions were reached by the Panel, which were reversed by the Appellate Body on the same grounds in earlier cases such as US- Zeroing (Japan) and US- Zeroing (EC). However, here the Panel’s rejection of settled Appellate Body jurisprudence and its reliance upon principles and theories that were expressly rejected by the Appellate Body in earlier cases brought to light fundamental questions about the precedential nature of rulings of the Appellate Body.

The status of prior rulings in WTO law is grounded in the international law principle that the decisions of international tribunals do not represent binding precedents, but are rather limited to providing persuasive evidence of law. In the 1996 landmark dispute of Japan-Alcoholic Beverages II, the Appellate Body had concluded that as a formal matter, an adopted panel report binds only the particular dispute and the particular parties who’ve appeared before the panel. The Appellate Body later ruled that the same principle applied to adopted Appellate Body reports as well. In support of this conclusion, in Japan-Alcoholic Beverages II the Appellate Body cited Article IX:2 of the WTO Agreements, which provides explicitly states that the Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of the WTO Agreement and of Multilateral Trade Agreements.

Subsequent Appellate Body rulings have suggested a presumption that WTO Panels will have to adhere to the rulings of the Appellate Body. In the 2004 case of US-Oil Country Tubular Goods Sunset Review, the Appellate Body concluded that “following the Appellate Body’s conclusion in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same.” Scholars have characterized the precedential authority of the rulings of the Appellate Body on panel decisions in various ways, ranging from that of nonbinding precedents – akin to courts of the same level in the US – to suggestions that a system of de facto stare decisis may already exist.

All the previous zeroing cases show that the panels have not really felt as bound by the Appellate Body reports as would be expected if a system of stare decisis existed. The panel in US – Zeroing (Japan) felt free to arrive at conclusions which were contrary to the conclusions arrived by the Appellate Body in US – Zeroing (EC) on the same issue of law and it did so without elaborately discussing its departure from the Appellate Body ruling. Similarly, the panel in US-Stainless Steel (Mexico) cited similar reasons that were cited by the panel in US-Zeroing (Japan) to reach conclusions contrary to prior rulings of the Appellate Body, even though the reasons adopted were clearly rejected by the Appellate Body.

The Appellate Body’s stance in US – Stainless Steel (Mexico) emphasised the importance of adherence to prior jurisprudence by focusing on the WTO’s interest in security and predictability. While US – Oil Country made reliance upon prior rulings of the Appellate Body “expected”, US – Stainless Steel (Mexico) appears to have gone a step further by making it an implicit requirement under Article 3.2 of the DSU in absence of “cogent reasons” for acting otherwise. Further, it also deviated from the Appellate Body’s statement in the US – Oil Country case by taking an additional step of grounding the cogent reasons standard in the text of DSU, a step that implies application of precedents beyond cases relating to zeroing. Even though the report acknowledges the formally nonbinding nature of Appellate Body reports, the focus of its discussion on reliance on interests, stability of legal interpretation, and the hierarchical structure of the dispute settlement system can be understood to be narrowing the circumstances under which a panel may deviate from prior rulings of the Appellate Body.

In a later case of US – Continued Zeroing, a panel was asked to rule on the permissibility of use of simple zeroing again, in US periodic reviews. The European Community claimed violation of GATT provisions on almost identical grounds claimed by Mexico in US – Stainless Steel (Mexico). While deciding on the key arguments, the panel stated that it agreed with the views of the panel report in US – Stainless Steel (Mexico), even quoting and citing the report at length. However, after a discussion on the role of jurisprudence in the
WTO, the panel concluded it would ultimately follow the Appellate Body ruling, citing the ruling of the Appellate Body in US – Stainless Steel (Mexico), and held the US in violation of the claimed grounds. The significance of this case is that it suggests a possibility that US – Stainless Steel (Mexico) has brought a shift to the WTO doctrine relating to adherence to Appellate Body reports. However, it can also been that Appellate Body’s reading of the DSU text was found to be persuasive by the panel with respect to precedent and accordingly it afforded greater weight to prior rulings of the Appellate Body on zeroing, or that the panel concluded from its review of US – Stainless Steel (Mexico) that it has to conduct its own review as to the role of panels in WTO jurisprudence and in the end agreed with the Appellate Body’s stress on security and predictability and with the standard of “cogent reasons”.

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