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

WT/DS344

OPENING STATEMENT OF THE UNITED STATES OF AMERICA AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

July 17, 2007

Mr. Chairman, members of the Panel:

1. The United States welcomes this opportunity to meet with the Panel again to discuss the issues raised in this dispute. We will not repeat our arguments in full here, but instead will respond to some of the arguments provided by Mexico in its responses to the Panel's questions and in its rebuttal submission.

2. First, we note Mexico's acknowledgment in response to the Panel's questions that its claims are limited by the language of its panel request to the use of model zeroing in average-to-average comparisons in original investigations and simple zeroing in periodic reviews. Unfortunately, Mexico continues to cling to its argument that there is a single measure taken by the United States that requires the Department of Commerce to "zero." Mexico presents no new evidence of the existence of a measure that prescribes and requires specific action. It merely continues to present the same evidence of past actions by the Department of Commerce. For the reasons we provided in our prior submissions, Mexico has not demonstrated that there is any "as such" measure requiring zeroing, because there is no such measure. The Panel should therefore reject Mexico's "as such" claims.

3. In addition, in both its answers to the questions from the Panel and its second submission, Mexico insists on making accusations regarding alleged non-compliance by the United States

with respect to the DSB recommendations and rulings in *US – Zeroing (EC)* – DS294. With respect to the "as such" ruling regarding "model zeroing," Mexico states that it "does not agree that the United States fully abandoned the use of 'model zeroing' in investigations as of February 22, 2007." Mexico argues that full compliance would require the United States to revise all existing measures.

4. Aside from the fact that it is not for Mexico to unilaterally determine the non-compliance of another Member, as DSU Article 23 makes clear, we note that the European Communities – the complaining party in DS294 – does not appear to share Mexico's view. In its recent request for consultations under Article 21.5, the complaint of the European Communities is limited to its "as applied" claims.[1] Indeed at the April 24, 2007 meeting of the DSB, the European Communities welcomed the decision to abandon zeroing in original investigations when calculating the dumping margin on a weighted average-to-weighted average basis.[2]

5. Moreover, in arguing that a Member can implement a ruling against a measure "as such" only by revising all applications of that measure, Mexico improperly blurs the distinction between "as such" and "as applied" claims.

6. Mexico also continues to argue that a suggestion from the Panel regarding implementation is necessary. However, it is well-established that a Member has the right to determine the means of implementation. Further, Mexico appears to be seeking though a suggestion a result that goes well beyond any right it might have under the Agreement. In this connection, we note Mexico's recognition that the provision of offsets in the original

[1] WT/DS294/22 (12 July 2007).

[2] WT/DSB/M/230 (25 May 2007).

investigation on stainless steel would still result in a margin of dumping well above the *de minimis* threshold. Therefore, the antidumping order would remain in place.

7. Turning to Mexico's arguments regarding the alleged legal basis for requiring offsets, in its rebuttal submission, Mexico explains that its claim that the Antidumping Agreement contains an obligation to reduce antidumping duties to account for instances of non-dumping rests on two essential textual foundations. We will show that these two supposed foundations fail to support Mexico's claims with respect to periodic reviews.

8. Mexico's first alleged textual foundation is that the terms "dumping" and "margin of dumping" as they are defined in Article VI:1 and VI:2 of the GATT 1994 and in Article 2.1 of the Antidumping Agreement have no meaning except in relation to the product taken in its entirety. The text of these definitions, however, does not contain the words "taken in its entirety" or "taken as a whole" or any words to that effect. Instead, the text of these definitions contains only the word "product." In its rebuttal submission, Mexico admits that the term "product" can refer to individual transactions in the context of numerous provisions of the GATT 1994, including within Article VI. Nevertheless, Mexico argues that those uses of the term "product" are distinguishable because they arise in contexts other than the determination of margins of dumping. However, by so arguing, Mexico effectively concedes that the ordinary meaning of the term "product" – standing alone – cannot serve as the textual basis for an interpretation that requires the phrase "margin of dumping" to relate solely and exclusively to the "product as a whole." Moreover, Mexico has identified no other textual basis for interpreting the term "product" – as used in the definitions of "dumping" and "margin of dumping" – to mean the "product as a whole." Nor has Mexico identified any textual basis for excluding the

possibility that the term "product" – as used in these definitions – may include the concept of individual transactions.

9. In fact, the text of these definitions, which refer to the price of a product introduced into the commerce of an importing country, supports the individual transaction meaning of the term "product," since the price of a product is established for each transaction and since each transaction is introduced into the commerce of the importing country. The fact that prices are set in individual transactions and the fact that products are introduced into the commerce of an importing country pursuant to individual transactions are not "subjective views" of the United States, as Mexico argues. Rather, this is the actual commercial conduct that is described by the text of the provisions of the Antidumping Agreement from which Mexico purports to derive an entirely contrary interpretation. As the panel in *US – Zeroing (Japan)* concluded, the definition of dumping itself "undermines the argument that it is not permissible to interpret the concept of dumping as being applicable to individual sales transactions." Consequently, and for the additional reasons detailed in our written submissions, the first essential foundation of Mexico's claims fails.

10. Mexico argues that a second essential foundation of its claims in this case is the notion that the remedies contained in the Antidumping Agreement are not directed toward importers. It is not disputed that dumping results from the pricing behavior of exporters and producers. It is also indisputable, however, that antidumping duties – the remedy for injurious dumping that is provided by the Antidumping Agreement – are directed at importers. The fact that importers are the parties that actually pay the antidumping duties must not be ignored if antidumping duties are

to be an effective remedy to "offset or prevent" dumping as provided in Article VI:2 of the GATT 1994.

11. Mexico misunderstands the remedies provided for in the Antidumping Agreement as punitive measures directed at the conduct of producers and exporters. On the contrary, antidumping duties are remedial measures taken to "offset or prevent" dumping and its injurious effects by removing any incentive the importer has to import merchandise at less than normal value and to induce the importer to increase the resale price to cover the expense of the antidumping duties and prevent further injurious effect. Mexico interprets the Antidumping Agreement to require that the amount of antidumping duties be reduced in the amount by which some transactions are sold at prices in excess of normal value. Mexico is essentially arguing that non-dumped transactions constitute a remedy for dumped transactions that supplants the remedy provided for in the Antidumping Agreement. There is no basis for this interpretation in the provisions of the GATT 1994 or the Antidumping Agreement. Consequently, the second essential foundation of Mexico's claims also fails.

12. The lack of a textual basis for Mexico's claims with respect to periodic reviews is also demonstrated by Mexico's attempt to apply the "product as a whole" concept in a manner that is detached from the concept's underlying textual basis in the first sentence of Article 2.4.2 of the Antidumping Agreement. Recall that Mexico's claims rely on the argument that margins of dumping calculated in periodic reviews must relate solely and exclusively to the "product as a whole," and cannot be calculated for individual transactions. The concept of "product as whole," however, was originally derived from the phrase "all comparable export transactions" in the first sentence of Article 2.4.2. Not surprisingly, Mexico is forced to acknowledge that the

phrase "all comparable export transactions" cannot lend any support to its claims with respect to periodic reviews, because that phrase pertains only to average-to-average comparisons in original investigations.

13. Nevertheless, Mexico attempts to find support for its interpretation in the Appellate Body report in *US – Softwood Lumber Dumping* by asserting that the phrase "all comparable export transactions" was not integral to the Appellate Body's reasoning in that report. Mexico's assertion is erroneous, however, because the Appellate Body expressly stated that it was interpreting the term "margins of dumping" and the phrase "all comparable export transactions" in an "integrated manner." Thus, the Appellate Body did not ignore, but instead based its findings on, the phrase "all comparable export transactions." In addition, the fact that the Appellate Body was, contrary to Mexico's assertions, not deriving its interpretation of "margins of dumping" solely from the definitions in Article 2.1 of the Antidumping Agreement and Article VI of the GATT 1994 is further demonstrated by the fact that the Appellate Body declined to address the contextual argument that a general prohibition of zeroing would be inconsistent with the provision for transaction-to-transaction comparisons in Article 2.4.2. If the Appellate Body was articulating a general prohibition of zeroing based on the definitional provisions, as Mexico argues, there would have been no sound basis for declining to address the transaction-to-transaction context.

14. For these reasons, Mexico's proposed interpretation is textually and conceptually at odds with the provisions of the Antidumping Agreement upon which it relies. In addition, with respect to Article VI:2 and Ad Article VI:2 of the GATT 1994, and Articles 2.2, 2.4.2 second sentence, and Article 9 of the Antidumping Agreement, the implications of the interpretation

proposed by Mexico provide further contextual support for the conclusion that Mexico's interpretation is not correct. Mexico's proposed interpretation carries with it implications that simply cannot be reconciled with these provisions.

15. Article 2.4.2, for example, provides for average-to-transaction comparisons under certain circumstances as an alternative to average-to-average or transactions-to-transaction comparisons. The interpretation offered by Mexico is incorrect because it renders inutile the average-to-transaction comparisons provided for in the second sentence of Article 2.4.2. Contrary to Mexico's arguments in its response to the questions of the Panel, the United States is not asserting an "affirmative defense" based on the second sentence of Article 2.4.2. Rather, the United States is arguing that application of the customary rules of interpretation of public international law leads to the conclusion that Mexico's proposed interpretation fails to give effect to the provisions of Article 2.4.2, second sentence, and, for that reason, should be rejected.

16. The redundancy of the average-to-transaction comparison type with the average-to-average comparison type, if offsets are granted, is a function of the mathematics of calculating weighted averages, and can be readily demonstrated, as the United States did in its response to the Panel's questions. As detailed in our submissions, under Mexico's interpretation that the Antidumping Agreement incorporates a general prohibition of dumping, this comparison type is rendered a nullity because it cannot mathematically produce a result that differs from the average-to-average comparison type.

17. With respect to Article 9.3, Mexico argues that excess antidumping duties have been assessed. This argument rests on its misinterpretation of the term "margin of dumping" in Article 9.3 as relating exclusively to the product "as a whole", and as considered exclusively

from the perspective of the exporter and on an aggregate basis over some frame of reference that is nowhere mentioned in the text. This interpretation of the term "margin of dumping" in Article 9.3 is not supported by the text of the Article. Indeed, this interpretation is at odds with the text of Article 9.3, which provides for determination of final liability for antidumping duties that are paid by importers on the basis of individual import transactions.

18. The mismatch between the nature of the assessment proceedings provided for in Article 9.3 and the interpretation of the term "margin of dumping" proposed by Mexico result in perverse incentives and absurd results. In particular, as previously noted, the reduction of antidumping duties to account for non-dumped transactions will result in a remedy that is insufficient to "prevent or offset" dumping and its injurious effects as intended by Article VI:2 of the GATT 1994. Moreover, the offsets contemplated by Mexico would confer an additional competitive disadvantage upon importers who refrain from importing dumped merchandise from the same exporter or producer as an importer that does import dumped merchandise. Under Mexico's proposed interpretation, the antidumping duty liability for the importer of the dumped transactions would be reduced by the offset attributable to the non-dumped import transactions. This kind of competitive disincentive to engage in fair trade could not have been intended by the drafters of the Antidumping Agreement and should not be accepted by the Panel as consistent with a correct interpretation of Article 9.3.

19. In addition, an obligation to account for other imports in assessing antidumping duties on a particular entry is contrary to the very concept of a prospective normal value system provided for in Article 9. Under such a system, the amount of liability for payment of antidumping duties is determined at the time of importation on the basis of a comparison between the price of the

individual export transaction and the prospective normal value. If the margin of dumping must relate exclusively to an aggregation of all transactions constituting the "product as a whole", as Mexico argues, the administration of such an assessment system cannot function as intended.

20. Under Mexico's interpretation, a prospective normal value assessment system necessarily requires retrospective reviews on the basis of the aggregation of transactions because, according to Mexico, the margin of dumping for the "product as a whole" can never be known at the time of importation. Nothing in the text of Article 9, however, suggests that the refund proceeding described therein necessarily must relate to an aggregated examination of all transactions. Nor does Mexico attempt to explain why, if refund proceedings under Article 9.3 require aggregation of transactions for the "product as a whole", Article 9.3 fails to provide for any time frame over which the transactions would be aggregated. Thus, it is impossible to discern from the text the universe of transactions that comprise the "product as a whole."

21. Mexico tries to avoid the natural conclusion of its own argumentation by explaining that the possibility of retrospective refund proceedings would arise in a prospective normal value system only if the sum total of antidumping duties applied upon importation were to exceed the margin of dumping determined on the basis of aggregating all transactions and providing offsets for non-dumped transactions. But, under Mexico's own interpretation, this would arise in virtually every circumstance. Upon entry of any non-dumped transaction, under a prospective normal value system, zero antidumping duty liability is incurred. Under Mexico's interpretation, however, each of those non-dumped transactions will result in an offset that must reduce the antidumping duty liability for the other dumped transactions. Thus, the only way to avoid the necessity of a retrospective review under Mexico's interpretation of a prospective normal value

system is if there are no non-dumped transactions. This interpretation contradicts the prospective nature of the assessment system described in the text of Article 9.

22. Nevertheless, Mexico argues that the U.S. position renders the refund proceeding a nullity because it means that, without an aggregated retrospective determination of the margin of dumping, the margin of dumping and the antidumping duty applied at the time of importation would always be identical. This is not correct; a more limited refund proceeding is consistent with the prospective nature of this type of assessment system. For example, a refund proceeding would be necessary to deal with instances in which the price or other relevant elements of the transaction change after importation of the product occurs. In such instances the actual margin of dumping may differ from the antidumping duty applied upon importation.

23. Mexico also argues that zeroing is inconsistent with the "fair comparison" requirement of Article 2.4 because it is "biased" and "inflates" the margin of dumping. The relevant text of Article 2.4, however, provides only that a "fair comparison shall be made between the export price and the normal value." It is not disputed, however, that the United States makes a "fair comparison" between export price and normal value for each export transaction in an assessment proceeding. Mexico's claims relate not to the comparison of export price and normal value, but to a supposed obligation to aggregate the results of those comparisons. Mexico has repeatedly argued that zeroing does not occur when export price and normal value are compared, but when the results of those comparisons are aggregated without providing offsets for the non-dumped transactions. Accordingly, Mexico's complaints with respect to zeroing can have no bearing on whether the United States makes a fair comparison of export price and normal value consistent with Article 2.4.

24. Even if the "fair comparison" requirement of Article 2.4 were pertinent to Mexico's claims, there is no textual basis in Article 2.4 for concluding that the denial of offsets for non-dumped transactions is unfair. If the Panel finds, as prior panels have found, that it is permissible to understand the term "margin of dumping" as used in Article 9.3 as applying to an individual transaction, then there will be no basis for a finding that the margins of dumping calculated by the United States in periodic reviews are "inflated" or the result of "bias."

25. In summary, Mexico has failed to reconcile its proposed general prohibition of zeroing with a correct interpretation based on the text and context of the relevant provisions of the Antidumping Agreement. The practical consequences of adopting Mexico's interpretation counsel strongly in favor of the interpretation adopted by prior panels, which is that, except for the context of average-to-average comparisons in investigations, the Antidumping Agreement does not impose an obligation to provide offsets for non-dumping.

26. Mr. Chairman, members of the Panel, this concludes our opening statement. We would be pleased to respond to any questions you may have.