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

WT/DS344

RESPONSE TO THE PANEL'S QUESTIONS TO THE PARTIES IN CONNECTION WITH THE SECOND SUBSTANTIVE MEETING

July 31, 2007

A. IDENTIFICATION OF "ZEROING PROCEDURES" AS A MEASURE

Q1. The Panel notes Mexico's following statement in its answer to Question 1 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. (emphasis added)

b) BOTH PARTIES: Assuming for the sake of the argument that the United States did in fact abandon the use of model zeroing in investigations through the policy change dated 22 February , what consequence, in your view, would that have on the measure at issue in connection with Mexico's two "as such" claims? Would it, for instance, mean that the measure at issue expired during the panel proceedings, or that the measure has been amended? In both cases, please indicate what implications, in your view, this change in the USDOC's policy would have on whether or not this Panel may address Mexico's "as such" claim regarding model zeroing in investigations? In other words, please explain whether the Panel is precluded from making, findings and/or recommendations about a measure which expires or which is amended during the panel proceedings. Should the Panel, in your view, make such findings and/or recommendations? Please elaborate on the basis of the relevant legal texts and jurisprudence.

1. First, the United States does not believe model zeroing constitutes a measure that can be challenged "as such" within the meaning of the DSU. Further, as the United States has previously noted[1], the fact that the United States has begun providing offsets when calculating margins of dumping on the basis of average-to-average comparisons in original investigations supports the conclusion that there never was a unitary "zeroing" measure in the first place. In other words, the United States treated offsets when performing average-to-average comparisons in original investigations separately from any other treatment of offsets. Furthermore, if there had been a unitary "zeroing" measure in the first place, the United States would have needed to have repealed or amended that measure as part of beginning to provide such offsets, but the United States did not do so – there was no such unitary "measure" to repeal or amend. The

[1] See First Written Submission of the United States, para. 46.

United States thus considers that no findings or recommendations should be made with respect to any alleged "as such" measure.

2. As a general matter, if a measure exists at the time a panel is established but expires or is withdrawn during the course of the panel proceedings, it is still within the panel's terms of reference, and the panel may make findings regarding the WTO consistency of the measure.[2]

> ***Q2. UNITED STATES: The Panel notes the following explanation in the United States' answer to Question 9(b) from the Panel:***
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> > ***Regarding the second part of the question, prior to February 22, 2007, Commerce had not exercised its discretion to provide offsets in any antidumping proceeding. This should come as no surprise, because in the absence of a reasoned explanation for granting offsets, one would not expect an administering authority to treat similarly situated cases in an inconsistent manner. The fact that Commerce did not exercise its discretion in an arbitrary fashion is only evidence that Commerce maintained good administrative practices. (emphasis added)***
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> ***The Panel notes that Question 9(b) asked whether the USDOC used discretion not to use zeroing in any anti-dumping investigation up until the modification of the USDOC's practice that took effect on 22 February 2006, or in any periodic review carried out to date. Please clarify whether your answer is that the USDOC did not use discretion not to zero in the investigations where the WA-WA method was used until the policy change came into effect on 22 February 2007, and in any periodic review to date.***

3. Under U.S. law, Commerce has discretion to provide offsets for non-dumped comparisons (*i.e.*, not use "zeroing") or to deny such offsets (*i.e.*, use "zeroing"). With respect to the clarification requested by the Panel, the United States response is, as described by the Panel, that Commerce did not use discretion not to zero in investigations using average-to-average comparisons until the policy change came into effect on February 22, 2007. In addition, Commerce did not exercise its discretion not to zero in any periodic review to date.

B. ZEROING IN PERIODIC REVIEWS

[2] See Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products,* WT/DS291,292,293/R, adopted 21 November, 2006, paras. 7.1306 - 7.1319, citing to Panel Report, *India – Measures Affecting the Automotive Sector,* WT/DS146/R, adopted 5 April, 2002, para. 7.26, and Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry,* WT/DS54/R, adopted 23 July 1998, para. 14.9.

Q3. The Panel notes both parties' arguments regarding the description of the calculation of the margins of dumping in periodic reviews in the US system. More specifically, the Panel notes paragraphs 79-83 of Mexico's First Written Submission and the United States' answer to Question 14 from the Panel.

a) BOTH PARTIES: Please explain whether the explanation below represents a complete and accurate description of the manner in which the margin calculations are made by the USDOC in periodic reviews:

The United States has a retrospective duty assessment system. Under the US system, the anti-dumping duty order imposed following an investigation does not necessarily constitute the final liability for the importers importing the subject product into the United States. The importer deposits a security in the form of a cash deposit at the time of importation. Subsequently, the importer may, on an annual basis, ask the USDOC to calculate the importer's final liability for the imports made in the previous year. This is called a "periodic review", a "duty assessment proceeding" or an "administrative review" under US law. If the duty calculated in a periodic review exceeds the original cash deposit rate, the importer has to pay the difference. When the opposite is the case, the difference is reimbursed. In cases where no final assessment is requested, the initial cash deposit paid at the time of importation is automatically assessed as the final duty. Besides assessing the final liability of importers for imports made during the period of review, the USDOC, in a periodic review, also calculates the cash deposit rate for the following period.

The calculation of margins of dumping in a periodic review entails three steps. First, the product under consideration is broken into models and a monthly weighted average normal value is determined for each model. Each export transaction is compared against the relevant monthly weighted average normal value. Second, these comparisons are aggregated. In such aggregation, the results of comparisons where the export price exceeds the weighted average normal value are treated as zero. Third, the model-specific calculations are aggregated and a weighted average margin of dumping is calculated for each exporter, which then becomes the cash deposit rate for the following period. The calculation of the importer-specific assessment rate is also similar. The USDOC segregates, from the figures pertaining to the exporter, the results of the comparisons for each importer and divides it by the total value of imports

> ***made by the same importer. In other words, the nominator for the exporter-specific margin of dumping, i.e. the future cash deposit rate, is the total of the comparisons where the normal value exceeds the export price and the denominator is the value of all exports from that exporter during the period of review. The nominator for the importer-specific assessment rate reflects the results of comparisons where the normal value exceeds the export price within the universe of the imports made by that particular importer, and the denominator is the total value of all imports by the importer.***
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> ***If, in your view, the explanation above does not represent a complete and accurate description of the manner in which the margin calculations are made by the USDOC in periodic reviews, please explain its shortcomings by referring to the relevant provisions of US law.***

4. No concise explanation could adequately describe all of the calculations that may be performed and determinations that may be made in the course of Commerce's periodic reviews. The details of the steps and calculations may involve considerable complexities that have no bearing on the issues in this dispute, including the particularities of the commercial and accounting practices of a wide variety of companies and industries, complexities regarding the determination of the appropriate export price and comparable normal value for purposes of comparison and any appropriate adjustments that must be made thereto. While the description offered by the Panel is a fairly accurate general description of the calculations performed by Commerce in a periodic review, certain inaccuracies are identified below.

5. As an initial matter, it is not accurate to refer to all of the calculations performed in a periodic review as "margin calculations." Article VI:2 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994') refers to the "margin of dumping" as the "price difference determined in accordance with the provisions of [Article VI:1]." Therefore, as that term is used in Article VI of the GATT 1994, calculation of the "margin of dumping" does not require the aggregation of price differences found with respect to multiple transactions. If Article VI of the GATT 1994 or any of the relevant provisions of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") had contemplated aggregation as a necessary part of the calculation of any margin of dumping, then it would have been essential to specify a time frame over which the aggregation would be performed. The absence of any mention of such a time frame over which an aggregation would be performed strongly indicates that aggregation is not a necessary part of the calculation of any margin of dumping. Thus, it would be more accurate to describe the three principal calculations performed in a periodic review as: (1) the calculation of margins of dumping for each export transaction; (2) the calculation of an assessment rate for each importer on the basis of the margins of dumping of the importer's transactions from each exporter/producer during the period examined; and (3) the calculation of a cash deposit rate for future entries of each exporter/producer on the basis of the

margins of dumping of the exporter/producer's transactions during the period examined. In this regard, the provisions of U.S. law relating to each calculation are: 19 U.S.C. 1675(a)(2)(A) (providing that Commerce shall determine the margin of dumping for each entry of the subject merchandise), 19 U.S.C. 1675(a)(2)(C) (providing that the determination of the margin of dumping for each entry shall be the basis for the assessment of antidumping duties and for deposits of estimated duties (*i.e.*, the cash deposit)).

6. Similarly, the use of the term "margin of dumping" in the following statement may incorrectly suggest that aggregation is a necessary part of calculating a margin of dumping as that term is used in the GATT 1994 and AD Agreement: "In other words the nominator for the exporter-specific *margin of dumping*, i.e. the future cash deposit rate ..." (emphasis added) Where an aggregation of margins of dumping is performed, the result of the aggregation can be more accurately identified by reference either to the pool of transactions over which the aggregation is performed and/or the purpose for which the aggregation is being performed. In particular, the use of the phrase "exporter-specific margin of dumping" may be a convenient, but less accurate, way of referring to the weighted average of dumping margins of the exporter's transactions during the period examined, which is used as the cash deposit rate for future entries. Alternatively, the same concept could be referred to as the "exporter's weighted average dumping margin during the period of review" to more accurately indicate that what is being referred to is the result of an aggregation of transaction-specific margins of dumping. In this regard, the U.S. statute provides for separate definitions of the "dumping margin" and the "weighted average dumping margin." The latter is determined by "dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices such exporter or producer." 19 U.S.C. 1667(34) and (35).

7. In the same vein, the use of the term "margins of dumping" in the following statement may also incorrectly suggest that aggregation is a necessary part of calculating margins of dumping as that term is used in the GATT 1994 and AD Agreement: "The calculation of *margins of dumping* in a periodic review entails three steps"(emphasis added). Rather, "margins of dumping" are calculated for each export transaction in the "first step" by comparing export price and the corresponding average-normal value. If the comparison reveals that export price is lower than normal value, the difference is a margin of dumping. Subsequent aggregations of these margins of dumping are not, therefore, a necessary part of the margin calculation. Rather, the aggregations are undertaken to establish an assessment rate for each importer and a cash deposit rate for each exporter or producer.

8. The description of the "first step" incorrectly suggests that a single monthly average normal value is always calculated for each model, regardless of whether there are multiple levels of trade involved. Consistent with Article 2.4, however, comparisons must be made at the same level of trade. Accordingly, to ensure comparability, where transactions involving merchandise within the same model are sold at multiple levels of trade, a model-specific monthly average normal value is calculated for each level of trade to allow comparisons to be made at the same level of trade.

9. In addition, the description of two aggregation "steps" performed in a periodic review suggests that the aggregation of the transaction-specific margins of dumping calculated in the "first step" occurs in a particular sequence, i.e. first within each of the models and then those aggregation results are aggregated for all models. In the periodic reviews at issue in this dispute, Commerce did not perform the aggregations that resulted in assessment rates or cash deposit rates using two sequential stages as described by the Panel. Instead, the aggregation was performed in a single stage, with the margin of dumping for each export transaction being considered separately for purposes of aggregation and in no particular sequence. For each transaction for which a margin of dumping is calculated, the amount of the margin of dumping is summed in the aggregation. For each transaction for which no margin of dumping is calculated, i.e. where the export price exceeds the normal value, to date the Department of Commerce has not granted an offset to reduce the aggregated sum of the margins of dumping. While the sequencing of aggregations described by the Panel is one possible method Commerce could use in aggregating the transaction-specific margins of dumping, the sequencing of the aggregation has no effect on the result of the aggregation.

10. With respect to the statement, "This is called a 'periodic review', a 'duty assessment proceeding' or an 'administrative review' under US law", only the terms "administrative review" and "periodic review" are used by the U.S. antidumping statute and regulations. 19 U.S.C. 1675 "Duty assessment proceeding" is not a term used by the U.S. antidumping statute or regulations; and is, instead, a generic term that has been used to refer to procedures used by Members for imposition and collection of antidumping duties as described in Article 9 of the AD Agreement.

11. The statement, "... the USDOC, in a periodic review, also calculates the cash deposit rate *for the following period*"(emphasis added), incorrectly suggests that the future cash deposit rate would be applied to all imports that occur in the period immediately following the period that is the subject of the periodic review. This can be best clarified by considering an example of a periodic review. All merchandise subject to antidumping order is subject to some pre-established cash deposit rate, either from the original investigation or from a review completed after the investigation. A periodic review will examine transactions made in a particular period of review, for example the year 2007. The retrospective periodic review would be initiated in early 2008 after the period of review is complete. While the periodic review is conducted, i.e. during 2008, the pre-existing cash deposit rates will remain in effect. When the periodic review is completed, likely in early 2009, the new cash deposit rates would go into affect for entries made after the date the results of the periodic review are final. Those cash deposit rates would then remain in effect until superceded by the final results of a subsequent periodic review.

12. Finally, the statement, "the importer may, on an annual basis, ask the USDOC to calculate the importer's final liability for the imports made in the previous year," is incomplete to the extent that it does not also mention that domestic interested parties and exporters or producers may also request that a periodic review be conducted. As explained below in response to the Panel's question 3.b.iv, Commerce's Regulations provide that domestic interested parties

(including petitioners) and foreign exporters or producers, as well as importers, are allowed to seek the initiation of a periodic review. *See* 19 C.F.R. 351.213(b).

b) More specifically, please explain:

i) BOTH PARTIES: Whether the margin calculations for both the importer's final liability and the future cash deposit rate are made on the basis of the WA-T method?

13. Yes. The result of each comparison of a model-specific weighted-average normal value and transaction-specific export price is a margin of dumping for each export transaction. Those margins of dumping for each export transaction are the basis of both the importer's final liability and the future cash deposit rate. The final liability of each importer is established by dividing the sum of the margins of dumping for the importer's transactions by the sum of the entered values of those transactions to calculate an assessment rate for the importer. The amount of security for payment of duties on future entries is established for each exporter/producer by dividing the sum of the margins of dumping for the exporter/producer's transactions by the sum of the export prices of those transactions to calculate a cash deposit rate for the exporter/producer's merchandise.

iv) BOTH PARTIES: Are petitioners and foreign exporters also allowed under US law to seek the initiation of a periodic review, or is this right given exclusively to importers?

14. Commerce's Regulations provide that domestic interested parties (including petitioners) and foreign exporters or producers, as well as importers, are allowed to seek the initiation of a periodic review. *See* 19 C.F.R. 351.213(b).

C. OTHER QUESTIONS

Q5. UNITED STATES: The Panel notes the dumping margin calculation tables presented in Exhibit US-10 in order to demonstrate the mathematical equivalency between the results obtained through the WA-WA comparison methodology and those obtained through the WA-T comparison methodology without zeroing. The Panel also notes the calculation tables submitted by Mexico in Exhibit MEX-12, allegedly disproving such mathematical equivalency. Do the tables submitted Exhibit MEX-12, in your view, invalidate the United States' mathematical equivalency argument? Please elaborate.

15. The United States has demonstrated that, if offsets for non-dumping must be granted as Mexico proposes, the results of making comparisons on an average-to-transaction basis or on an

average-to-average basis would invariably be mathematically equivalent.[3] Mexico's attempt at a counter-example improperly alters the weighted average normal value basis of the comparison used under the second sentence of Article 2.4.2, contrary to the text of the provision which describes only a change in the export price basis of comparison to account for a pattern of differences found in the export prices. Mexico's example provides no basis to justify its use of an alternative basis for the average normal value and no basis for such a change appears in the text of Article 2.4.2. Therefore, Mexico's example does not invalidate the argument presented by the United States that a general prohibition of zeroing would render inutile the average-to-transaction comparisons provided for in the second sentence of Article 2.4.2.

16. The second sentence of Article 2.4.2 is intended to provide for an asymmetrical alternative to the symmetrical comparisons provided for in the first sentence of Article 2.4.2, if the authority "find[s] 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." Thus, the alternative provided for in the second sentence of Article 2.4.2, properly interpreted, is to permit asymmetrical comparisons by using a transaction-specific basis for comparison only on the export price side of the comparison, while the normal value side of the comparison is maintained as a weighted-average normal value. Without any justification for its alteration of the basis for normal value, Mexico's example does not, consistent with the text of Article 2.4.2, rebut the U.S. demonstration of mathematical equivalence.

17. The example provided by Mexico is substantively identical to arguments raised by Japan in *US – Zeroing (Japan)* which were examined in detail by the panel in that dispute and rejected as failing to effectively rebut the inutility of the second sentence of Article 2.4.2 under a general prohibition of zeroing. Japan argued that the results of average-to-average and average-to-transaction comparisons were not the same if the basis for normal value differed under these two comparisons. In this regard, the panel report noted that Japan had provided monthly average normal value as an example of an alternative basis for normal value.[4] In response to Japan's argument, the panel explained:

> Regarding Japan's argument that, if zeroing is prohibited, an average-to-transaction comparison will produce a result different from that of an average-to-average comparison if the average normal value is established on a different basis, we see nothing in the text of Article 2.4.2 that suggests any distinction between the bases upon which the normal value is established under the average-to-average method, on the one hand, and under the average-

[3] *See* First Written Submission of the United States, paras. 58-64; United States' Answers to Panel Questions, paras. 34-37 and Exhibit US-10.

[4] *US – Japan (Zeroing) (Panel)*, n. 7.66.

> to-transaction method, on the other. There exists no substantive difference between "a weighted average normal value" in the first sentence of Article 2.4.2 and "a normal value established on a weighted average basis" in the second sentence of that provision. Moreover, the average-to-transaction method provided for in the second sentence is manifestly designed to address a problem arising from a particular pattern of export prices, not domestic prices. Thus, Japan's interpretation of the second sentence as contemplating an average normal value established on a basis different from the average normal value referred to in the first sentence of Article 2.4.2 is without support in the text of Article 2.4.2 and has no logical relationship to the purpose of the average-to-transaction method. In this respect, we see no merit in Japan's argument that Article 2.4.2 does not prohibit a Member from using different bases for calculating the average normal values in the average-to-average comparison and the average-to-transaction comparison and that Article 2.4.2 was thus crafted on the assumption that Members could choose to use different bases for calculating the average normal value under these two methods.[5]

18. The Appellate Body in *US – Zeroing (Japan)* did not endorse the monthly average normal value example as a rebuttal of mathematical equivalence — despite the above analysis by the panel, Japan's introduction of the monthly average normal value example in the dispute, and an argument by Mexico specifically endorsing the monthly average normal value example.[6] Instead, the Appellate Body's analysis rested on the notion that the targeted dumping provision would apply to a different universe of transactions than would be examined under the first sentence of Article 2.4.2.[7] The United States has specifically addressed this in response to the Panel's Question 15 following the First Substantive Meeting.[8] Therefore, the Appellate Body's analysis lends no support to Mexico's example as a rebuttal to mathematical equivalence consistent with the requirements of Article 2.4.2.

19. Mexico argues that particular credence should be given to its example because it purports to have been derived from application of a U.S. regulation pertaining to targeted dumping. The United States, however, has never applied the regulation in question, let alone applied it in the manner in which Mexico has presented it in this dispute. The existence of a never-applied U.S. regulation has no bearing on the Panel's determination of whether Mexico's hypothetical example is consistent with Article 2.4.2.

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[5] *US – Zeroing (Japan) (Panel)*, para. 7.129.

[6] *See US – Zeroing (Japan) (AB)*, para. 59.

[7] *US – Zeroing (Japan) (AB)*, paras. 134-135.

[8] United States' Answers to Panel Questions, paras. 34-37 and Exhibit US-10.

20. To the extent that the Panel considers relevant the actual experience of Members who do utilize the targeted dumping provision in their antidumping regimes, the Panel may consider that the redundancy that results from the mathematical equivalence appears to have already led one such Member that has used the average-to-transaction comparison in its investigations to conclude that a general prohibition of zeroing would render the average-to-transaction comparison inutile.[9] As the panel in *US – Zeroing (EC)* concluded, a general prohibition of zeroing that applies to the targeted dumping provision "would deny the second sentence [of Article 2.4.2] the very function for which it was created."[10]

[9] *See* First Written Submission of the United States, para. 63 and Exhibit US-5 (referencing the arguments of the Council of the European Union before the Court of First Instance in the case of Ritek Corp. v. Council of the European Union, arguing that the results of the two comparison methods are mathematically the same unless zeroing is applied, with which the court agreed).

[10] *US – Zeroing (EC) (Panel),* para. 7.266, *see also US – Softwood Lumber Dumping (Article 21.5) (Panel),* para. 5.52 ("[A] general prohibition of zeroing ... would deprive the second sentence of Article 2.4.2 of effect."); *US – Zeroing (Japan) (Panel),* para. 7.127 ("If zeroing is prohibited in the case of the average-to-transaction comparison, the use of this method will necessarily always yield a result identical to that of an average-to-average comparison.").