UNITED STATES – FINAL ANTI-DUMPING MEASURES ON STAINLESS STEEL FROM MEXICO
(WT/DS344)

(AB-2008-1)

OPENING STATEMENT OF THE UNITED STATES OF AMERICA

March 6, 2008

1. Mr. Presiding Member, members of the division, my name is Warren Maruyama and I appear on behalf of the United States. Since this is Ambassador Bautista's first oral hearing, the United States would like to welcome her to the Appellate Body and express our appreciation for her willingness to serve.

2. Members of the division, the United States respectfully urges the Appellate Body to uphold the Panel's findings that assessing duties based on an importer's individual transactions in periodic assessment proceedings is, as such and as applied, not inconsistent with GATT 1994 Article VI and the WTO Antidumping Agreement.

3. Since I am sure the Appellate Body is delighted to be asked to address yet another zeroing appeal involving the United States, I will start by briefly explaining why we believe the zeroing line of reports raises fundamental, over-arching concerns about the role of the Appellate Body in the WTO system that go well beyond the technical issues involving zeroing itself. I will then discuss our interpretation of the key textual provisions of GATT Article VI and the WTO Antidumping Agreement. Here, I shall contend that the language of the GATT and the Antidumping Agreement, having been subjected to customary rules of treaty interpretation, supports the use of individual dumped transactions to calculate duties in retrospective assessment proceedings. While we recognize that the Appellate Body has struggled valiantly to discern a

unitary theory underlying the various provisions of the Antidumping Agreement, the reality is that the WTO text is a hodge-podge of obscure antidumping terminology, much of which dates back to the GATT 1947, the Kennedy Round Antidumping Agreement, or the Tokyo Round Antidumping Code. In addition, the Uruguay Round negotiators – not surprisingly – had major, irreconcilable disagreements over many antidumping issues, such as zeroing. These differences persist even today. Accordingly, the antidumping negotiators – like trade negotiators and diplomats from time immemorial – set out clear rules in those instances where they could agree, but in others, where there was no consensus, they papered over their differences, or were silent. In such a situation, examination of the "surrounding circumstances" and resort to the negotiating history are not just appropriate, but necessary for determining the "ordinary meaning" of key terms.

4. While our friends from Mexico and the third parties have portrayed zeroing as a device that massively inflates dumping margins, the consequences of zeroing in the investigation in this dispute were to increase the weighted-average dumping margin by a mere 0.16 percentage points – from 30.69 percent to 30.85 percent.[1] Our concern, therefore, is with the broader systemic implications of the Appellate Body's handling of this case for the WTO's dispute settlement system. In the European Court of Justice, there is a well-established tradition of interpreting the Treaty of Rome broadly to fill gaps that could not be bridged by politicians and the member States. The WTO's drafters, however, steered clear of authorizing panels or the Appellate Body to engage in "gap-filling." Instead, Article 3.2 of the DSU is explicit: "Recommendations and

[1] *See* First Written Submission of Mexico, para. 62.

rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements." In other words, panels and the Appellate Body must base any right or obligation on the text and the "common understanding" of WTO Members. Otherwise, a ruling has no legal basis and the DSB has overstepped its authority by taking over the role of the WTO Members in negotiations.

5. The zeroing reports represent a long-running dispute between the Appellate Body and panels – composed primarily of trade remedy experts – about the meaning of key provisions of the Antidumping Agreement. In their submissions, Mexico and several third parties have flayed the Panel for not adopting the Appellate Body's findings in the various zeroing cases. While engaging in legal histrionics has dramatic value, the reality is that the Appellate Body recognized long ago in *Japan – Alcoholic Beverages II* that GATT and WTO reports are "not binding except with respect to resolving the particular dispute between the parties." The Appellate Body has also indicated that panels are required only to "take into account" prior rulings on matters in issue. Here, the Panel carefully analyzed the Appellate Body's reasoning in expanding a zeroing prohibition beyond average-to-average comparisons in investigations, and found that it could not agree. A reading of the Panel's report will show that it responded in detail to each of the various rationales that have been put forward by the Appellate Body in its zeroing decisions. The Panel's report reflects a sincere disagreement with the Appellate Body's reasoning, <u>not</u> a lack of respect.

6. All of us want a strong WTO dispute settlement system that commands widespread respect and adherence. But no legal system can afford an unthinking adherence to precedent. Even in our common law system with its principle of *stare decisis*, the courts can and do reverse earlier rulings if they are convinced that a mistake was made. A legal system that cannot fix

mistakes will lose credibility and eventually fall apart. Therefore, we urge the Appellate Body to approach this dispute with an open mind, and not to be cowed by emotional predictions by some of our friends that the world as we know it will end if some aspect of an earlier ruling is ever reconsidered. In view of the number of expert panelists that have disagreed with the Appellate Body's previous findings on zeroing, and the criticism by respected academics of the Appellate Body's zeroing rationales, it is simply not realistic or credible for our Mexican, Japanese, and European friends to try to shout down legitimate principled disagreement about whether the Antidumping Agreement and GATT 1994 Article VI contain a clear, broad-based prohibition on zeroing in all contexts.

7. I turn now to the legal issues in this dispute, starting with the Vienna Convention. As the Appellate Body made clear in *EC – Chicken Cuts*, the WTO Agreements are not to be interpreted solely through the Oxford English Dictionary, but instead as part of a holistic contextual effort to ascertain common intent. As the Appellate Body emphasized, the "ordinary meaning" of textual terms must be "seen in the light of the intention of the parties 'as expressed in the words used by them against the light of the surrounding circumstances ... ."[2] This is particularly important in this case, where we are dealing with arcane antidumping terminology, negotiated by veteran antidumping experts, who often borrowed words, sentences, phrases, and paragraphs wholesale from the GATT 1947, the Kennedy Round Antidumping Agreement, and the Tokyo Round Antidumping Code.

[2] *EC – Chicken Cuts (AB)*, paras. 175.

8. In its zeroing decisions, the Appellate Body has put forward an evolving series of rationales for prohibiting zeroing, so we will discuss them seriatim.

Article 2.4.2

9. The Appellate Body initially based its zeroing prohibition on the phrase "all comparable export transactions" in Article 2.4.2. While the U.S. disagreed with this interpretation, we have nevertheless complied by eliminating zeroing in average-to-average comparisons in investigations. So Article 2.4.2. is not in issue in this dispute. We note that Mexico did not appeal the Panel's findings with respect to Article 2.4.2, and that Mexico did not even advance a claim under Article 2.4.2 with respect to periodic reviews. While we look forward to hearing from our EC friends in some future case why the word "phase" in Article 2.4.2 "reaches out, like a dead hand from the grave, with supernatural power," we respectfully urge this Body to focus on the matters at hand in this case, and not on the supernatural.

Product as a Whole

10. While the Appellate Body referred to "product as a whole" in its discussion of Article 2.4.2 in *EC – Bed Linen*, it converted this into a separate and independent rationale in *US – Zeroing (EC)*. This phrase, however, does not appear anywhere in the Antidumping Agreement or GATT 1994. As discussed in the Panel report, the WTO Antidumping Agreement and GATT 1994 use the words "product" and "products" to refer to both products in the aggregate and the treatment of individual products in individual transactions. These various meanings date back to the original GATT 1947 and have never been interpreted to require aggregation of individual transactions in assessment proceedings before this line of cases. Indeed, in 1960, the Group of Experts stated that "individual transactions" are the "ideal method"

of fulfilling GATT Article VI. This report was adopted by consensus and must help guide the Appellate Body's deliberations as provided in Article XVI of the WTO Agreement. Since the various references to "product" and "products" did not change between 1947, 1960, and 1995, when the WTO Agreement entered into force, it is wholly unclear when or how the concept of "product as a whole" somehow attached itself to these terms.

Fair Comparison

11. Mexico has argued that the Panel erred in not treating the fair comparison requirement of Article 2.4 as an "overarching" obligation for antidumping authorities to refrain from "inherently biased" dumping calculations. The "fair comparison" provisions of Article 2.4 date back to the Kennedy Round Antidumping Agreement. This term has generally been understood as covering specific requirements set out in the text relating to adjustments, level of trade, costs, currency conversions, etc., as opposed to a subjective, broad-ranging source of authority for the DSB to seek out right and justice in the antidumping arena. This interpretation is borne out by the structure of Article 2.4, where the second sentence goes on to provide specificity on the content of "fair comparison," stating: "This comparison shall be made at the same level of trade, normally at the ex-factory level ... ." This interpretation is also supported by the decision of the Tokyo Round Antidumping Code panel in *EC – Cotton Yarn*, which rejected precisely the open-ended reading of "fair comparison" espoused by Mexico and the third parties in this case and declined to read a prohibition on zeroing into "fair comparison." We note that if the Appellate Body were to adopt the interpretation put forward by Mexico and the third parties, it would mean the WTO Members effectively abdicated their responsibility to negotiate rules in this area and left the rule-making function completely in the hands of the dispute settlement system. And

since the term "fair" is completely subjective, and utterly dependent on the eye of the beholder, it would mean that the rules in the trade remedy arena would become even more insecure and unpredictable.

Article 9.3

12. In seeking guidance on how to interpret Article 9.3, the Appellate Body has relied heavily on the first sentence, which provides: "The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2." This sentence, however, is silent on how the "margin of dumping" should be calculated – on the basis of individual transactions by importers, as in the United States, Canada and India, or on the basis of a comparison between normal value and an exporter-wide average of various import transactions, as in the EC. The reason for this silence should be obvious – given the differences in the various national antidumping assessment systems at the time of the Uruguay Round, there was no consensus on a single methodology. Despite this silence, the Appellate Body has sought to extrapolate a single methodology from Article 6.10, which indicates that authorities should as a rule "determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation." However, this sentence exists because most antidumping systems rely on exporter-wide calculations in investigations under Article 5. The purpose of this sentence is merely to express a preference for an individual margin calculation for each exporter or foreign producer, as opposed to a sampling of a limited number of exporters, which is discussed in the second sentence. Other provisions of Article 9 – including Article 9.2, which refers to imposing duties on "imports," and Article 9.3.2, which references the role of individual importers in requesting refunds – lend support to assessing duties based on individual transactions in assessment proceedings.

Uruguay Round Negotiating History

13. The Appellate Body has struggled valiantly to derive a unified vision of antidumping that underlies the various articles of the Antidumping Agreement. The United States respectfully submits that such a unitary construct does not exist. Instead, in the Uruguay Round, and even in the Doha Round today, antidumping was a complex, divisive, and ugly subject on which there was only limited consensus.

14. The key terms that have been cited by the Appellate Body in its zeroing reports for the most part date back to the GATT 1947, the Kennedy Round Antidumping Agreement, or the Tokyo Round Antidumping Code. The only new language is the phrase "all comparable export transactions" in Article 2.4.2, which is limited to investigations and thus is not in issue here. The rest were part of longstanding antidumping terminology, which the negotiators turned to when they cobbled together the WTO Antidumping Agreement. As the negotiating history makes clear, these terms did not acquire a new ordinary meaning during the Uruguay Round.

15. During the Uruguay Round, the negotiators were well aware of zeroing, or as it was referred to at the time – "negative dumping." While the negotiations were underway, Japan and Brazil challenged the EC's zeroing practices in two disputes under the Tokyo Round Antidumping Code. In both cases, Code panels found that the Code did not prohibit zeroing. Accordingly, Japan, Hong Kong, Singapore, and the Nordic countries all submitted proposals, including detailed textual changes, designed to require WTO Members to consider "negative dumping" or "non-dumped transactions." None of their textual proposals appeared in the final Uruguay Round Antidumping Agreement. Instead, the provisions of the Antidumping Agreement that are at issue in this case reflect standard language from prior agreements that had

previously been interpreted by Tokyo Round Code dispute settlement panels as not requiring consideration of "negative dumping" or aggregation of individual transactions.

16. The Japanese, Hong Kong, Singaporean, and Nordic negotiators were some of the most sophisticated and skilled in the GATT. They knew that they needed to change the Tokyo Round Code in order to achieve a broad-based prohibition on zeroing in all contexts. The lack of any explicit textual reference in the WTO Antidumping Agreement to zeroing or "negative dumping" speaks for itself. No common understanding was reached on zeroing in the Uruguay Round. No common understanding could be reached because, despite extensive efforts by Japan, Hong Kong, Singapore, and the Nordic Countries, their proposals were firmly opposed by the EC, the United States, Canada, and other users of antidumping measures, all of whom continue to use zeroing today – the United States and Canada through assessing antidumping duties through individual transactions, and the EC in the guise of "targeted dumping."

Standard of Review

17. I want to close with a few words on the special standard of review in Article 17.6. The existence of such a provision in the Antidumping Agreement, but nowhere else in the WTO Agreements, indicates that the WTO Members were well aware that the antidumping text would pose particular challenges. In many instances, the antidumping text permits more than one legitimate interpretation, because it was drafted to cover multiple antidumping systems around the world and longstanding differences regarding methodology. Thus, the negotiators indicated that panels and the Appellate Body should respect a permissible interpretation of the agreement by an individual WTO Member. This provision must have some meaning.

Conclusion

18. Members of the division, in this dispute, Mexico has asked this Body to read a new obligation into the Antidumping Agreement and GATT Article VI, notwithstanding the lack of any textual basis for the obligation that Mexico proposes. The United States respectfully urges the Appellate Body to reject Mexico's claims. Whatever one's personal views on zeroing, it is plain that Mexico and others are trying to get through the Appellate Body what they did not achieve at the negotiating table in the Uruguay Round. By going along with this, the Appellate Body would only contribute to further uncertainty and unpredictability, and further diminish the vital role of WTO negotiations in expanding world trade. The Appellate Body plays a major role in the WTO system but it cannot, and should not, seek to substitute for the WTO Members, who ultimately must bear the final responsibility for negotiating agreements to further open markets and strengthen the global trading system and the rule of law. If WTO Members left out certain words, rules, or provisions for lack of consensus, Article 3.2 makes it plain that it is not the job of the Appellate Body or panels to put them back in.