

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

WT/DS344

**OPENING STATEMENT OF THE UNITED STATES OF AMERICA
AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL**

MAY 22, 2007

Mr. Chairman, members of the Panel:

1. On behalf of the United States delegation, I would like to thank you for agreeing to serve on this Panel. We do not intend to offer a lengthy statement, as our first written submission responds to the arguments Mexico raised in its first written submission.

2. Instead, we would like to focus on a few points regarding Mexico's argument. First, we will offer a few comments on general procedural issues and the proper scope of this dispute, then we will offer a few comments on Mexico's claim that the text of the Antidumping Agreement sets forth an obligation to provide an offset for instances of non-dumping in assessment proceedings.

Procedural Issues

3. This Panel is tasked with making its own objective assessment of the matter before it. This includes an assessment of the facts as well as the conformity of the challenged measures with the relevant covered agreements. Mexico and some third parties, however, would have this Panel neglect its responsibilities in the name of "security and predictability". According to them, it is sufficient that the Appellate Body previously has found zeroing to be inconsistent with provisions of the WTO Agreements, and the Panel need do nothing more than blindly follow prior Appellate Body reports.

4. There are several problems with this position. For one thing, no matter how often Mexico invokes prior Appellate Body findings to argue that an issue in this dispute has been settled “conclusively”, the Appellate Body itself has stated that its reports are not binding on panels. Prior panel and Appellate Body reports should be taken into account only to the extent that the reasoning contained in them is persuasive. In our first written submission, we have provided cogent reasons why the findings and reasoning of the Appellate Body in *US – Zeroing (Japan)* and *US – Zeroing (EC)* are seriously flawed with respect to certain aspects relevant to this dispute and therefore should not be followed.

5. In addition, “security and predictability” is not an independent obligation, nor is it a stated “object and purpose” of any WTO Agreement. The only reference to this phrase in the WTO Agreement is in DSU Article 3.2, which makes clear that security and predictability are achieved only when the dispute settlement system works as provided therein – that is, through the proper application of customary rules of interpretation of public international law to the agreed-upon provisions of the covered agreements, in order to preserve the rights and obligations to which the Members agreed. The security and predictability referred to in Article 3.2 is provided by a dispute settlement system that does not add to or diminish the rights and obligations of WTO Members. Indeed, the reference to security and predictability is provided in the same provision as the admonition that DSB recommendations and rulings cannot add to or diminish rights and obligations under the covered agreements. In other words, a panel is not permitted to follow a prior panel or Appellate Body report in the name of “security and predictability” where that prior report has added to or diminished rights and obligations.

Scope of this Dispute

6. In light of its terms of reference and Article 7 of the DSU, this Panel may only address those matters identified by Mexico in its request for establishment of a panel. In its request for consultations and its request for the establishment of a panel, Mexico identified two alleged measures it was challenging “as such”. One is the use of “zeroing” in average-to-average comparisons in original investigations, what Mexico and others have called “model zeroing”. The other is the use of “zeroing” in assessment proceedings, which Mexico and others have called “simple zeroing”. Yet, in its first written submission, Mexico switches positions and asserts that it is challenging a “single zeroing measure”, which it calls “the Zeroing Procedures” in all antidumping proceeding contexts.

7. Mexico argues that in its recent report in *US – Zeroing (Japan)*, the Appellate Body concluded that there was one single rule which it found to be inconsistent with U.S. obligations. A prerequisite for the Appellate Body to reach that conclusion was its finding that “zeroing” in all contexts and with respect to all types of comparisons was within the scope of Japan’s request for establishment of a panel and request for consultations. That is clearly not the case here, where Mexico limited its “as such” challenge to “model zeroing” and “simple zeroing.”

8. Furthermore, the “single zeroing measure” that Mexico purports to challenge simply does not exist in fact. There is nothing in U.S. law that requires a monolithic use of “zeroing” in all contexts. This is supported by the fact that Commerce is no longer making average-to-average comparisons in original investigations without providing offsets for non-dumped comparisons, a fact which Mexico acknowledges in its first written submission. Mexico relies on descriptions of what Commerce has done in the past to argue the existence of a “single zeroing measure”.

Aside from the fact that these past examples do not cover all the contexts supposedly covered by the so-called “single zeroing measure”, Mexico’s arguments imply that if an administering authority acts in a non-arbitrary and consistent manner, this should expose it to dispute settlement for somehow maintaining a separate measure. This is a very troubling proposition.

The Claimed Obligation to Provide Offsets

9. We now turn to comments related to Mexico’s argument that the Antidumping Agreement contains an obligation to provide offsets for instances of non-dumping in the context of assessment proceedings. Mexico argues that the Antidumping Agreement imposes on Members an obligation to provide an offset to dumping in all types of antidumping proceedings, including assessment proceedings. As mentioned, the key issue here is whether the text of the Antidumping Agreement actually contains such an obligation that applies in assessment proceedings. The starting point must be what the text of the Agreement actually says. It is fundamental that a treaty interpreter must not impute into an agreement words and obligations that are not contained in the text. In this dispute, Mexico asks this Panel to read an obligation into the Antidumping Agreement, notwithstanding the fact that there is no textual basis for the obligation that Mexico proposes.

10. In particular, Mexico seeks to infer an obligation to reduce antidumping duties to account for instances of non-dumping. This treats non-dumped imports as though they were a remedy for dumped imports. Mexico does so despite the absence of a textual basis for such an obligation and despite the presence of a permissible interpretation of the Antidumping Agreement that does not require such offsets.

11. In the disputes to date that have addressed the issue of offsets, the only textual basis panels have identified for an obligation to provide offsets has been the “all comparable export transactions” language in the text of Article 2.4.2 of the Antidumping Agreement. This is entirely consistent with the approach articulated by the Appellate Body in *US – Softwood Lumber Dumping*. The phrase “all comparable export transactions” in Article 2.4.2 applies only to antidumping investigations and only when authorities use average-to-average comparisons pursuant to Article 2.4.2. The panels have consistently found that the obligation to provide offsets applies only as a consequence of the text-based obligation to include all comparable export transactions when making weighted-average to weighted-average comparisons in an investigation. With respect to the argument that there is an obligation to provide offsets outside the context of average-to-average comparisons in investigations, the panels addressing this question have consistently found that there is no textual basis for such an obligation. The analysis offered by the prior panels is persuasive and correct.

12. Article 2.4.2 provides for three different types of comparisons: two symmetrical comparison types, average-to-average and transaction-to-transaction; and, a third asymmetrical comparison type, average-to-transaction, which may be used under certain conditions. With respect to the average-to-average comparisons, the phrase “all comparable export transactions”, as interpreted by the Appellate Body in *US – Softwood Lumber Dumping*, addresses whether the relevant comparison may be made at the level of averaging groups (or “models”). Under this reading, the word “all” in “all comparable export transactions” refers to all transactions across all models of the product under investigation. This is the textual basis for the conclusion that margins of dumping based on average-to-average comparisons must relate to the “product as a

whole” rather than individual averaging group comparisons. This phrase, “all comparable export transactions,” however, applies only to the use of average-to-average comparisons in an investigation. It does not apply to the use of transaction-to-transaction or average-to-transaction comparisons, which will necessarily result in multiple comparisons where there are numerous transactions because each export transaction will result in its own separate comparison. The text of Article 2.4.2 does not address whether or how a Member should aggregate the results of such multiple comparisons into a single overall margin of dumping.

13. A general prohibition of zeroing that applies in all proceedings and with respect to all comparison types would negate and contradict the interpretation of the phrase “all comparable export transactions” that was the basis of the obligation to provide offsets in the context of average-to-average comparisons, and for the conclusion that the margin of dumping must be calculated for “the product as a whole.” However, in *US – Zeroing (Japan)*, the Appellate Body did just that by reinterpreting “all comparable export transactions” to relate solely to all transactions within a model, and not across models for the product under investigation. In doing so, the Appellate Body abandoned the only textual basis in the Antidumping Agreement for prohibiting zeroing. In this case, Mexico argues that margins of dumping calculated in assessment proceedings must relate to the “product as a whole,” and cannot be calculated for individual transactions. However, “product as a whole” is not a term found in the Antidumping Agreement nor does it have any defined meaning. Furthermore, to the extent the concept of “product as a whole” has any relevance to the Antidumping Agreement, it is only as a shorthand for the operation of the phrase “all comparable export transactions” in the context of average-to-

average comparisons in investigations. And Mexico's argument relies entirely on the concept of "product as a whole" being applied in a manner detached from that underlying textual basis.

14. In search of a textual home for its proposed obligation to provide offsets, Mexico seeks to redefine the concept of dumping contained in Article 2.1 of the Antidumping Agreement and Article VI of the GATT 1994 such that the terms "dumping" and "margins of dumping" relate "solely, and exclusively, to the 'product' under consideration taken 'as a whole'." This redefinition of the concepts of dumping and margins of dumping is inconsistent with the relevant text, is refuted by the relevant context, and is entirely contrary to the well-established prior understanding of these concepts.

15. The text of these provisions defines and describes dumping as occurring in the course of individual commercial transactions. The commercial reality is that prices are generally set in individual transactions and products are "introduced into the commerce" of the importing country in individual transactions. In other words, dumping – as defined under these provisions – may occur in a single transaction. There is nothing in the GATT 1994 or the Antidumping Agreement that suggests that injurious dumping that occurs with respect to one transaction is mitigated by the occurrence of another transaction made at a non-dumped price. To the extent that some transactions introduce merchandise into the market of an importing country at a price above normal value, this is to the benefit of the seller, not the domestic industry injured by other transactions made at less than normal value.

16. Nevertheless, Mexico asserts that dumping and margins of dumping "are concepts that have no meaning unless considered with reference to the product under consideration taken as a whole." The Appellate Body reports relied upon by Mexico for this proposition are

unpersuasive because they cannot alter the simple fact that the relevant text of these provisions, the relevant context for interpreting the meaning of these terms, and the well-established prior understanding of these concepts all confirm that dumping and margins of dumping do have a meaning in relation to individual transactions. Our written submission sets forth the textual, contextual, and other evidence that the concepts of dumping and margins of dumping, as defined in the Antidumping Agreement and GATT 1994, are applicable to individual transactions. That evidence is too extensive to describe in this brief statement, but it cannot be ignored. It conclusively establishes that the terms dumping and margins of dumping as used in Article 2.1 of the Antidumping Agreement and Article VI of the GATT 1994 do not support the existence of an obligation to provide offsets for instances of non-dumping in assessment proceedings.

17. Mexico's misinterpretation of the term "margin of dumping" is the basis for its claim of inconsistency with Article 9.3. Article 9.3 requires that the amount of the antidumping duty assessed shall not exceed the margin of dumping. The obligation in Article 9.3 to assess no more in antidumping duties than the margin of dumping, just like the term "margin of dumping" itself, may be applied at the level of individual transactions. This understanding of the term "margin of dumping" and the obligation in Article 9.3 is particularly appropriate in the context of antidumping duty assessments, where duties are assessed on individual customs entries resulting from individual transactions for which importers are liable for payment. Mexico's argument that excess antidumping duties were assessed in this dispute depends on its misinterpretation of the term "margin of dumping" referred to in Article 9.3 as relating exclusively to the product "as a whole" considered on an exporter-wide basis. As the panels examining this issue have consistently observed, interpreting the term "margin of dumping" as relating exclusively to the

“product as a whole” for all importers of product from a particular exporter is inconsistent with the importer- and import-specific obligation to pay an antidumping duty.

18. In addition, Mexico’s interpretation of Article 9.3, requiring that antidumping duty liability be determined for the product “as a whole,” cannot be reconciled with the specific provision in Article 9 that recognizes the existence of prospective normal value systems of assessment. Under such systems, 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 the “product as a whole” determined on an exporter-specific basis, as Mexico argues, the administration of such an assessment system is simply an impossibility. This is because, among other reasons, future transactions that would need to be taken into account in such a margin of dumping would not yet have occurred. 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 and, if accepted, would effectively render prospective normal value systems WTO-inconsistent unless they were converted to a retrospective system by adopting retrospective assessment reviews.

19. Antidumping duties are applied at the level of individual entries for which importers incur the liability. In this way, an importer may be induced to raise resale prices to cover the amount of the antidumping duty, thereby preventing the dumping from having further injurious effect. If, instead, the amount of the antidumping duty must be reduced to account for the amount by which some other transaction was sold at above normal value, possibly involving an entirely different importer, then the antidumping duty will be insufficient to have the intended

effect. The importer of the dumped product would remain in a position to profitably resell the product at a price that continues to be injuriously dumped. For this reason, if Mexico's reading of "margin of dumping" is accepted as the sole permissible interpretation of Article 9.3, the remedy provided under the Antidumping Agreement and the GATT 1994 will be prevented from fully addressing injurious dumping.

20. In addition, as described in detail in our written submission, under Mexico's reading of the obligation in Article 9.3, importers that contribute the most to injurious dumping would be favored over other importers (and domestic competitors) that price fairly. And, as the panel in *US – Softwood Lumber Dumping (21.5)* observed, the perverse incentives and "absurd results" created by providing offsets in assessment proceedings also arise in the context of prospective normal value systems.

21. Mexico's claim of inconsistency with the "fair comparison" requirement of Article 2.4 relies upon its assertion that the United States has assessed antidumping duties "in excess of the actual margin of dumping for the product." Mexico does not claim that any of the transaction-specific comparisons made by the United States failed to reflect a "fair comparison." Instead, Mexico's claim is that the aggregate amount of antidumping duties assessed exceeded the margin of dumping for the product as a whole. 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." The text of Article 2.4 does not address whether any particular assessment of antidumping duties exceeds the margin of dumping. This is because the text of Article 2.4 does not address whether "dumping" and "margins of dumping" are concepts that apply to individual transactions. Nor does the text address whether, for purposes of assessing antidumping duty liability, a margin of

dumping may be specific to each importer that is liable for payment of the antidumping duties. Indeed, the text of Article 2.4 does not resolve the question of whether zeroing is “fair” or “unfair.” Consequently, resolution of Mexico’s claim depends not on the text of Article 2.4, but on whether it is permissible to interpret the term “margin of dumping” as used in Article 9.3 as applying to transactions. Therefore, if the Panel finds, as the 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 the challenged assessments will not exceed the margin of dumping and there will be no basis for a finding of inconsistency with Article 2.4.

22. With respect to all of the relevant provisions of the Antidumping Agreement and the GATT 1994, any interpretation that gives rise to a general prohibition of zeroing also renders the second sentence of Article 2.4.2, the “targeted dumping provision,” inutile. This is because the targeted dumping methodology, provided for in Article 2.4.2, mathematically must yield the same result as an average-to-average comparison if, in both cases, non-dumped comparisons are required to offset dumped comparisons. This defect cannot be ignored or assumed away by supposing that the targeted dumping provision permits an authority to ignore any obligation in the Antidumping Agreement other than the obligation to use one of the two symmetrical comparison methods.

23. As mentioned at the beginning of this statement, the United States respectfully disagrees with the Appellate Body’s reasoning in *US – Zeroing (Japan)* that the Antidumping Agreement includes a general prohibition of zeroing. Instead, the United States agrees with the reasoning applied by the panels, finding that outside the context of average-to-average comparisons in investigations the Antidumping Agreement does not impose an obligation to provide offsets for

non-dumping. At a minimum, we urge this Panel to find that a permissible interpretation of the Antidumping Agreement, consistent with the Appellate Body's original interpretation in *US – Softwood Lumber Dumping* and faithful to the text of the Antidumping Agreement, contains no obligation to provide for an offset to dumping in assessment proceedings.

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