UNITED STATES – FINAL ANTI-DUMPING MEASURES ON STAINLESS STEEL FROM MEXICO: RECOURSE TO ARTICLE 21.5 OF THE DSU BY MEXICO
(DS344)

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

October 4, 2011

1. Mr. Chairman, members of the Panel: on behalf of the United States, thank you for your ongoing work in this panel proceeding.

I. Introduction

2. Both Parties have now had an opportunity to submit two written submissions in this proceeding. As such, I will only provide some brief comments this morning, highlighting a few of our key points.

3. As we have indicated, in light of the specific language of Article 21.5, we do not believe that Mexico has established that its "as such" claim is properly within the terms of reference of this Article 21.5 Panel. Nor do we believe that Mexico has established that any of the measures Mexico has referred to in its submissions constitute a measure taken to comply with regard to its myriad of "as applied" claims. With regard to the "as applied" claims, the United States objects in particular to Mexico's arguments that measures that either pre-dated the consultation request in the original proceeding, or post-date the panel request in this proceeding – or, in fact, have not yet occurred at all – constitute measures taken to comply with the DSB's recommendations and rulings for purposes of this proceeding.

4. In making these arguments, Mexico attempts to unreasonably expand the scope of this proceeding, which is limited to determining whether "there is disagreement as to the *existence* or *consistency*" of measures taken to comply with the DSB's recommendations and rulings.

However, it would be incorrect for the Panel to find a measure taken before the initial dispute had even begun to in fact be a measure taken to comply with the DSB's recommendations and rulings that followed years later. And it would seem equally incorrect – indeed, impossible – for this Panel to determine the consistency of a measure taken to comply if the measure has yet to come into existence.

II. Argument

A. Mexico's "As Such" Claim

5. As to Mexico's "as such" claim, we continue not to understand why Mexico considers this claim to be within this Panel's terms of reference. Presumably, both parties can agree that the terms of reference of this Panel are limited by the text of Article 21.5, which states that recourse to a panel will only be taken "{w}here there is *disagreement* as to the existence or consistency" of measures taken to comply with the DSB's recommendations and rulings. Yet, as to this claim, no such disagreement exists.[1] Further, Mexico has yet to explain what prejudice it suffers if its "as such" claim is not considered by this Panel.

B. Administrative Reviews 1-5

6. Mexico also continues to claim that administrative reviews 1 through 5 – the measures that were the subject of the original dispute – are in fact measures taken to comply with the DSB recommendations and rulings. No reasonable interpretation of Article 21.5 could lead to the conclusion Mexico draws.

[1] *See* U.S. Second Written Submission, paras. 6-7.

7. Mexico also argues that the "legal effects" of these measures continue to linger, and, as such, the measures remain in existence. However, the fact that a measure is "taken into account" in a subsequent measure does not mean the initial measure remains in existence, such that it could be "withdraw{n}" or "remove{d}" within the meaning of DSU Articles 3.7 and 22.8, nor does it bring the initial measure within the Panel's terms of reference under Article 21.5.[2] We believe Mexico's argument in this regard to be unprecedented.[3]

8. In any event, the United States has explained in detail as to why Mexico's claims in this regard should be rejected even aside from Mexico's view of the relevance of the subsequent "legal effect" of an expired measure.[4]

C. The Panel Should Not Reach Mexico's Claims Regarding the Subsequent Measures (Administrative Reviews 6-12)

9. As we discussed in our first submission, the United States believes that administrative reviews 6 through 10 fall outside the terms of reference of this proceeding because the entries covered by these administrative reviews were made prior to the expiry of the reasonable period of time ("RPT") on April 30, 2009, with the exception of two months' worth of entries made during administrative review 10.[5]

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[2] U.S. Second Written Submission, para. 9; U.S. First Written Submission, para. 32.

[3] U.S. Second Written Submission, para.13.

[4] U.S. Second Written Submission, paras. 14-20; U.S. First Written Submission, paras. 35-48.

[5] U.S. First Written Submission, para. 53-78.

10. Moreover, administrative review 10 falls outside the scope of this proceeding for an entirely separate reason – it was not completed at the time of Mexico's panel request.[6] And, in fact, there are no administrative reviews 11 or 12 since they were never completed due, in part, to the lack of interest of the Mexican exporter in obtaining determinations of final antidumping liability based on the entries covered by those two administrative review periods.[7]

11. For this reason, Mexico's claims under Article 9.3 of the Antidumping Agreement and Article V1:2 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") as to these uncompleted administrative reviews are unfounded. The fact of the matter is that the actions taken by Commerce with regard to administrative reviews 11 and 12 (*i.e.*, rescinding the latter and not initiating the former) was perfectly consistent with Article 9.3.1 of the Antidumping Agreement. That provision provides that final assessment or refund proceedings are to be conducted upon request. In the absence of a request, the administering authority, whether operating a retrospective, prospective, or prospective normal value system, is not obligated to depart from its treatment of the entries of subject merchandise at the time of entry. Yet, here, the request was withdrawn for administrative review 11 and was never made at all for administrative review 12. Accordingly, consistent with Article 9.3.1, the status and treatment of the entries in question at the time of entry is considered as final, just as it would be in a prospective or prospective normal value system.

[6] U.S. First Written Submission, paras. 79-84; U.S. Second Written Submission, paras. 22-23.

[7] U.S. Second Written Submission, paras. 22-23.

12. The GATT 1994 and the Antidumping Agreement do not favor the prospective normal value system over the retrospective system or vice versa. And where no review is completed, both systems work the same way – the duty liability is assessed on a transaction-specific basis and the amount deposited for each transaction on entry is collected as the amount of the antidumping duty without providing offsets from non-dumped transactions.[8]

13. However, in a prospective normal value system, the Appellate Body has recognized in connection with this very dispute that a Member does not breach its obligations by assessing antidumping duties on each transaction without providing offsets based on other non-dumped transactions, because a review may be requested to correct any inaccuracy that would result in collection of the antidumping duties in excess of the ceiling prescribed in Article 9.3. If such a review is requested, according to the Appellate Body, Members operating prospective normal value systems are under an obligation to conduct refund proceedings which must retrospectively determine the dumping margin for *all* the exporters' sales.[9] But in *either* system, if no request for review or a refund proceeding is received, Members will collect the antidumping duties for each transaction in the amount deposited on entry, regardless of whether prices of other transactions are above the normal value.[10]

14. In this case, the Mexican exporter of the subject merchandise withdrew its request for Commerce to complete a review for the entries covered by period 11 and chose not to request a review for the entries covered by period 12. The company was well within its rights to refrain

[8] U.S. Second Written Submission, para. 25.

[9] U.S. Second Written Submission, para. 27 (quoting *US–Zeroing (Mexico)(AB)*, para. 120).

[10] U.S. Second Written Submission, para. 28.

from requesting a review to determine its final liability, but as a result of this decision Mexico cannot now argue that Commerce, in its administration of a retrospective system, must do something that administrators of prospective systems would not be required to do.

D. Mexico's Claims Regarding the Revocation Decisions Made in Administrative Reviews 7 and 9 Are Unfounded

15. Mexico's claims regarding the revocation decisions made in administrative reviews 7 and 9 are also incorrect.[11] Nothing in the WTO agreements obligates the United States to revoke the order for a specific company when a respondent company does not sell below normal value for three consecutive years. Rather, that option provides for revoking a duty over and above what Members committed to so under the Antidumping Agreement (that is, it is "WTO plus"). As such, we disagree that the failure to revoke could be inconsistent with U.S. WTO obligations – whether that decision relied on zeroing or not. The WTO dispute settlement system does not exist to enforce a Member's domestic laws.

16. In any event, and as we discussed previously, Mexico is wrong to assert that, as a factual matter, these particular determinations relied on zeroing.[12]

E. This Panel Should Reject Mexico's Claims Concerning the Liquidation Instructions for Administrative Reviews 6 Through 12

1. Liquidation Instructions for Administrative Reviews 6-10

17. As we have discussed, administrative reviews 6 through 10 are not yet finalized as each review continues to be the subject of litigation before individual NAFTA binational panels.[13]

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[11] *See* U.S. Second U.S. Second Written Submission, paras. 31-37; U.S. First Written Submission, paras. 88-90.

[12] *See* U.S. Second Written Submission, paras. 33-37.

[13] U.S. Second Written Submission, paras. 38-41.

Liquidation instructions will not issue for any one of these administrative reviews until the litigation for that particular review comes to a close. At present, we do not know when that will happen for any of these administrative reviews.

18. Given that the liquidation instructions have not been issued we would have thought it would have been straightforward for the parties to agree that such measures do not "exist" for purposes of DSU Article 21.5, and thus are outside the terms of reference of this Panel. The fact that Mexico continues to press this argument is an example of one of Mexico's more extreme arguments before the Panel.

19. Given that the liquidation instructions do not exist, Mexico's claims are, of course, speculative in nature, and we do not understand how the Panel could fulfill its responsibility of assessing the consistency of these measures with the covered agreements. As we have discussed, the various legal proceedings are progressing on their own independent timelines and we cannot anticipate what the final results of each review will ultimately contain, including whether all, some, or none of the methodologies of each of the reviews will ultimately include zeroing.

20. Accordingly, we do not believe that the Panel can make any factual findings regarding the content of any future liquidations instructions and reach the merits of Mexico's claims regarding these instructions, except for finding that no instructions concerning the entries covered by these administrative reviews have been issued.

21. Mexico's claims under GATT 1994 Article II regarding these same instructions are unfounded for much the same reasons.[14]

[14] *See* U.S. Second Written Submission, para. 42.

2. Liquidation Instructions for "Administrative Reviews" 11 and 12

22. In addition, Mexico's Article II claims with regard to the alleged administrative reviews 11 and 12 – neither of which were completed and thus never resulted in a measure – are also unfounded. As we have previously discussed, Commerce assessed duties for the entries made during the period that would have been covered by administrative review 11 in a WTO-consistent manner.[15] Regarding administrative review 12, there simply was no such review. No review was requested for that period of review, and therefore Commerce did not calculate dumping margins. The duty liability will be assessed on a transaction-specific basis in the amount deposited on entry. Because the liquidation instructions will not be based on margins calculated during the twelfth period of review, Mexico's contention that these margins will be "calculated" in violation of Article II is unfounded.[16] Moreover, while no duties have been assessed with respect to entries covered by the so-called administrative review 12 at this time, if and when the duties are assessed, the assessment will be consistent with provisions of Article VI of the GATT 1994.[17]

F. Mexico's Claims Concerning the 2005 Sunset Review Are Unfounded

23. Once again, Mexico stretches the bounds of reasonableness in claiming that the 2005 sunset review is a measure taken to comply with the DSB recommendations and rulings.

24. First, Mexico did not include this measure in the original dispute and the DSB recommendations and rulings did not pertain to sunset reviews. Accordingly, we continue to fail

[15] U.S. Second Written Submission, para. 44.
[16] U.S. Second Written Submission, para. 44.
[17] U.S. Second Written Submission, para. 45.

to see how the 2005 sunset review – or any sunset review – could be seen as a measure taken to comply with the particular DSB recommendations and rulings in this dispute.

25. Second, claiming that a measure that was taken prior to consultations of Mexico's original claims is a "measure taken to comply" with subsequent DSB recommendations and rulings that followed *three* full years afterwards, simply put, renders that phrase meaningless. If this measure qualifies, the United States fails to understand what measure taken pursuant to the relevant antidumping order would *not* be considered a measure taken to comply with the DSB's recommendations and rulings.

26. Finally, Mexico's claim, if successful, would undermine the rights and obligations of Members provided for in the DSU and the Antidumping Agreement and the due process and fairness interests reflected in those agreements. As we have discussed, the finding sought by Mexico would, for example, deprive the United States of a meaningful opportunity to bring the alleged measure into compliance under the circumstances where immediate compliance is not practicable and a reasonable period of time is necessary, contrary to the protections afforded by DSU Article 21.3.[18] Again, it is our understanding that Mexico's argument in this regard is unprecedented.[19]

G. The Panel Should Decline Mexico's Request That It Make Suggestions to the United States Regarding Compliance Pursuant to DSU Article 19.1

27. Finally, we believe that the Panel should reject Mexico's DSU Article 19.1 request to "suggest ways in which the {United States} could implement the recommendations." Mexico

[18] U.S. Second Written Submission, para. 51.
[19] U.S. Second Written Submission, para. 52.

provides no explanation as to why such suggestions will contribute to a positive solution to this dispute. As we have discussed, the question in this proceeding is the existence or consistency of the measure taken to comply, not what future actions the United States should take to ensure compliance. All Members retain the right to determine the manner of implementing DSB recommendations and rulings.[20] As we discussed in our second submission, panels and the Appellate Body have declined to grant such a request in previous zeroing cases.[21]

28. Today for the first time Mexico has provided specific suggestions. Because the United States is seeing these for the first time, we will respond but will need time to reflect and evaluate.

29. Thank you for your attention. We would be pleased to answer any questions you may have for the United States.

[20] U.S. Second Written Submission, para. 53.

[21] U.S. Second Written Submission, para. 54.