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

**WT/DS344**

# COMMENTS OF THE UNITED STATES ON MEXICO'S ANSWERS TO THE PANEL'S QUESTIONS IN CONNECTION WITH THE SECOND SUBSTANTIVE MEETING

**August 7, 2007**

## A. IDENTIFICATION OF "ZEROING PROCEDURES" AS A MEASURE

***Q2. UNITED STATES: The Panel notes the following explanation in the United States' answer to Question 9(b) from the Panel:***

> ***Regarding the second part of the question, <u>prior to February 22, 2007, Commerce had not exercised its discretion to provide offsets in any antidumping proceeding</u>. 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)***

***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.***

1. Mexico relies upon the observation that the United States has acted "consistently" as establishing the existence of a measure. However, mere repetition of an act does not constitute a separate measure susceptible of challenge "as such." Repetition does not transform the individual act into a rule or norm intended to have general and prospective application, nor does mere repetition mandate that the "act" occur in the future. In fact, as the United States has explained, 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").

2. It is entirely to be expected that an administering authority will seek not to exercise its discretion arbitrarily by treating the same circumstances differently. Mexico does not explain exactly what circumstances would have justified Commerce providing offsets in some proceedings while not providing them in others. Mexico seems to expect that if an administering authority is not acting in an arbitrary and inconsistent manner, there must be a separate measure requiring the consistent approach. However, governments often exercise their discretion in a consistent manner, without being compelled to do so by any measure. There are very good reasons of policy why an authority, when confronted by a particular factual pattern, might want to respond to that factual pattern in the same manner when administering its laws and regulations – even without a separate measure that is requiring them to do so. In the WTO context, such policy values find expression, among other places, in the terms of GATT Article X:3(a), which provides for administration "in a uniform, impartial and reasonable manner" of laws.

3. Mexico's position in this dispute, however, asks the WTO dispute settlement system to give a troubling response to a Member that pursues those values by exercising its discretion in a non-arbitrary manner. Mexico essentially asks that the WTO dispute settlement system respond to such a Member's exercise of discretion by inferring the existence of a measure that does not exist, in order to make findings against that non-existent measure.

## B. ZEROING IN PERIODIC REVIEWS

***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.***

***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. Mexico's response to the Panel's question contains certain inaccuracies and mischaracterizations, which are identified below.

5. As explained in the U.S. response to this question, it is not accurate to refer to all of the calculations performed in a periodic review as a margin calculation.[1] Instead, dumping margins are calculated for each export transaction 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. It is not accurate, therefore, to refer to these margins of dumping as "intermediate comparison results," suggesting that a margin of dumping cannot be obtained without aggregating the results of comparing export price and normal value.[2] Rather, the aggregations are undertaken to establish an assessment rate for each importer and a cash deposit rate for each exporter or producer.

[1] Mexico's Response to the Panel's Questions, paras. 21, 22.

[2] Mexico's Responses to the Panel's Questions, paras. 22-28.

6. Mexico has taken the position that the Panel should ignore the import- and importer-specific nature of antidumping duty assessment when interpreting the term "margin of dumping" as it is used in Article 9.3. Instead, Mexico asserts that the term "margin of dumping" has no meaning except in relation to the product as a whole considered on an exporter-specific basis. In support of this position, Mexico's response to the Panel's question attempts to mischaracterize the periodic reviews conducted by the United States as an exercise exclusively focused on the exporter.[3] The fact that periodic reviews result in the calculation of exporter/producer-specific cash deposit rates and importer-specific assessment rates belies Mexico's mischaracterization. In this regard, Mexico attaches misplaced significance to the fact that periodic reviews requested by importers are not limited to the imports of the particular importers.[4] This fact is entirely explained by the U.S. antidumping statute's provision that one of the end results of a periodic review is the recalculation of an exporter/producer-specific cash deposit rate to be applied to all future entries of an exporter/producer. The calculation of the cash deposit rate, however, has no bearing on Mexico's claim of inconsistency with Article 9.3, which relates to the "amount of antidumping duty." Indeed, Mexico's own arguments in support of its claims of Article 9.3 inconsistency emphasize the amount of antidumping duties that have been assessed on imports of Mexican stainless steel as a result of the importer-specific assessment rates calculated in the periodic reviews at issue — duties for which the importer was liable. Accordingly, Mexico's argument fails to justify its position that the Panel's interpretation of "margin of dumping" as used in Article 9.3 should ignore the import- and importer-specific nature of antidumping duty assessment.

7. Finally, Mexico states that the government of an exporting country may request a periodic review.[5] This is true with respect to certain periodic reviews conducted in relation to countervailing duty orders. The government of an exporting country, however, is generally not directly involved in antidumping duty proceedings and would not be considered an interested party in a periodic review of an antidumping duty order. Accordingly, the portions of the Department of Commerce regulations identified by Mexico in relation to requests for periodic review by a government of an exporting country are not applicable in the context of this dispute because the matter before the panel does not relate to periodic reviews of a countervailing duty order.

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[3] Mexico's Response to the Panel's Questions, paras. 17-19.

[4] Mexico's Response to the Panel's Questions, para. 17-19.

[5] Mexico's Response to the Panel's Questions, para. 16.

***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?***

8. As explained above, Mexico's reference to the transaction-specific margins of dumping as "intermediate comparison results" erroneously suggests that a margin of dumping cannot be obtained without aggregating the results of comparing export price and normal value. Instead, where the result of the comparison shows that the transaction-specific export price is lower than the comparable average normal value, the result is a margin of dumping.

***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?***

9. Mexico's response to the Panel's question attempts to mischaracterize the periodic reviews conducted by the United States as an exercise exclusively focused on the exporter.[6] As explained above, this is erroneous because periodic reviews result in importer-specific assessment rates applied to an importer's entries for which the importer is liable for payment. In any event, Article 9.3 and Mexico's claims thereunder relate to the amount of antidumping duty assessed. Therefore, the Panel should not ignore the import- and importer-specific nature of antidumping duty assessment in its interpretation of the term "margin of dumping" as used in Article 9.3.

## C. OTHER QUESTIONS

***Q4. MEXICO: The Panel notes the United States' arguments between paragraphs 17-22 of its oral statement at the second meeting of the Panel with the parties, regarding the alleged practical implications on the conduct of the investigating authorities of adopting the line of reasoning developed by the Appellate Body that zeroing is prohibited in all anti-dumping proceedings and in connection with all types of comparison between the normal value and the export price. Please explain your views on the United States' arguments in this regard, particularly on the assertion in paragraph 18 of the United States' oral statement that " [] the interpretation of the term "margin of dumping" proposed by Mexico result in perverse incentives and absurd results".***

[6] Mexico's Response to the Panel's Questions, para. 35.

10. In its earlier submissions, the United States has demonstrated that the interpretation of the term "margin of dumping" proposed by Mexico results in perverse incentives and absurd results.[7] In particular, an obligation to grant offsets for non-dumping, reducing the antidumping duty liability for dumped transactions, prevents the antidumping duty from having its intended effect under Article VI:2 of the GATT 1994. Such offsets also create perverse incentives by providing a competitive disadvantage to importers whose fairly traded transactions would result in the reduction of duty liability for their competitors importing dumped transactions. Additionally, with respect to prospective normal value systems, the implication of Mexico's interpretation that the margin of dumping must relate solely and exclusively to the product "as a whole" requires these systems to adopt retrospective reviews to meet an alleged obligation that is nowhere in the text of the AD Agreement. Reaching the same conclusion, a prior panel found such a result to be "absurd."[8] In short, the interpretation of the AD Agreement proposed by Mexico in this dispute simply breaks down as a logical and practical matter in the real world of antidumping duty assessment.

11. In its response to the Panel's question, Mexico argues that concerns about practical consequences do not constitute a basis to go against the "plain meaning of the text."[9] Mexico fails, however, to cite any text, the plain meaning of which supports its interpretation that the terms "dumping" and "margin of dumping" have no meaning except in relation to the product as a whole considered on an exporter-specific basis. There is no such text in the GATT 1994 or the AD Agreement. Indeed, the United States has demonstrated that the ordinary meaning of the text of Article VI of the GATT 1994 and Article 2.1 of the AD Agreement, which define dumping, is contrary to Mexico's interpretation. The only textual basis for a prohibition of zeroing is the phrase "all comparable export transactions", which appears solely in relation to investigations using average-to-average comparisons. The obligations that Mexico attempts to read into the provisions of the AD Agreement are based on inferences that are contrary to the plain meaning of the relevant text, contrary to the relevant context, contrary to the well-established prior understanding of the concepts incorporated into AD Agreement, and also lead to the perverse incentives and absurd results described above.

12. Mexico's answer does not attempt to further address the absurdity that prospective normal value systems are rendered retrospective under Mexico's interpretation. With respect to the perverse incentives created by an obligation to provide offsets, Mexico's response is unpersuasive.

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[7] *See* United States' First Written Submission, paras. 88-96; United States' Opening Statement at the First Substantive Meeting, paras.19-20; United States' Second Written Submission, paras. 2-3; United States Opening Statement at the Second Substantive Meeting, paras. 18-21.

[8] *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.57.

[9] Mexico's Response to the Panel's Questions, paras. 38, 42.

13. First, Mexico engages in circular reasoning by arguing that because the "full margin of dumping" consistent with the AD Agreement is obtained "without the use of zeroing" it is therefore not possible that this "full margin of dumping" could be insufficient to prevent or offset dumping.[10] Mexico's reference to the "lesser duty rule" is similarly inapposite because the permissibility of imposing a duty less than the margin of dumping does not reveal or suggest the existence of an obligation to provide an offset to reduce antidumping duties for non-dumped transactions — which have nowhere been demonstrated to mitigate the injury caused by dumped transactions. By assuming its conclusion, Mexico fails to address how an antidumping duty assessed on an importation for which the export price is less than the comparable normal value will prevent or offset the dumping, as provided for in Article VI:2 of the GATT 1994, if the amount of the antidumping duty is reduced to an amount less than the amount by with the export price is less than the comparable normal value.

14. With respect to the competitive disadvantage created when an importer of non-dumped merchandise provides offsets that reduce the antidumping duty liability of a competing importer of dumped merchandise, Mexico argues that the incentives that are created for importers are irrelevant because the exporter or producer "faces potential anti-dumping liability on all of its exports at the maximum level permitted under the Agreement."[11] This is factually erroneous. Antidumping duties are paid by importers, not exporters. Mexico also argues that the competitive disadvantage to the importer of non-dumped merchandise is, in fact, "precisely the correct 'incentive[]'" because the disadvantaged importer will seek to have the exporter raise its price to the advantaged importer. This implausible scenario supposes that an importer will act contrary to its normal commercial interest, which is to seek a lower price from the exporter. More plausibly, the disadvantaged importer will demand that it not continue to subsidize its competitor by paying higher prices for the exporter's merchandise and will demand a price reduction, creating a deleterious race to the bottom and even greater levels of injurious dumping.

***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. Mexico's response to the Panel's question fails to demonstrate that Mexico's example represents a legitimate scenario under Article 2.4.2. Without any justification for its alteration of

[10] Mexico's Responses to the Panel's Question, para. 40.

[11] Mexico's Responses to the Panel's Questions, para. 43.

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.

16. Mexico appears to argue that the Panel should accept Mexico's example as rebutting the United States mathematical equivalence argument simply because it purports to have been derived from application of a U.S. regulation pertaining to targeted dumping. The existence of a never-applied U.S. regulation, however, cannot aid in the Panel's interpretation of Article 2.4.2 as Mexico suggests. Irrespective of the U.S. regulation, Mexico's hypothetical example provides no justification for altering the basis for normal value from that which would be used in the corresponding average-to-average comparisons. Mexico must establish that any such scenario is consistent with Article 2.4.2. Under Mexico's interpretation, a pattern of differences in export prices that cannot be taken into account using average-to-average or transaction-to-transaction comparisons cannot be accounted for except by altering the basis for determining normal value. Accordingly, Mexico's example does not rebut the United States' argument that the effect of a general prohibition of zeroing is to nullify the intended operation of the second sentence of Article 2.4.2, as demonstrated by its text, which provides that such patterns may be accounted for by using an asymmetric comparison as an alternative to the symmetric comparisons used in the first sentence of Article 2.4.2.