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 FIRST SUBSTANTIVE MEETING

June 15, 2007

A. JURISDICTIONAL ISSUE

Q1. The Panel notes the United States' assertion that Mexico's panel request is limited to model zeroing in investigations and simple zeroing in duty assessment proceedings. More specifically, the United States argues that Mexico has not raised a claim regarding the single "Zeroing Procedures" irrespective of the proceeding in which such procedures are used and irrespective of the type of comparison carried out between the normal value and the export price.

a) MEXICO: Please comment. Please refer the Panel to the relevant parts of Mexico's panel request where measures other than model zeroing in investigations and simple zeroing in duty assessment proceedings have been identified.

1. In its preliminary answer to this question at the First Substantive Meeting of the Panel, Mexico indicated that its references to "model zeroing" and "simple zeroing" in its panel request were merely labels which it understood to apply to the alleged measures it is challenging in this dispute. However, no matter how Mexico chooses to characterize its description of the alleged measures, those descriptions only encompass two alleged measures relating to zeroing.[1] Those two alleged measures correspond to original investigations using average-to-average comparisons and periodic reviews (*i.e.*, assessment proceedings, also known as administrative reviews under U.S. domestic law) for which the comparisons are based on an individual export transaction and monthly average normal values. Consequently, Mexico's panel request and the terms of reference of the Panel are limited to these two alleged measures, and do not cover a subsequently alleged single zeroing measure in all contexts irrespective of the type of comparison used.

b) BOTH PARTIES: What significance, if at all, should the Panel attach to the fact that the word "review" is preceded by the word "periodic" in each instance it is used in Mexico's panel request?

2. The significance of the term "periodic review" is that Mexico uses this term throughout its panel request as well as its First Written Submission to specifically refer to assessment proceedings conducted by the U.S. Department of Commerce ("Commerce"). In the third paragraph of Section B of its panel request, Mexico describes what it means by "periodic reviews", stating that it is "when USDOC calculates the magnitude of dumping margins in order to assess an importer's final liability for payment of anti-dumping duties and any future cash deposit rate."[2] In the first bullet after that paragraph and in the subsequent paragraph, Mexico

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[1] The United States emphasizes at the outset that it does not agree that these alleged "measures" identified by Mexico actually qualify as "measures" within the meaning of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").

[2] Request for Establishment of a Panel by Mexico, WT/DS/344/3.

uses the term "administrative reviews," which refers to assessment proceedings under U.S. domestic law.[3] Therefore, in referring to periodic reviews Mexico makes clear it is referring only to "assessment proceedings", as opposed to other types of reviews, such as sunset reviews, changed circumstances reviews or new shipper reviews. In addition, in the last bullet of paragraph 2 of its request for consultations, Mexico refers to "the methodology employed by the Department to determine the overall margin of dumping for the product subject to the review in the listed administrative reviews . . . ."[4] These are the same administrative reviews identified in the annex attached to the panel request.

3. In the third paragraph of Section B of its panel request, Mexico also describes with particularity the type of comparison for which it is making a claim of inconsistency; that is, that the "USDOC first subdivides reported comparison market sales (also known as 'normal value' sales) by 'control number' into a series of monthly 'averaging groups' on a model-specific basis. The comparison is usually between each reported individual export transaction and the average normal value of the identical or most similar contemporaneous monthly averaging group to which it corresponds." This describes the type of comparison that Commerce actually uses in periodic reviews and that was used in the periodic reviews listed in the annex to Mexico's request. It does not describe any other type of comparison for which Mexico now requests findings. Mexico itself notes this in the last paragraph in Section B of Mexico's panel request. Therefore, the comparison type described with respect to periodic reviews in Mexico's request, which delimits the terms of reference of the Panel, could not possibly include comparison types that Commerce did not apply in the periodic reviews listed by Mexico. Thus, the "periodic" reviews Mexico has identified are assessment proceedings conducted by Commerce using the same comparison types as were used in the particular assessment proceedings that are the subject of Mexico's "as applied" claims, and not assessment proceedings using other types of comparisons.

> ***Q2. MEXICO: The scope of Mexico's request for findings and recommendations is not entirely clear to the Panel. The Panel notes, for instance, that in the introductory parts of its First Written Submission[5] Mexico challenges the "Zeroing Procedures" in all procedural contexts, including investigations, periodic reviews and sunset reviews, and irrespective of the comparison methodology used, i.e. the weighted average-to-weighted average ("WA-WA"), transaction-to-transaction ("T-T") and weighted average-to-transaction ("WA-T") methodologies. There are also other instances in Mexico's First Written Submission where Mexico cites measures that go beyond model zeroing in investigations and simple zeroing in duty***

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[3] Request for Establishment of a Panel by Mexico, WT/DS/344/3.

[4] Request for Consultations by Mexico, WT/DS/344/1.

[5] See, First Written Submission of Mexico, paras. 1 and 2.

assessment proceedings.[6] It seems to the Panel, however, that the bulk of Mexico's argumentation is based on model zeroing in investigations and simple zeroing in periodic reviews. Unlike the claims relating to model zeroing in investigations and simple zeroing in periodic reviews, Mexico's First Written Submission does not seem to contain a section devoted to explaining why zeroing is WTO-inconsistent outside the context of these two claims. The "Conclusion" section of Mexico's First Written Submission does not mention proceedings other than investigations and periodic reviews although it mentions all comparison methodologies used in investigations and periodic reviews. Finally, the Panel also notes Mexico's statement in paragraph 35 of its Oral Statement that Mexico is challenging the use of zeroing in investigations and periodic reviews. Please clarify the scope of Mexico's case by referring to the relevant parts of Mexico's panel request and its First Written Submission. Please explain what specific finding(s) Mexico is expecting from the Panel in these proceedings.

4. In its opening statement, paragraph 35, Mexico unsuccessfully attempts to reconcile its panel request and its request for findings in paragraph 264 of its First Written Submission. However, the addition of "regardless of the comparison methodology" in paragraph 264 cannot be reconciled with the fact that, in its panel request, Mexico described with specificity the two alleged measures it was challenging and related them to the investigation and periodic reviews that form part of Mexico's "as applied" claims. The description of the alleged measures does not encompass types of comparison that were not actually used by Commerce. The Panel's terms of reference are limited to the matter referred to the Dispute Settlement Body ("DSB") by Mexico in its panel request (WT/DS344/4).

B. IDENTIFICATION OF "ZEROING PROCEDURES" AS A MEASURE

Q4. UNITED STATES: The Panel notes the United States' argument that Mexico has failed to demonstrate the existence under US law of a single "Zeroing Measure" which is a norm of general and prospective application. Please explain whether the United States' argument applies to the single "Zeroing Measures" that, in Mexico's view, apply in all proceedings and with respect to all kinds of comparison methodologies, or whether it also applies to the "Zeroing Measures" that apply in the context of model zeroing in investigations and simple zeroing in periodic reviews. In other words, is it the United States' view that there is no such measure under US law as the "Zeroing Procedures" that apply in the context of model zeroing in investigations and simple zeroing in periodic reviews?

[6] See, for instance, First Written Submission of Mexico, paras. 12, 37, 194, 195, 196, 200, 208.

5. There is no such measure under U.S. law as "Zeroing Procedures" that precludes the United States from providing offsets for non-dumping in periodic reviews. Further, as of February 22, 2007, Commerce no longer makes average-to-average comparisons in investigations without providing offsets for non-dumped comparisons. In its First Written Submission, Mexico erroneously argues that there is a "single zeroing measure". The U.S. First Written Submission responds to that argument in detail at paragraphs 37 through 47, demonstrating that the alleged measure does not exist. Whether Mexico's allegations are with respect to one single zeroing measure applicable in all contexts, one measure that applies in the context of average-to-average comparisons in investigations and zeroing in periodic reviews, or even separate zeroing measures with respect to those two contexts, Mexico has not presented evidence that there is an act or instrument of the United States that sets forth a rule of general and prospective application requiring Commerce to zero. Mexico has presented historical evidence that Commerce, when presented with similar factual circumstances, has not acted arbitrarily and instead has engaged in good administrative practice by engaging in consistent conduct. But, consistent behavior in the past does not create a separate measure. Mexico has not demonstrated that a measure exists that requires that behavior to occur.

> ***Q5. UNITED STATES: The Panel notes Mexico's references, in various parts of its First Written Submission, to the testimony of Ms Owenby[7] describing the USDOC's calculation of margins of dumping in investigations and periodic reviews. Could the United States please confirm whether this description of its practice is correct? If your answer is in the negative, please explain in what ways Ms Owenby's testimony does not reflect an accurate description of the USDOC's methodology. If you consider it to be partly accurate, please specify in detail which parts are accurate and which ones are not.***

6. There are many assertions with respect to the U.S. "practice" and calculation of margins of dumping contained in Ms. Owenby's statement. As an initial matter, Ms. Owenby's statement should be recognized for what it is – a statement by a member of Mexico's delegation presumably paid by and for the benefit of the Government of Mexico. It is not a reflection of an impartial expert. As such, the United States does not adopt or endorse Ms. Owenby's statement, or any part thereof, as being entirely accurate in its description. As a factual matter, the United States does not dispute that in the particular periodic reviews at issue in this dispute, after comparing U.S. sales to their contemporaneous normal value, the United States did not use non-dumped sales to reduce the margin of dumping found with respect to other, dumped sales. As they pertain to this dispute, a number of inaccuracies and inconsistencies in Ms. Owenby's statement are explained in detail below.

[7] Exhibit MEX-1.

7. First, Ms. Owenby's statement asserts that certain portions of programming code, including a so-called "zeroing" line, are "universal and executed in every margin calculation."[8] Ms. Owenby appears to suggest that is so because the standard programming is not equipped with a "switch" to "turn off" those portions of the programing code.[9] To the extent this suggests that Commerce is not capable of, or does not have the option to, grant offsets by altering the programming code in question, this is not the case. In fact, as mentioned, Commerce has discretion to grant offsets for non-dumping if it considers it to be appropriate given the circumstances. The programming code referred to does not bind Commerce's discretion to grant offset in any particular proceeding. Ms. Owenby's assertions that tend to imply the contrary are not accurate. For example, in paragraphs 8 and 10, Ms. Owenby refers to "standard" computer programs used to execute all calculations in antidumping proceedings. This is inaccurate and contradicted elsewhere in her statement. The "programs" to which Ms. Owenby refers might better be referred to as basic templates that Commerce officials utilize to expedite the development of the particular program that is written specific to any particular exporter/producer for any specific product, and, indeed, for any specific review. Ms. Owenby recognizes the review, company and fact-specific development of the program that must occur in paragraphs 14 and 17 – and most tellingly in paragraphs 61 to 66, wherein she highlights certain programming changes and additions made in some of the administrative reviews at issue in this dispute in response to particular facts and arguments made in those reviews. While the so-called "zeroing" aspects of the program may not have changed in those reviews, those lines of programming had no different legal status than the changes made at lines 3768 and 3840 of the first review program (para. 61 and fn. 24), or line 3382 of the second review program (para. 62), or lines 4009 or 4041 of the third review program (para. 63 and 64), and so on.

8. Second, in paragraph 20 of her statement, Ms. Owenby purports to describe a "method" for the application of transaction-to-transaction comparisons and margin calculations. Although she describes this "method" in the same general terms used with respect to other types of comparisons, the fact is that the United States has used this particular type of comparison in only a single instance, as Ms. Owenby acknowledges.[10] This highlights the fact that wherever used, the term "method" represents nothing more than a description of something that has been done, at least once, and does not constitute evidence of the existence of a separate measure causing that something to be done. In addition, Ms. Owenby's statement does not accurately describe the sequence of steps followed to obtain a single corresponding normal value transaction for comparison to each export transaction in the one case involving transaction-to-transaction comparisons.

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[8] Owenby Statement, paras. 14-17.

[9] Id.

[10] Owenby statement, paras. 20-21.

9. Third, in paragraph 67 of her statement, Ms. Owenby suggests a manner in which the so-called "zeroing procedure" might be eliminated. As the United States discussed in its First Written Submission, should this Panel find that the United States acted inconsistently with its WTO obligations (which the United States does not believe to be the case), there is no need for a suggestion as to how the United States might come into compliance.[11]

Q6. UNITED STATES: The Panel notes the statements of some US senators in their letter dated 11.12.2006 [12] regarding the decisions made by WTO panels and the Appellate Body on the issue of zeroing. More specifically, the Panel notes the following parts of the mentioned letter:

> ***"The practice of "zeroing" is critical and longstanding, and was most certainly not negotiated away during the Uruguay Round...In our view, any effort to implement these decisions by discontinuing the practice of "zeroing" would be flatly inconsistent with U.S. law, which requires the use of this methodology." (emphasis added)***

Please comment on the relevance of this statement to the issue of the alleged existence of "Zeroing Measures" as such under US law.

10. In the U.S. system of government, statutes are enacted by means of passage by the legislative branch, comprised of the House of Representatives and the Senate, and signature by the President. In the case of a statute that is administered by a government agency, it is typical for legislators, such as the respected Senators mentioned, to take an interest in the agency's administration of the statute. The views of any individual Senator or group of Senators regarding the interpretation of those statutes, however, do not carry the force of law in the United States. Instead, it is the function of the judicial branch to interpret the statutes of the United States and determine whether the agency carries out its responsibilities in accordance with the law. See Marbury v. Madison, 5 U.S. 138, 138 (1803) ("It is emphatically the province of the judicial department to say what the law is.") With respect to the issue of whether the U.S. antidumping statute requires the denial of offsets for non-dumping, the courts have ruled that the U.S. antidumping statute does not resolve whether offsets should be granted for non-dumping in Commerce's dumping margin calculations in antidumping investigations and periodic reviews. See Corus Staal BV v. Dep't of Commerce, 395 F.3d 1343, 1345 (Fed. Cir. 2005); Timken Co. v. United States, 354 F.3d 1334 (Fed. Cir. 2004).[13]

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[11] First Written Submission of the United States of America, paras. 105-109.

[12] Exhibit MEX-7.

[13] See Exhibits US - 8 and 9.

Q7. UNITED STATES: The Panel notes that the modification to the USDOC's dumping margin calculations in investigations where the WA-WA methodology is used was published in the Federal Register in the United States.[14] The Panel also notes the United States' proposition that as from 22 February 2006 the USDOC has been providing offsets for non-dumped comparisons in such investigations. Could the fact that the United States made an official modification to the way the USDOC calculates margins of dumping in such investigations indicate that up to the date of this modification the USDOC felt obliged to follow the previous practice/methodology that entailed zeroing? Please indicate the nature of this modification that was published in the Federal Register. Was this a modification of the USDOC's policy on dumping margin calculations? If, as the United States argues, there is no such measure under US law as "Zeroing Measures", please explain to the Panel the reason why the United States needed to make a written modification to the existing practice and publish it in the Federal Register. Why would a non-existent measure be modified in writing and through official notice in the Federal Register?

11. As part of the U.S. statute implementing the Uruguay Round Agreements, Congress imposed certain requirements in connection with U.S. implementation of DSB recommendations and rulings through administrative means. Section 123(g) of the Uruguay Round Agreements Act (19 U.S.C. § 3533) sets out the domestic legal procedures that U.S. government agencies must follow in order to amend, rescind, or otherwise modify a regulation or practice of a U.S. department or agency that a WTO dispute settlement panel or the Appellate Body has found to be inconsistent with any of the WTO agreements. The procedures require the U.S. Trade Representative and the relevant department or agency to consult with appropriate congressional committees and advisory committees. In addition, the procedures require the relevant agency to publish in the Federal Register the proposed modification for notice and comment, as well as the final modification. The Federal Register notice issued in connection with U.S. implementation in *US – Zeroing (EC)* was thus required by section 123(g), and this is the sole reason the notice was issued. Such a notice would not have been required absent DSB recommendations and rulings.

Q8. The Panel notes the following statements in paragraphs 45 and 46 of the United States' First Written Submission:

> ***"45. In addition, Mexico's own argumentation contradicts its assertion that there is a "single zeroing measure." Mexico divides its presentation into two separate sections. One deals with "USDOC Zeroing Procedures in Original Investigations" and another deals with "USDOC Zeroing Procedures in Periodic***

[14] Exhibits MEX-10 and MEX-11.

> ***Reviews." This division, and the use of the plural, is in itself probative that there is no one single measure.***
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> ***46. Finally, as noted above, the United States is providing offsets when calculating margins of dumping on the basis of average-to-average comparisons in antidumping investigations. This further demonstrates that there is no one "single zeroing measure.""***
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> ***a) MEXICO: What is Mexico's reaction to these arguments?***
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> ***b) UNITED STATES: Could these arguments be interpreted to mean that although there is no single "Zeroing Measures" under US law, there may be "Zeroing Measures" specific to certain types of zeroing, such as model zeroing in investigations and simple zeroing in periodic reviews? Please elaborate.***

12. The arguments in paragraphs 45 and 46 of the United States' First Written Submission should not be interpreted to mean that there may be "Zeroing Measures" specific to certain types of zeroing. They were intended to respond solely to the argument that there is a "single zeroing measure." Our point in paragraph 45 was simply that, based on Mexico's own argumentation, not even Mexico itself considers that there is a single zeroing measure. Our point in paragraph 46 was simply that the freedom the United States had to discontinue zeroing in investigations belies the conclusion that there was or is a measure requiring that the United States must zero in all contexts. It is equally true that there is no measure or measures requiring Commerce to zero in any specific context, and Mexico has not established otherwise. As explained in response to the Panel's Question 4, the U.S. arguments in paragraph 37 through 47 of its First Written Submission address this issue.

> ***Q9. UNITED STATES: The Panel notes the United States' statement in paragraph 43 of its First Written Submission that Mexico's description of the computer programs used by the USDOC is "nothing more than yet another description of what Commerce has done in the past, without any indication that it will do so as a matter of general and prospective application." The United States also argues -and Mexico seems to concede[15] - that the USDOC officials adjust their computer programs depending on the particularities of specific cases.***
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> ***a) Can these adjustments include the deletion of the zeroing line in these computer programs? In other words, do the USDOC officials have***

[15] First Written Submission of Mexico, para. 57.

discretion to deactivate the zeroing line in these computer programs? If so, please explain who is authorised to use that discretion under US law.

b) Please also explain whether that discretion has ever been used by the USDOC 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. If your answer is in the affirmative, please submit to the Panel copies of the relevant documents in this regard.

13. Commerce has discretion to calculate margins of dumping without using zeroing. Commerce is not required to use any particular computer software package, calculation program, or programming code. In any particular proceeding, Commerce may adapt a previously written calculation program, write a new calculation program, or use a calculation method other than a calculation program. If a calculation program (*e.g.*, a SAS program) is used to calculate the margin of dumping, then Commerce may exercise its discretion not to include the particular programming code that functions to deny offsets for non-dumped comparisons. If any other method, such as a spreadsheet software package, is used to calculate margins of dumping in a particular proceeding, Commerce similarly has discretion to grant offsets for non-dumped comparisons.

14. In each antidumping proceeding conducted by Commerce, the Assistant Secretary for Import Administration, or an official acting in that capacity, makes the final determination. Such final determinations incorporate and/or supersede all interim decisions made in the course of the proceeding, including the particular means of calculating the dumping margins, whether by SAS program or other means as described. Thus, in any proceeding in which the Assistant Secretary determines that offsets for non-dumped comparisons should be granted, the Assistant Secretary has the discretion to do so.

15. 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.

Q10. The Panel notes Mexico's assertion in paragraph 163 of its First Written Submission that "zeroing is a deliberate policy that has been, and continues to be, systematically applied by the USDOC, without exception, in all original investigations and periodic reviews." The Panel also notes that part of the evidence presented by Mexico on the issue of the alleged consistent application

of zeroing in investigations and periodic reviews is the findings of past panels and the Appellate Body.[16]

a) BOTH PARTIES: Please explain – by referring to the relevant treaty provisions and jurisprudence – whether this Panel can take note of, and base its decision partly on, the factual findings made by past panels and the Appellate Body regarding the USDOC's use of zeroing in the past.

16. Article 11 of the DSU requires each panel to make an objective assessment of the matter before it. This includes an objective assessment of the facts and the applicability of and conformity with the relevant covered agreements. In *Guatemala – Cement I* , the Appellate Body explained that the matter includes both the facts of the case (and the specific measures at issue in particular) and the legal claims raised.[17] In addition, it is well established in WTO dispute settlement that the complaining party bears the burden of proving that a Member has acted inconsistently with its WTO obligations, be it with respect to an "as such" or "as applied" claim. This includes the burden of proving the existence of the measure that is allegedly inconsistent. Therefore, each panel must satisfy itself that the complaining party has established a *prima facie* case by presenting evidence and arguments to identify the measures being challenged and explain the basis for the claimed inconsistency with a WTO provision.[18]

17. Were a panel to rely on the factual findings of another panel or the Appellate Body, it would be shirking its responsibilities under Article 11 of the DSU. Furthermore, as explained by the Appellate Body in *EC – Hormones*, a panel engages in legal error when it absolves the complaining party from the necessity of establishing a *prima facie* case.[19] Likewise, in *US – Gambling*, the Appellate Body stated that the "evidence and argument underlying a *prima facie* case, therefore, must be sufficient to identify the challenged measure and its basic import, identify the relevant WTO provision and obligation contained therein, and explain the basis for the claimed inconsistency of the measure with that provision."[20] Finally, the panel in *US – Subsidies on Upland Cotton* rejected Brazil's request that the panel apply the reasoning of a prior panel, as modified by the Appellate Body, *mutatis mutandis*. In declining to do so, the panel stated that there was "no basis in the text of the DSU . . . for such incorporation by reference of

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[16] See, for instance, First Written Submission of Mexico, para. 164.

[17] Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998, para. 73.

[18] Panel Report, *United States – Anti-Dumping Measure on Shrimp from Ecuador*, WT/DS335/R, adopted 20 February 2007, par. 7.9.

[19] Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, adopted 1 February 2002 , para. 109.

[20] Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, adopted 20 April 2005, para. 141.

claims and arguments made in a previous dispute nor for a quasi-automatic application of findings, recommendations and rulings from a previous dispute."[21]

18. A separate panel's findings are not evidence, but conclusions based on evidence presented in a separate proceeding, and do not relieve a party of its burden of proof in its own proceeding.

b) UNITED STATES: Does the United States consider that Mexico has presented evidence sufficient to demonstrate that the USDOC has consistently used zeroing in the past investigations and periodic reviews? Please elaborate.

19. The United States has already noted the numerous factual errors in Mexico's description of how Commerce conducts antidumping calculations, including in connection with zeroing.[22] The United States has also noted that it is providing offsets in the context of weighted average to weighted average comparisons in investigations.[23] To the extent that Commerce had not previously provided offsets, as described in response to Question 9, this is evidence only of the fact that Commerce responds to similar facts in a similar fashion

Q11. The Panel notes that in paragraphs 46 and 84 of its First Written Submission, Mexico states that Exhibits MEX-1 through MEX-9 contain evidence regarding the specific content of the Zeroing Procedures applied by the USDOC. The Panel also notes that Exhibits MEX-2 and MEX-3 contain excerpts from the US statutes and regulations, respectively.

a) MEXICO: The Panel would like to know whether, in Mexico's view, the Zeroing Procedures have any legal basis under US law, including more specifically the statutory and regulatory provisions submitted in the above-quoted exhibits. Please elaborate.

b) BOTH PARTIES: Does, in your view, a measure have to be rooted in the law of the relevant Member in order to be susceptible to an "as such" challenge in the WTO dispute settlement proceedings? Please elaborate by referring to the relevant treaty provisions and jurisprudence.

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[21] Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, adopted 21 March 2005, as modified by the Appellate Body Report, WT/DS267/AB/R, paras. 735 - 739.

[22] See answer to Question 5.

[23] See First Written Submission of the United States of America, para. 10.

20. To be susceptible of any challenge – as such or otherwise – a measure, taken by a Member within its territory, has to exist. That is the issue in this dispute. The United States has taken no "measure" that requires that Commerce zero in any particular circumstance. Mexico's efforts in this dispute only demonstrate the absence of any such measure. In particular, Mexico is unable to identify precisely what measure it is challenging "as such" and how the United States took this supposed measure. Mexico refers to no legal provisions setting forth the measure, nor any other actions of the United States, whether or not in compliance with U.S. municipal law, which might conceivably constitute the measure. Mexico merely refers to past instances in which U.S. authorities took a consistent approach to a consistent set of facts, and to the tools, such as computer programs, used to conduct investigations. This is not evidence of a separate measure nor is it a basis for inferring a measure.

21. The DSU does not contain a definition of the term "measure." Nonetheless, a few things are clear from the text of the DSU. For example, the DSU makes it clear that a "measure" is not some abstract or hypothetical action, omission, or any of the other means used to describe a measure. Article 3.3 refers to "measures *taken* by another Member" in describing the role of WTO dispute settlement (emphasis added). Similarly, Article 4.2 of the DSU refers to "consultations regarding ... *measures* affecting the operation of any covered agreement *taken* within the territory [of a Member] ." (Emphasis added). In *US - Zeroing (EC)*, the Appellate Body correctly explained that a key element of the analysis of whether there is a measure is Article 3.3 and the concept of "measure taken by another Member", as that identifies the necessary nexus between the "measure" and the "Member" for purposes of the DSU.[24] And in this sense it is necessary that an alleged "measure" be rooted in the law of the Member[25] (that is, it must be "taken" by that Member) in order to exist at all and hence be susceptible to challenge under the DSU.

22. In *US – Zeroing (EC)*, the Appellate Body also explained that the measures that can be subject to dispute settlement can include not only acts applying a law, but also "acts setting forth rules or norms that are intended to have general and prospective application" and that "instruments of a Member containing rules or norms could constitute a 'measure' irrespective of how or whether" they are applied in a particular instance.[26] In

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[24] Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins*, WT/DS294/AB/R, adopted 9 May 2006, para. 187, citing to Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, para. 81.

[25] For purposes of this dispute it is not necessary to consider issues that might arise from alleged actions or other measures that a Member has taken that are alleged to be contrary to that Member's law.

[26] Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins*, WT/DS294/AB/R, adopted 9 May 2006, para. 188, citing to Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, para. 82 (footnote omitted).

either case, among other elements necessary to establish whether it is a "measure," the act would have to have been "taken" by the Member or the instrument would need to be "of" a Member – even if that act or instrument is unwritten or non-transparent. It is not sufficient to identify a "rule or norm" in the descriptive sense, to describe what a Member may have done "as a rule" or "normally." The fact that a Member may have acted consistently does not permit the conclusion that there is a separate measure that is causing that consistent behavior. The Member, instead, must have done something that creates a measure that is *prescriptive*, that is intended to have general and prospective application. The Appellate Body has emphasized that a panel "must not lightly assume" the existence of a measure that is not in the form of a written document, emphasizing that "particular rigour" is required on the part of a panel to support a conclusion as to the existence of such a measure.[27]

23. Separate from the question of whether a measure exists is the question of whether that measure in fact is in breach of an obligation.[28] In order to find that a measure, as such, breaches an obligation, the measure must mandate that breach; if the measure provides the authorities with discretion to act in a manner consistent with the specific obligation, then it would not be permissible to find that measure is in breach "as such" since it is not permissible to presume that a Member would always choose to exercise that discretion in a manner contrary to its obligations.[29] This test has been consistently applied by GATT and WTO panels, either explicitly or implicitly. For example, in concluding that an alleged zeroing measure was "as such" in breach of a WTO obligation, the panel in *US – Zeroing (EC)* emphasized that the alleged measure "necessarily results in" a WTO-inconsistent result.[30] The United States disputed that any such measure existed, and continues to do so. However, it is correct that, with respect to any measure challenged as such, the measure must mandate a result in breach of a WTO obligation – it must necessarily result in such a breach – in order for the measure to "as such" breach the particular obligation.

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[27] Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins*, WT/DS294/AB/R, adopted 9 May 2006, para. 196 - 198.

[28] Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, paras. 78 and 89.

[29] *See, e.g.,* Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, adopted 1 February 2002 , para. 259; Panel Report, *Korea – Measures Affecting Trade in Commercial Vessels*, WT/DS273/R, adopted 11 April 2005, para. 7.67. *See also*, GATT Panel Report, *EEC – Regulations on Imports of Parts and Components,* BISD 37S/132, adopted 16 May 1990, para. 5.26.

[30] Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins*, WT/DS294/R, adopted 31 October 2005, para. 7.105.

24. In this regard, the Member's municipal law will be important in determining what the measure does, that is, whether the measure requires actions that are inconsistent with the obligation in question.

25. Mexico has failed to provide evidence of any written or unwritten measure (act or instrument) that requires Commerce to zero in any particular context. As the United States has described in its answer to Question 6, U.S. courts have held that the U.S. antidumping statute does not resolve whether offsets should be granted for non-dumping in Commerce's dumping margin calculations in antidumping investigations and periodic reviews. Therefore, under U.S. law, Commerce has discretion to determine whether offsets for non-dumping should be granted or denied.

C. ZEROING IN INVESTIGATIONS

Q12. UNITED STATES: The Panel notes the United States' statement in paragraph 104 of its First Written Submission that "in US – Softwood Lumber Dumping the Appellate Body found that the use of "zeroing" with respect to the average-to-average comparison methodology in investigations was inconsistent with Article 2.4.2, by interpreting the terms "margins of dumping" and "all comparable export transactions" as used in Article 2.4.2 in an integrated manner" and that "[t]he United States acknowledges that this reasoning is equally applicable with respect to this claim". Should the Panel interpret this statement to mean that the United States does not contest Mexico's claim regarding model zeroing in investigations? Please explain.

26. The United States does not concede that Mexico has established the existence of a measure that can be challenged "as such" with regard to investigations. The United States does not contest that in the original investigation of stainless steel from Mexico Commerce did not provide offsets for non-dumped transactions. The United States recognizes the findings by the Appellate Body in *US – Softwood Lumber Dumping* that the use of "zeroing" with respect to average-to-average comparisons in investigations was inconsistent with Article 2.4.2, by interpreting the terms "margins of dumping" and "all comparable export transactions" in an integrated manner. The United States acknowledges this reasoning applies equally to Mexico's as-applied claim with respect to the stainless steel investigation. The United States is no longer making average-to-average comparisons in investigations without providing offsets for non-dumped comparisons.

D. ZEROING IN PERIODIC REVIEWS

Q14. The Panel notes Mexico's description, in paragraphs 79-83 of its First Written Submission, of the method through which the USDOC calculates the margin of dumping in periodic reviews.

a) UNITED STATES: Do you agree with this description? If your answer is in the negative, please explain clearly in what ways Mexico's description is not an accurate reflection of the USDOC's methodology.

27. As a generalized description of the calculation in periodic reviews, much of what Mexico describes in paragraphs 79 through 83 of its First Written Submission is accurate. However, Mexico's description includes erroneous characterizations of how the steps in the calculation relate to the obligations in the AD Agreement. It also includes speculation concerning facts that are not demonstrated by evidence on the record of this proceeding.

28. To the extent that Mexico's description suggests that Commerce does not have discretion to use types of comparisons other than the comparison described in paragraphs 79 through 83, Mexico's description is not correct. In fact, Commerce has discretion to use other types of comparisons and to provide offsets for non-dumping.

29. In paragraph 80, Mexico describes comparison of individual export prices with monthly average normal values and characterizes the results of these as "intermediate comparisons." This is not correct. The price differences that are the results of these comparisons are themselves margins of dumping as that term is used in Article 9.3 of the AD Agreement, consistent with the definition of dumping in Article VI of the GATT 1994 and Article 2.1 of the AD Agreement.

30. In paragraph 82 and footnote 65, Mexico similarly and equally incorrectly applies the term "margin of dumping" exclusively to the weighted average margin of dumping as defined in 19 U.S.C. 1677(35)(B), and erroneously asserts that this is intended to be the margin of dumping as defined in the AD Agreement. Likewise, also in paragraph 82, Mexico again incorrectly characterizes price differences that are the results of comparisons showing normal value in excess of export prices as "intermediate comparisons" rather than as "margins of dumping."

31. Finally, it is not clear what Mexico means, at the end of paragraph 79, when it states that the "Zeroing Procedures contested by Mexico are manifested in a virtually identical manner" in investigations and periodic reviews. Therefore, the United States is not in a position to comment on this.

b) BOTH PARTIES: Please explain whether the above-mentioned methodology was used by the USDOC in the five periodic reviews cited in Mexico's First Written Submission[31]?

[31] First Written Submission of Mexico, paras. 12-139.

32. The United States understands the question's use of the term "methodology" as relating to Mexico's generalized description of the calculation in periodic reviews; in that regard, much of what Mexico describes in these paragraphs is consistent with the calculations performed by Commerce in the five periodic reviews cited in Mexico's First Written Submission. It would, however, be inaccurate to suggest that a methodology exists as a separate "measure" which is applied in particular instances.

c) BOTH PARTIES: Please explain whether the above-mentioned methodology is the same as the methodology challenged in US-Zeroing (EC) and US-Zeroing (Japan)? If your response is in the negative, please explain the reasons for it.

33. To the extent Mexico argues that these reports are relevant to this dispute, Mexico bears the burden of establishing that the facts on the record in those proceedings are the same as the facts presented with respect to this dispute.

Q15. UNITED STATES: The Panel notes the United States' argument that - absent zeroing- the targeted dumping methodology provided for under Article 2.4.2 of the Anti-Dumping Agreement would yield the same mathematical result as the WA-WA methodology. According to the United States, therefore, interpreting the Agreement as prohibiting zeroing in connection with this exceptional methodology would render this part of Article 2.4.2 inutile. In connection with this issue, could the Parties please comment on the following finding by the Appellate Body in US-Zeroing (Japan):

> ***"...The emphasis in the second sentence of Article 2.4.2 is on a "pattern", namely a "pattern of export prices which differs significantly among different purchasers, regions or time periods." The prices of transactions that fall within this pattern must be found to differ significantly from other export prices. We therefore read the phrase "individual export transactions" in that sentence as referring to the transactions that fall within the relevant pricing pattern. This universe of export transactions would necessarily be more limited than the universe of export transactions to which the symmetrical comparison methodologies in the first sentence of Article 2.4.2 would apply. In order to unmask targeted dumping, an investigating authority may limit the application of the W-T comparison methodology to the prices of export transactions falling within the relevant pattern."[32]***

[32] Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews* ("*US – Zeroing (Japan)*"), WT/DS322/AB/R, adopted 23 January 2007, para. 135.

34. In the quoted passage, the Appellate Body appears to take the position that it is possible to avoid the fact of mathematical equivalence by interpreting the targeted dumping provision to permit the investigating authority to discard a subset of export transactions from the analysis. The Appellate Body's suggestion is surprising. No Member has ever done this, nor has any Member ever suggested that it would be permissible to do this.

35. The language of the AD Agreement says nothing about selecting a subset of transactions when conducting a targeted dumping analysis. Instead, the provision refers to a "pattern of export prices which differs significantly among different purchasers, regions or time periods ... [that] cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison."[33] The word "pattern" has the ordinary meaning: "An arrangement or order discernable in object, actions, ideas, situations, *etc.*"[34] In this context the "pattern" incorporates export prices that differ significantly. Nothing in the text of the provisions or in the meaning of the word "pattern" suggests that part of the pattern described may be disregarded.

36. Further, it is difficult to reconcile the use of a sub-group of merchandise when using a targeted dumping comparison with the Appellate Body's conclusion that "all" export transactions must be included when performing average-to-average or transaction-to-transaction comparisons. This interpretation also appears to render trivial the requirement in the text of Article 2.4.2 to provide an explanation "as to why such differences cannot be taken into account appropriately by the use of" one of the two symmetrical comparison types. As construed by the Appellate Body, the differences would be accounted for under the second sentence by disregarding a subset of transactions that are the basis for the differences, *i.e.,* "the part outside the relevant pattern." Under the first sentence, however, the subset of transactions "outside the relevant pattern" would not be permitted to be discarded. As such, the explanation requirement appears to be reduced to a mere observation of the fact that the universe of transactions can be truncated when a pattern of differences has been found. Contrary to the implication of text, the explanation need not have any basis in the symmetrical or asymmetrical nature of the available comparison types.

37. Alternatively, if the excerpt of the Appellate Body report were read to mean that the use of average-to-transaction comparisons with a subset of the export transactions is to be done in conjunction with the use of the average-to-average comparison for the remaining export transactions, then the Appellate Body's conclusion is a *non sequitur*, because the combined results of such comparisons will be mathematically equivalent to the results obtained through the use of average-to-average comparisons. For the Panel's reference, this mathematical equivalence and its effect in rendering the second sentence of Article 2.4.2 inutile are demonstrated in Exhibit US-10.

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[33] AD Agreement, Article 2.4.2, second sentence.

[34] New Shorter Oxford English Dictionary, 1993 Ed., Vol. 2, p. 2126, def. 6d.

LIST OF EXHIBITS

US-8 Corus Staal BV v. Dep't of Commerce, 395 F.3d 1343 (Fed. Cir. 2005)

US-9 Timken Co. v. United States, 354 F.3d 1334 (Fed. Cir. 2004)

US-10 Tables 1 and 2