(COURTESY TRANSLATION)

BEFORE THE WORLD TRADE ORGANIZATION

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

(DS344)

OPENING STATEMENT OF MEXICO AT THE FIRST MEETING WITH THE PANEL

Geneva
22 May 2007

INTRODUCTION

Mr. Chairman, members of the Panel:

1. On behalf of the Mexican delegation, it is our privilege to appear before you today to present the views of Mexico concerning the issues in this dispute. I would like to thank you for agreeing to serve on this Panel and for your efforts – and those of the Secretariat and interpreters – in preparing for this first substantive meeting of this Panel.

2. In this opening statement, we do not intend to provide an exhaustive presentation of our arguments in this dispute and we refer the Panel to Mexico's first written submission. Instead, we limit our discussion to certain key points, which form the foundation for our specific arguments, and about which Mexico and the United States have directly divergent viewpoints.

3. First, we discuss the importance to this panel of the fact that the zeroing procedures has been the subject of repeated Appellate Body Reports and that all of the arguments raised by the United States in this dispute have been rejected in reasoned findings of the Appellate Body. We firmly believe that the Appellate Body's reasoning and findings regarding zeroing are sound. We invite this panel to consider how the Appellate Body's reasoning and findings apply to this dispute and rule in Mexico's favour in this dispute.

4. Second, we address the point in the US first written submission that "the exclusive textual basis" for the prohibition against zeroing is found in the first sentence of Article 2.4.2 which refers to "all comparable export transactions". As we will discuss, the prohibition is grounded in the meaning of the terms "dumping", "margins of dumping", and "product".

5. Third, we will discuss that, contrary to the views expressed by the United States, the Anti-dumping Agreement does not address the conduct of individual importers or individual import transactions, but instead consistently prescribes that dumping determinations and margins of dumping be made in respect of each exporter or producer examined.

6. Finally, we will discuss the findings that Mexico is requesting and the reason for Mexico's references to the existence of a single measure: the zeroing procedures.

I. SECURITY AND PREDICTABILITY IN WTO PRECENDENTS

7. This is not the first time that a WTO Member initiates a dispute settlement proceeding against the United States for the same reason.

8. As the DSU, article 3.2, specifically states, the dispute settlement system is a "central element" in providing security and predictability to the multilateral trading system. As stated by the Appellate Body in *US – OCTG Sunset Reviews*, the language of Article 3.2 therefore creates an expectation that panels will follow the reasoning adopted by prior Appellate Body rulings on the same issues.

9. The matter referred to this Panel is not an issue of first impression. Whether the *Anti-Dumping Agreement* permits investigating authorities to disregard or treat as zero intermediate price comparisons where the export price exceeds the normal value was first decided by the Appellate Body in 2001 in *EC – Bed Linen*. The Appellate Body in that case found that so-called "zeroing" is not consistent with definitions of "dumping", "margins of dumping", and "product" as set forth in the text of Article VI of the GATT of

1994 and in the *Anti-Dumping Agreement*. The zeroing procedures at issue in that first case were applied in the context of an original investigation and by reference to comparisons made between weighted-average export prices and normal values as defined in the first sentence of Article 2.4.2. However, the definitional principles embedded in the text of the Agreements as identified by the Appellate Body clearly transcend the boundaries of original investigations and the average-to-average comparison methodology.

10. This became clear in the next "zeroing" case to be considered by the Appellate Body, *US – Softwood Lumber V (21.5),* in which the Appellate Body extended its findings to the zeroing procedures applied in an original investigation determination using transaction-to-transaction comparisons. The Appellate Body reached its determination through the same interpretation of the text of the Agreements with respect to the definitions of "dumping", "margins of dumping", and product contained in Article VI of the GATT and Article 2.1 and 2.4.2 of the *Anti-Dumping Agreement* that was applied in the *EC – Bed Linen* decision.

11. These same definitional provisions of the Agreements and the same consistent interpretations, were applied again by the Appellate Body in *US – Zeroing (EC 1)* in which the Appellate Body found that the U.S. zeroing procedure in original investigations using the average-to-average comparison methodology is "as such" inconsistent with the United States' obligations under the Agreements, and that the zeroing procedures as applied in sixteen periodic review determinations, where comparisons were made between individual export prices and monthly average normal values, likewise conflicted

with the United States' obligations to calculate margins of dumping for the exporter at issue and with respect to the product under investigation.

12. Most recently, in *US – Zeroing (Japan)*, the Appellate Body has resolved the last remaining issue by recognizing that zeroing procedures in administrative reviews, sunset reviews and other proceedings are inconsistent "as such" with GATT Article VI and the relevant provisions of the *Anti-Dumping Agreement*. Again, at the core of the Appellate Body's reasoning was the same consistent interpretation of the textual definitions of "dumping", "margins of dumping" and "product" that were at issue in *EC-Bed Linen*.

13. This Panel should recognize two key points in considering the unbroken history of decisions by the Appellate Body in this area. First, despite the efforts of the United States to cloud the issue, the measure at issue in each of these cases is identical. As clearly identified by the Appellate Body in *US –Zeroing (Japan)* there is only one zeroing measure that is applied in different contexts. Like Canada, the EC, and Japan, Mexico is challenging this same measure.

14. Second, contrary to the United States' claims, the Appellate Body has neither changed its reasoning nor its interpretation of the text of the Agreements over the span of these decisions. While the particular facts have varied somewhat from case to case, the interpretation of the Agreements adopted by the Appellate Body in each of these decisions remains consistent. The decisions by the Appellate Body have always returned to the same fundamental principles found in the text of the Agreements – namely, that dumping and margins of dumping are concepts that can have meaning in the text of the

Agreements only with reference to the product under investigation or review taken as a whole, and that margins of dumping are specific to exporters, not importers (or individual transactions), as unsuccessfully insisted upon by the United States. We will, of course, discuss these principles in detail in the course of this meeting.

15. With this background clearly in mind, Mexico draws the Panel's attention to the text of Article 3.2 of the DSU and the charge it gives this Panel to provide "security and predictability" within the WTO system. With respect to the issue of zeroing procedures, the Appellate Body has repeatedly considered the same United States measure and has rejected the United States' attempts to sustain its measure by arguing that the text of the Agreements does not require consideration of all sales comparisons. Mexico asserts now that the text of the Agreements supports only one conclusion: that *all* sales comparisons must be considered in calculating margins of dumping.

II. CONCEPTS OF "DUMPING", "MARGINS OF DUMPING" AND "PRODUCT"

16. As previously noted, at the foundation of Mexico and the Appellate Body's position are certain core legal principles contained in the text of the relevant agreements. First, "dumping" and "margins of dumping" as defined in Articles VI:1 and VI:2 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement*, refer to the "product" under consideration. Second, "dumping" and "margins of dumping" are concepts that relate exclusively to the pricing behavior of exporters or producers of the exported product.

17. These definitions are of critical importance to this dispute. The Appellate Body has clearly set forth a coherent and textually supported definition of "dumping" and "margins of dumping" in several cases, as we have outlined above. The United States, by contrast,

advocates interpretations of these terms that are inconsistent with the text, context, basis and purpose of the Agreements and thereby are inconsistent with customary rules of interpretation of international law.

"Margins of Dumping" – Calculated for the Product Taken as a Whole and Not for Individual Transactions or Models

18. We briefly recall the reasoning of previous Appellate Body reports regarding this measure. First, Articles VI:1 and VI:2 of the GATT 1994 define "dumping" by reference to a "product." This definition is carried over into the *Anti-Dumping Agreement* by Article 2.1. and by virtue of the introductory clause of Article 2.1 – "[f]or purposes of this Agreement" – the definition set forth therein applies to the *entire* Agreement. Therefore, Article 2.1 constitutes the governing rule, and context, for interpreting the term "margin(s) of dumping" throughout the *Agreement.* Similarly, the term "dumping" has the same meaning in all provisions of the Agreement and for all types of anti-dumping proceedings. Accordingly, any "dumping" or "margin of dumping" in accordance to the Agreement must be calculated with reference to the product that is under investigation or review.

19. This begs the question of what the Agreements mean by "product." The Appellate Body answered this question in *EC – Bed Linen.* The Appellate Body noted that the "product" for which dumping and margins of dumping are calculated is and must be the product under investigation "taken as a whole." As the Appellate Body noted in that first case, "[h]aving defined the *product* as it did, the European Communities was bound to treat

that *product* consistently thereafter in accordance with that definition." 1/ In that case, the product at issue was defined by the EC investigating authorities as "cotton-type bed linen." As a result, the Appellate Body found, the EC investigating authorities were required to determine the existence of margins of dumping for "cotton-type bed linen" from India and not for various types or models of the product under investigation. "Whatever the method used to calculate the margins of dumping," the Appellate Body found, "these margins must be, and only can be, established for the *product* under investigation as a whole." 2/

20. The words "dumping" and "margins of dumping" necessarily refer to the same definition of "product" "because it is the product that is introduced into the commerce of another country at less than its normal value in that country." 3/ This concept of dumping of a particularly defined "product" under investigation or review is also a factor taken into account in determining whether dumping causes or threatens to cause material injury. This logic, rooted in the text and context of the Agreements and intimately related to the meaning of the term "product," has been consistently applied by the Appellate Body in every dispute involving zeroing procedures.

21. The United States takes strenuous objection to the Appellate Body's use of the term "product as a whole," asserting that the words "as a whole" are not to be found in the text of the Agreements. This is true, but is in Mexico's view an irrelevant observation. The

1/ EC – Bed Linen (AB), para. 53.

2/ *Id.*

3/ US – Zeroing (Japan)(AB), para. 109.

Appellate Body, just like this panel, was required to decide the meaning of the term "product" as utilized in the Agreements and identified the only meaning that can be reconciled with the text, context, object and purpose of the Agreement.

22. That having been said, Mexico recognizes that it may be permissible – even required in certain circumstances - to make intermediate price comparisons by model or transaction. The Appellate Body has on several occasions affirmed that this is permissible under the Agreements. However, as the Appellate Body has also repeatedly concluded, from *EC – Bed Linen* to *US – Zeroing (Japan)*, such intermediate comparisons are not themselves "margins of dumping" as defined in the Agreements.

23. The United States also maintains that its definition of the term "product" as synonymous with a single transaction reflects "the real-world commercial conduct by which a product is imported into a country…"4/ However, the interpretation offered by the United States erroneously assumes that dumping is conduct engaged in by individual *importers*. , As we shall discuss next, this point of view is squarely at odds with the text and purpose of the Agreements.

"Margins of Dumping" – Calculated only with respect to Individual Exporters or Foreign Producers

24. Contrary to the views expressed by the United States, the *Anti-Dumping Agreement* does not address the conduct of individual importers or individual import transactions, but instead consistently prescribes that dumping determinations be made in respect of each

4 United States' First Written Submission, para. 66.

exporter or foreign producer examined. As the Appellate Body most recently stated in *US – Zeroing (Japan)*:

> This is because dumping is the result of the pricing behaviour of individual exporters or foreign producers. Margins of dumping are established accordingly for each exporter or foreign producer on the basis of a comparison between normal value and export prices, both of which relate to the pricing behavior of that exporter or foreign producer. In order to assess properly the pricing behavior of an individual exporter or foreign producer, and to determine whether the exporter or foreign producer is in fact dumping the product under investigation and, if so, by which margin, it is obviously necessary to take into account he prices of all the export transactions of that exporter or foreign producer. 5/

25. While the exporter-focus of the Agreements is evidenced throughout the text of Article VI and the AD Agreement, the Appellate Body has noted that this fact is forcefully evidenced in the text of Article 6.10 of the *Anti-Dumping Agreement*, which provides that:

> [t]he authorities shall, as a rule, determine an individual margin of dumping for *each known exporter or producer* concerned of the product under investigation (emphasis added).

26. Mexico submits that this text are consistent with the object and purpose underlying the imposition of anti-dumping duties under the *Anti-Dumping Agreement*. Antidumping measures are designed to counteract the effects of pricing behavior by producers and exporters because it is the producer or exporter of the product that necessarily engages in pricing exports that result in sales at less than normal value. Because of this, it is essential to take into account the prices of *all* of the export transactions of a particular exporter or foreign producer in order to determine whether dumping occurred and if so, to what degree.6/

5/ US – Zeroing (Japan)(AB), para. 111.

6 Appellate Body Report, *US – Zeroing Japan*, para. 111.

27. The contrary argument presented by the United States on this point in its First Written Submission is misplaced. The United States asserts that the language of Article 9.3 provides support for its view that there is no general requirement in the *Anti-Dumping Agreement* to determine "dumping" and "margins of dumping" with respect to the product taken as a whole. 7/ To argue this point, the United States relies heavily on the Panel interpretation in *US – Zeroing (Japan)*, since rejected by the Appellate Body, which noted that a requirement to determine margins of dumping for the product taken as a whole is "inconsistent with the importer- and import-specific obligation to pay an antidumping duty."8/

28. However, there is a clear distinction between the assessment or collection of duties and the margin of dumping that establishes the ceiling on the amount of duties that can be assessed or collected. The Appellate Body in *EC – Bed Linen (Article 21.5)* also affirmed this point, noting:

> the rules on the *determination* of the margin of dumping are distinct and separate from the rules on *imposition and collection* of anti-dumping duties. 9/

The United States' arguments based on the manner in which assessments are implemented are simply inapplicable to whether zeroing is permissible in determining "margins of dumping."

7 United States' First Written Submission, para. 86.

8 United States' First Written Submission, para. 86.

9 Appellate Body Report, *EC – Bed Linen (Article 21.5)*, para. 124.

III. THE INTERPRETATION OF THE "ALL COMPARABLE EXPORT TRANSACTIONS" PHRASE IN ARTICLE 2.4.2

29. Mexico has already noted that the definitions of "dumping","margins of dumping" and "product" apply throughout the *Anti-Dumping Agreement* and in all types of anti-dumping proceedings. The textual basis for these ruling concepts exists, among other provisions, in the text of Article 2.1 and Article VI of the GATT 1994.

30. The United States ignores this fundamental point by again asserting in its First Written Submission that it is the phrase "all comparable export transactions" that appears in Article 2.4.2 of the *Anti-Dumping Agreement* that dictates the requirement to calculate margins of dumping with reference to the "product" taken as a whole. The United States contends that because the "all comparable export transactions" language refers only to average-to-average comparisons, zeroing is prohibited only in the context of such comparisons.

31. Mexico does not believe that this position is supported by the Appellate Body's decisions. In the very first case to consider zeroing, *EC – Bed Linen*, where the parties made explicit reference to Article 2.4.2 in their arguments, it is clear that the principles that led the Appellate Body to determine that investigating authorities may not disregard or alter the results of intermediate price comparisons were found in the definitions of "dumping" and "margins of dumping" contained in Articles VI:1 and VI:2 of the GATT 1994 and in Article 2.1 of the *Anti-Dumping Agreement*. While the "all comparable transactions" language was discussed in the context of Article 2.4.2 and the arguments presented in relation thereto, this was not the decisive factor in the Appellate Body's decision.

32. Mexico also disagrees with the United States' argument in its First Written Submission that the Appellate Body rested its decision in *US – Softwood Lumber V* on the "all comparable transactions" phrase in Article 2.4.2. 10/ Consistent with its prior decision in *EC – Bed Linen*, the Appellate Body in *US – Softwood Lumber V* fundamentally based its findings on the definitions of "dumping" and "margin(s) of dumping" that apply throughout the *Anti-Dumping Agreement*. Rejecting the argument of the United States, the Appellate Body found that "dumping" and "margins of dumping" can be found only for the product under investigation taken as a whole, and cannot be found at the level of a product type, model or category. 11/

33. The United States also argues that the Appellate Body's decision would render the phrase "all comparable export transactions" devoid of meaning if zeroing were also prohibited under the other comparison methodologies set forth in Article 2.4.2. However, as the Appellate Body found, the reason the "all comparable export transactions" phrase appears only with regard to the average-to-average comparison methodology is that it is only relevant to that methodology. Because transactions may be divided into groups under the average-to-average comparison methodology, the phrase "all comparable export transactions" requires that each group include only transactions that are comparable and that no export transaction may be left out when determining margins of dumping under that methodology. Furthermore, the average-to-average comparison methodology involves the calculation of a weighted average export price. By contrast, under the transaction-to-transaction comparison methodology, all export transactions are taken into

10/ *See, e.g.*, United States' First Written Submission, para. 49.

11 Appellate Body Report, *US – Softwood Lumber V*, para. 93.

account on an individual basis and matched with the most appropriate transactions in the domestic market. Therefore, as the Appellate Body found, the phrase "all comparable export transactions" is simply "not pertinent" to the transaction-to-transaction comparison methodology.

34. In short, the United States is incorrect to assert that the duty to calculate a "margin of dumping" for the "product" taken as a whole is rooted in the "all *comparable* export transactions" phrase in Article 2.4.2. This conclusion is erroneous because it misreads the text of Article 2.4.2 and because it allows a result fundamentally inconsistent with the definitions of "dumping" and "margins of dumping" as applying solely to the product taken as a whole.

IV. THE FINDINGS REQUESTED BY MEXICO

35. In this proceeding, Mexico has challenged the Zeroing Procedures as manifested in original investigations and periodic reviews. This challenge includes both "as such" and "as applied" claims. Mexico's request for findings presented in paragraph 264 of its first written submission is consistent with the terms of reference established by its request for the establishment of a panel.

36. The United States has expressed concerns regarding Mexico's reference to zeroing procedures as comprising a single measure. It is beyond dispute that there is a single zeroing measure as found by the Appellate Body in *US – Zeroing (Japan)*. It is also beyond dispute that there has been a series of Appellate Body reports which cumulatively prohibit zeroing in all of its manifestations. Mexico's concern is that, notwithstanding these Appellate Body rulings, the United States continues to refuse to eliminate this

WTO-inconsistent practice in all of its manifestations. Therefore, it has phrased its challenge in the broadest possible terms given the scope of its request for establishment of a panel.

V. CONCLUSION

37. Mr. Chairman, Mexico again thanks the Panel for the opportunity to appear today and to present Mexico's views on this dispute. The issue of zeroing is important to Mexico because of its practical impact on the determination of margins of dumping by the U.S. authorities on exported products from Mexico, but also because of the concerns that this dispute has raised in regard to the United States' continued failure to comply with the findings of the DSB in related cases.

38. Mexico again reminds the Panel that the measure at issue challenged as such by Mexico is identical to the measure decided by the Appellate Body in cases brought by Canada, the EC and Japan. The Appellate Body has consistently determined that this measure is contrary to the United States' obligations under the Agreements. In reaching those determinations the Appellate Body has interpreted the text of the Agreements in accordance with recognized principles of international law applicable to dispute settlement proceedings and has applied its reasoning in a coherent and consistent manner.

39. Mr. Chairman, and members of the Panel, these prior decisions must be taken into account. Their reasoning has withstood the arguments posed against them by the United States in several previous cases. Third party submissions in this case overwhelmingly support our case. For the sake of the security and predictability of the WTO system, and

to ensure that the Agreements negotiated by the Members are enforced in accordance with their text, we urge you to sustain Mexico's claims in their entirety.

40. This concludes our opening statement. We would be pleased to respond to any questions you may have.