

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

Recourse to Article 21.5 of the DSU by Mexico

*Request for the Establishment of a Panel*

The following communication, dated 7 September 2010, from the delegation of Mexico to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 21.5 of the DSU.

The Government of Mexico hereby requests the establishment of a panel pursuant to Articles 6 and 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article XXIII of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), Article 17 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Anti-Dumping Agreement") and paragraph 2 of the *Agreement between Mexico and the United States Regarding Procedures under Articles 21 and 22 of the Dispute Settlement Understanding* ("Sequencing Agreement")<sup>1</sup>, with respect to the issues identified below.

**I. BACKGROUND TO THE REQUEST**

1. On 20 May 2008, the Dispute Settlement Body ("DSB") adopted the Appellate Body Report and the Panel Report, as modified by the Appellate Body Report, in *United States - Final Anti-Dumping Measures on Stainless Steel from Mexico* (WT/DS344) (*US - Zeroing (Mexico)*).<sup>2</sup> The DSB ruled that:

- (i) Model zeroing in original investigations is, "as such," inconsistent with Article 2.4.2 of the Anti-Dumping Agreement<sup>3</sup>;
- (ii) the United States Department of Commerce ("USDOC") acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement in the investigation on *Stainless Steel Sheet and Strip in Coils from Mexico* by using model zeroing<sup>4</sup>;
- (iii) simple zeroing in periodic reviews is, "as such," inconsistent with Article VI:2 of the GATT 1994 and Article 9.3 of the Anti-Dumping Agreement<sup>5</sup>; and

<sup>1</sup> WT/DS344/17.

<sup>2</sup> Minutes of DSB Meeting, WT/DSB/M/250, para. 74 (20 May 2008). See Appellate Body Report, *US - Zeroing (Mexico)*, WT/DS344/AB/R (30 April 2008); Panel Report, *US - Zeroing (Mexico)*, WT/DS344/R (20 December 2007).

<sup>3</sup> Panel Report, *US - Zeroing (Mexico)*, para. 8.1(a).

<sup>4</sup> Ibid., para. 8.1(b).

<sup>5</sup> Appellate Body Report, *US - Zeroing (Mexico)*, para. 165(a).

- (iv) the United States acted inconsistently with Article VI:2 of the GATT 1994 and Article 9.3 of the Anti-Dumping Agreement by applying simple zeroing in the five periodic reviews at issue in this dispute (and identified as case numbers 1 to 5 in the Annex to this Request).<sup>6</sup>

2. On 2 June 2008, the United States informed the DSB that it intended to comply with its WTO obligations in this dispute, but that it would require a reasonable period of time to do so.<sup>7</sup> The United States requested 15 months, ending on 20 August 2009, to take legislative action and/or administrative action pursuant to Section 123 of the Uruguay Round Agreements Act to implement the recommendations and rulings of the DSB with respect to simple zeroing used in periodic reviews.<sup>8</sup> Mexico and the United States, however, were unable to agree on a reasonable period of time for implementation.<sup>9</sup>

3. On 11 August 2008, Mexico requested that the reasonable period of time be determined through binding arbitration pursuant to Article 21.3(c) of the DSU.<sup>10</sup> On 20 October 2008, the Arbitrator determined that the reasonable period of time ("RPT") for the United States to implement the recommendations and rulings of the DSB was 11 months plus ten days from the date of adoption of the Panel and Appellate Body Reports. The RPT ended on 30 April 2009.<sup>11</sup>

4. On 18 May 2009, Mexico and the United States concluded the Sequencing Agreement with a view to facilitating the procedures for a resolution of this dispute under Articles 21 and 22 of the DSU.

5. On 19 July 2009, Mexico initiated the procedures under Article 21.5 of the DSU by requesting that the United States enter into consultations. The request was circulated in document WT/DS344/13 of 24 August 2009. Consultations were held on 2 September 2009.

6. Consultations have allowed a better understanding of respective positions, but have failed to settle the dispute. Accordingly, "there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB within the meaning of Article 21.5 of the DSU.

## **II. IMPLEMENTATION ACTION AND INACTION DECLARED BY THE UNITED STATES**

7. On 27 December 2006, the USDOC published a notice stating its intention to abandon the use of zeroing in average-to-average comparisons in anti-dumping original investigations, pursuant to the recommendations and rulings of the DSB.<sup>12</sup> The final modification became effective for investigations initiated on or after 22 February 2007.<sup>13</sup>

8. At the DSB meeting on 20 May 2009, the United States informed the DSB that it had issued a new final determination on 31 March 2009, recalculating the margin of dumping in the original

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<sup>6</sup> Ibid., para. 165(b).

<sup>7</sup> Minutes of DSB Meeting, WT/DSB/M/251, para. 9 (2 June 2008).

<sup>8</sup> *US - Zeroing (Mexico), Award of the Arbitrator*, Arbitration under Article 21.3(c) of the DSU, WT/DS344/15, paras. 6-21 (31 October 2008).

<sup>9</sup> Ibid., para. 2.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid., para. 65.

<sup>12</sup> *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin during an Antidumping Investigation*, 71 FR 77722 (Department of Commerce) (27 December 2006) (final modification).

<sup>13</sup> *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin in Antidumping Investigations*, 72 FR 3783 (Department of Commerce) (26 January 2007) (change in effective date of final modification).

investigation on *Stainless Steel Sheet and Strip in Coils from Mexico* without model zeroing.<sup>14</sup> The USDOC published a notice confirming implementation of this determination, effective 23 April 2009.<sup>15</sup> The determination, and instructions to US Customs and Border Protection issued pursuant thereto, revised the "all others" anti-dumping duty cash deposit rate prospectively for subject entries made from 23 April 2009 forward, but did not affect the anti-dumping duty cash deposit rate for the sole respondent, ThyssenKrupp Mexinox S.A. de C.V.<sup>16</sup>

9. With respect to the five administrative reviews that were challenged "as applied," the United States has taken no action and informed the DSB that "any prospective effect of those reviews had been eliminated and all entries of merchandise under the five reviews had been liquidated for customs purposes."<sup>17</sup> With respect to other findings and recommendations in the dispute, the United States informed the DSB that it had "also been conferring with Mexico about the steps that the United States has taken to comply with the recommendations and rulings of the DSB."<sup>18</sup> However, no other action has been taken by the United States to implement the recommendations and rulings in this dispute and the United States has continued to use simple zeroing in a series of closely connected measures as further described herein.

### III. MEASURES AT ISSUE AND CLAIMS MADE IN THESE PROCEEDINGS

10. Mexico considers that the United States has failed to implement the recommendations and rulings of the DSB in this dispute and is therefore in breach of its WTO obligations. The claims in respect of which Mexico is seeking establishment of a panel are as follows:

- (i) As described in paragraph 1(iii) of this Request, the DSB made recommendations and rulings that the use of simple zeroing in periodic reviews is "as such" inconsistent with Article VI:2 of the GATT 1994 and Article 9.3 of the Anti-Dumping Agreement. The United States has taken no steps to eliminate simple zeroing in periodic reviews and has therefore failed to implement the DSB's recommendations and rulings in this regard by the end of the RPT or thereafter. By continuing to maintain and use simple zeroing in periodic reviews as a measure of general and prospective application and failing otherwise to implement the DSB's recommendations and rulings with respect to this measure, the United States has acted and continues to act inconsistently with Articles 17.14, 21.1 and 21.3 of the DSU, Articles 2.1, 2.4 and 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.
- (ii) As described in paragraph 1(iv) of this Request, the DSB made recommendations and rulings that the United States acted inconsistently with Article VI:2 of the GATT 1994 and Article 9.3 of the Anti-Dumping Agreement by applying simple zeroing in the five periodic reviews originally at issue in this dispute (and identified in the Annex to this Request as case numbers 1 to 5). The margins of dumping calculated using zeroing in these five periodic reviews continue to have legal effects after the end of the RPT and have been relied upon by the USDOC in several subsequent closely connected measures, including in the 2005 and 2010 "sunset"

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<sup>14</sup> *Issues and Decision Memorandum for the Final Results of Proceeding Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Stainless Steel from Mexico*, A-201-822 (31 March 2009).

<sup>15</sup> *Implementation of the Findings of the WTO Dispute Settlement Panel and Appellate Body in United States - Final Anti-Dumping Measures on Stainless Steel from Mexico*, 74 FR 19527 (Department of Commerce) (29 April 2009) (notice of determination under Section 129 of the Uruguay Round Agreements Act).

<sup>16</sup> See US Customs and Border Protection Message No. 9126204 (6 May 2009).

<sup>17</sup> Minutes of DSB Meeting, WT/DSB/M/268, para. 74 (20 May 2009).

<sup>18</sup> *Ibid.*

reviews<sup>19</sup> and in revocation decisions made in the context of subsequent anti-dumping administrative reviews, including the 7<sup>th</sup> and 9<sup>th</sup> administrative reviews.<sup>20</sup> The United States has failed to adopt any measures by the end of the RPT or thereafter to implement the DSB's recommendations and rulings regarding the use of simple zeroing in case numbers 1 to 5. By continuing to maintain and use the simple zeroing measure in these five periodic reviews and failing to implement the DSB's recommendations and rulings, the United States acts inconsistently with Articles 17.14, 21.1 and 21.3 of the DSU, Articles 2.1, 2.4 and 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

- (iii) This Request also concerns the use of zeroing in a series of closely connected measures. These closely connected measures include:
- (a) The six subsequent periodic reviews of the same anti-dumping duty order on stainless steel sheet and strip in coils from Mexico (identified in the Annex to this Request as case numbers 6 to 11), and any subsequent amendments to the same<sup>21</sup>, in which margins of dumping for cash deposit purposes and assessment amounts are calculated using simple zeroing;
  - (b) the 2005 and 2010 five-year "sunset" reviews of the anti-dumping order on stainless steel sheet and strip in coils from Mexico conducted by the USDOC pursuant to section 751(c) of the Tariff Act of 1930, as amended (identified in the Annex to this Request as case numbers 12 and 13), and any subsequent amendments to the same, in which the USDOC relied upon margins of dumping calculated using simple zeroing;
  - (c) all other subsequent closely connected measures taken by the United States in relation to the anti-dumping order on stainless steel sheet and strip in coils from Mexico in which the USDOC calculated, or relied upon, margins of dumping calculated using simple zeroing or model zeroing, including the negative "absence of dumping" revocation determinations pursuant to 19 C.F.R. § 351.222(b)(2) made in the 7<sup>th</sup> and 9<sup>th</sup> administrative reviews (identified in the Annex to this Request as case numbers 7 and 9), and any subsequent amendments to the same; and
  - (d) any other determinations and measures that derive mechanically from the measures described in paragraphs 10(iii)(a) to (c) that bear a close nexus to the referenced five originally challenged periodic reviews including any

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<sup>19</sup> Final Results of Full Sunset Review - *Stainless Steel Sheet and Strip in Coils from Mexico*, 70 FR 6620 (Department of Commerce) (8 February 2005); Initiation of Sunset Review - *Stainless Steel Sheet and Strip in Coils from Mexico*, 75 FR 30437 (USITC) (1 June 2010); Letter from James Maeder, Director, Office 2 AD/CVD Operations to Catherine D. Felippo, Director, Office of Investigations (22 July 2010).

<sup>20</sup> *Stainless Steel Sheet and Strip in Coils from Mexico; Final Results of Antidumping Duty Administrative Review*, 73 FR 7710 (Department of Commerce) (11 February 2008), subsequently amended as *Stainless Steel Sheet and Strip in Coils from Mexico: Amended Final Results of Antidumping Duty Administrative Review*, 73 FR 14215 (17 March 2008).

<sup>21</sup> Cases 6, 7, 8, and 9 are each subject to pending review before binational panels established under Chapter 19 of the North American Free Trade Agreement (NAFTA). The review of the original USDOC determination in Case 6 (i.e. the administrative review covering the 2004-2005 annual administrative review period) resulted in a decision from the NAFTA panel finding that the use of zeroing in the calculation of margins of dumping in administrative reviews violates US law. See In the Matter of Stainless Steel Sheet and Strip in Coils from Mexico, USA-MEX-2007-1904-01 (14 April 2010). That matter has been "remanded" to the USDOC with instructions to recalculate the margin of dumping for the 2004-2005 administrative review period without zeroing. However, the USDOC has persisted in using zeroing in the margin calculation.

instructions and notices issued pursuant thereto, and any subsequent amendments to the same.

By failing to take action to bring these measures into compliance as of the end of the RPT established in this proceeding and by continuing to use simple zeroing in subsequent closely connected measures, the United States has imposed, assessed and/or collected anti-dumping duties in excess of the proper margin of dumping. The United States thereby improperly imposes duties on the importation of Mexican goods in excess of the duties permitted under the United States' Schedule of Concessions and otherwise nullifies or impairs benefits accruing to Mexico under the covered agreements. The United States' failure to take measures to eliminate simple zeroing from these measures and, thereby, to bring itself into conformity with its WTO obligations by the end of the RPT, is inconsistent with Articles 17.14, 21.1 and 21.3 of the DSU. As a result of these actions and omissions, the United States continues to act inconsistently with Articles 2.1, 2.4, 9.3, 11.2 and 11.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994, as set forth in the DSB's recommendations and rulings.

- (iv) Further, the United States' measures taken to comply as described herein, if and to the extent they exist, are inconsistent with Articles 2.1, 2.4, 9.3, 11.2 and 11.3 of the Anti-Dumping Agreement and Articles II:1(a), II:1(b), VI:1 and VI:2 of the GATT 1994 for the reasons given in the preceding paragraphs.

#### **IV. CONCLUSION**

11. Mexico requests that a panel be established under Article 21.5 of the DSU with standard terms of reference, as set forth in Article 7.1 of the DSU, and asks that this request be placed on the agenda of the DSB meeting scheduled for 21 September 2010.

12. Pursuant to paragraph 2 of the Sequencing Agreement, Mexico notes that the United States is required to accept the establishment of the panel at the first DSB meeting at which Mexico's request for the establishment of an Article 21.5 panel appears on the agenda.

## ANNEX

**STAINLESS STEEL SHEET AND STRIP IN COILS FROM MEXICO  
(USDOC CASE NO. A-201-822)**

CASE	PERIOD OF REVIEW	PUBLICATION
1	4 January 1999 - 30 June 2000	<i>Stainless Steel Sheet and Strip in Coils from Mexico</i> , 67 FR 6490 (USDOC) (12 February 2002), subsequently amended as <i>Stainless Steel Sheet and Strip in Coils from Mexico</i> , 67 FR 15542 (USDOC) (2 April 2002).
2	1 July 2000 - 30 June 2001	<i>Stainless Steel Sheet and Strip in Coils from Mexico</i> , 68 FR 6889 (USDOC) (11 February 2003), subsequently amended as <i>Stainless Steel Sheet and Strip in Coils from Mexico</i> , 68 FR 13686 (USDOC) (20 March 2003).
3	1 July 2001 - 30 June 2002	<i>Stainless Steel Sheet and Strip in Coils from Mexico</i> , 69 FR 6259 (USDOC) (10 February 2004).
4	1 July 2002 - 30 June 2003	<i>Stainless Steel Sheet and Strip in Coils from Mexico</i> , 70 FR 3677 (USDOC) (26 January 2005).
5	1 July 2003 - 30 June 2004	<i>Stainless Steel Sheet and Strip in Coils from Mexico</i> , 70 FR 73444 (USDOC) (12 December 2005).
6	1 July 2004 - 30 June 2005	<i>Stainless Steel Sheet and Strip in Coils from Mexico</i> , 71 FR 76978 (USDOC) (22 December 2006).
7	1 July 2005 - 30 June 2006	<i>Stainless Steel Sheet and Strip in Coils from Mexico</i> , 73 FR 7710 (USDOC) (11 February 2008), subsequently amended as <i>Stainless Steel Sheet and Strip in Coils from Mexico</i> , 73 FR 14215 (17 March 2008).
8	1 July 2006 - 30 June 2007	<i>Stainless Steel Sheet and Strip in Coils from Mexico</i> , 74 FR 6365 (USDOC) (9 February 2009).
9	1 July 2007 - 30 June 2008	<i>Stainless Steel Sheet and Strip in Coils from Mexico</i> , 75 FR 6627 (USDOC) (10 February 2010), subsequently amended as <i>Stainless Steel Sheet and Strip in Coils from Mexico</i> , 75 FR 17122 (USDOC) (5 April 2010).
10	1 July 2008 - 30 June 2009	Preliminary Results - <i>Stainless Steel Sheet and Strip in Coils from Mexico</i> , 75 FR 47780 (USDOC) (9 August 2010).
11	1 July 2009 - 30 June 2010	Initiation - <i>Stainless Steel Sheet and Strip in Coils from Mexico</i> , 75 FR 53274 (USDOC) (31 August 2010).
12	1 <sup>st</sup> (2005) Sunset Review	Final Results of Full Sunset Review - <i>Stainless Steel Sheet and Strip in Coils from Mexico</i> , 70 FR 6620 (USDOC) (8 February 2005).
13	2 <sup>nd</sup> (2010) Sunset Review	Initiation of Sunset Review - <i>Stainless Steel Sheet and Strip in Coils from Mexico</i> , 75 FR 30437 (USITC) (1 June 2010); Letter from James Maeder, Director, Office 2 AD/CVD Operations to Catherine D. Felippo, Director, Office of Investigations (22 July 2010).