UNITED STATES – FINAL ANTIDUMPING MEASURES ON STAINLESS STEEL FROM MEXICO

(WT/DS344)

Arbitration on the "Reasonable Period of Time"

Statement of the United States at the Oral Hearing

October 6, 2008

1. Good morning, Mr. Feliciano, members of the Secretariat, and members of the Mexican delegation. First, Mr. Feliciano, the United States would like to thank you for agreeing to serve as the arbitrator in this proceeding. We appreciate the opportunity to appear before you today to further explain why fifteen months is, in the circumstances of this case, a reasonable period of time to implement the recommendations and rulings of the Dispute Settlement Body ("DSB").

The United States Justified its Reasonable Period of Fifteen Months

2. We have outlined in our submission why a fifteen-month reasonable period of time ("RPT") is justified to implement the "as such" recommendations and rulings on so-called "simple zeroing" in periodic reviews. We won't repeat those arguments in detail here, other than to say that the proposed RPT represents our best judgment as to how long the legislative or Section 123 process will take. Our judgment of fifteen months is based on past experience and takes into account the additional complications posed by the intervening U.S. elections and changes in Congress and the Administration.

3. Mexico states that the United States bears the burden of demonstrating that 15 months is

the "shortest period of time possible within [its] legal system."[1] We agree that the implementing Member bears this initial burden and we believe we have met it. We also agree with the arbitrators cited in Mexico's submission that, "failing that," arbitrators are to determine the RPT "on the basis of the evidence presented by all parties."[2] In this regard, Mexico has failed to provide evidence sufficient to show that seven months is a reasonable period of time.

Mexico's Recommendation of Seven Months Is Unsupported and Unreasonable

4. Mr. Feliciano, Mexico's recommendation of seven months is unsupported and unreasonable. To demonstrate this, our statement today will follow the order of Mexico's written submission.

Zeroing as "context"

5. Under the guise of providing "context" for this arbitration, Mexico makes a series of incorrect statements and factual errors regarding prior zeroing disputes. We'd be happy to discuss this more during questions and answers. For now, since Mexico omits it from its discussion of the "particular circumstances of this case," we will only focus on one dispute – the dispute that is the subject of this arbitration.

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[1] Submission of Mexico, para. 10 & fn. 13 (quoting *Brazil – Measures Affecting Imports of Retreaded Tyres*, Award of the Arbitrator, WT/DS332/16, 29 August 2008 ("*Brazil – Tyres (Article 21.3(c))*"), para. 51).

[2] *Brazil – Tyres (Article 21.3(c)*, para. 51; *United States – Continued Dumping and Subsidy Offset Act of 2000*, Award of the Arbitrator, WT/DS217/14, WT/DS234/22, 13 June 2003 ("*U.S. – CDSOA (Article 21.3(c))*"), para. 44.

6. On December 20, 2007 (four days before the end of the RPT in *US – Zeroing (Japan)* that Mexico finds relevant) the Panel report in this dispute was circulated to Members. In that report the Panel, like multiple panels before it, found that "simple zeroing in periodic reviews is 'as such' *not inconsistent*" with the WTO Agreements.[3] It was not until April 30, 2008, that the Appellate Body issued its findings against simple zeroing in periodic reviews in this dispute, and it was only on May 20, 2008 that the DSB adopted those findings.[4] Thus, the United States has not "already had more than 15 months to engage in the necessary 'preparatory process'" as Mexico alleges.[5] Instead, as Mexico recognizes elsewhere in its submission[6], the obligation to comply with the DSB's recommendations and rulings begins at the date those recommendations and rulings are adopted. That is the only relevant "context within which to evaluate the appropriate RPT in this instance."[7]

Both legislative and administrative implementation are allowable options

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[3] *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, Report of the Panel, WT/DS344/R, 20 December 2007, ("*US – Zeroing (Mexico) (Panel)*"), para. 8.1(c) (emphasis in original). *See also United States – Measures Relating to Zeroing and Sunset Reviews*, Report of the Panel, WT/DS294/R, 31 October 2005, para. 8.1(g); *United States – Measures Relating to Zeroing and Sunset Reviews*, Report of the Panel, WT/DS322/R, 20 December 2006, para.7.259(b).

[4] *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, Report of the Appellate Body, WT/DS344/AB/R, 30 April 2008.

[5] Submission of Mexico, para. 51.

[6] Submission of Mexico, para. 38.

[7] Submission of Mexico, para. 13.

7. Mexico argues that legislation is a "demonstrably unnecessary and slower alternative" than administrative implementation, and therefore the reasonable period of time should not include this option.[8] While we welcome Mexico's understanding that "U.S. Federal legislative action is a slow and complex process,"[9] and note that Mexico does not contest that legislation will take at least 15 months in this dispute,[10] Mexico's arguments are otherwise legally and factually incorrect.

8. The United States is in the stage of implementation involving "consultations and technical assessments."[11] As Mexico acknowledges,[12] we have been consulting internally to determine the best means of implementation. We have narrowed our options to two, and consultations to determine which of these two options will be most effective are ongoing.

9. Mexico asks the arbitrator to curtail this preparatory process and to decide for the United States which implementation option it should choose. In so doing, it asserts that "administrative action . . . *must* be the basis for any award in this arbitration."[13] This is inconsistent with the repeated findings by arbitrators that it is for the implementing Member to decide the nature of the

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[8] Submission of Mexico, para. 27.

[9] Submission of Mexico, para. 20.

[10] *See*, Submission of Mexico, paras. 23-27.

[11] *Chile – Taxes on Alcoholic Beverages*, Award of the Arbitrator, WT/DS85/15, WT/DS110/14, 23 May 2000, ("*Chile – Alcohol (Article 21.3(c))*"), para. 43.

[12] Submission of Mexico, para. 37.

[13] Submission of Mexico, para. 18 (emphasis added).

implementing measures it must take.[14] As a previous arbitrator observed, within its own legal system, "a Member's prerogative to select the means of implementation is particularly strong, and it is appropriate in that situation for an arbitrator to refrain from questioning whether another, perhaps shorter, means of implementation is available within that legal system."[15]

10. Mexico's request that the arbitrator decide which form of implementation the U.S. may pursue creates a situation similar to that faced by the arbitrator in *Canada – Pharmaceuticals*. In that dispute the respondent also asked the arbitrator to "define the nature of the measure necessary to implement the recommendations and rulings of the DSB," and to decide whether legislative or regulatory implementation should be pursued.[16] The arbitrator declined, saying, "the 'reasonable period of time' for implementation that must be determined in this Article 21.3 proceeding is the 'reasonable period of time' for implementing what has been *proposed by Canada*" – the implementing Member – "and nothing else."[17]

11. This present case is admittedly complicated by the fact that the United States is still considering two specific courses of implementation, and that one is legislative while the other is administrative. Nevertheless, because the United States is consulting to determine which course

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[14] *See, e.g., United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, Award of the Arbitrator, WT/DS184/13, 19 February 2002, para. 30; *U.S. – CDSOA (Article 21.3(c))*, para. 52.

[15] *European Communities – Customs Classification of Frozen Boneless Chicken Cuts, Award of the Arbitrator*, WT/DS269/13, WT/DS286/15, 20 February 2006, ("*EC – Chicken Cuts (Article 21.3(c))*"), para. 51.

[16] *Canada – Patent Protection of Pharmaceutical Products*, Award of the Arbitrator, WT/DS114/13, 18 August 2000, ("*Canada – Pharmaceuticals (Article 21.3(c))*"), para. 27.

[17] *Canada – Pharmaceuticals (Article 21.3(c))*, para. 43 (emphasis in original).

of implementation will be appropriate, the arbitrator need not decide which means of implementation the U.S. must pursue. Indeed, to determine otherwise would be to do what arbitrators such as the *Pharmaceuticals* arbitrator decided they could not do: to take away the prerogative from the implementing Member to decide on the best means of implementation.

12. The difficulty in concluding otherwise is highlighted by Mexico's inability to put forth a standard that would guide that decision. First, Mexico seeks to advance, without providing any support from the text of the DSU or prior arbitrations, a "necessity" standard and then attempts to show that legislative implementation is unnecessary.[18] However, arbitrators have consistently emphasized that a reasonable period of time is not just the shortest possible time to implement, but is the shortest possible time to implement effectively.[19] In *Chile – Alcohol*, for example, the arbitrator stated that "the shortest period of time *theoretically* possible" for implementation "is not the *sole* criterion that I should take into account in determining the reasonable period."[20] Instead, he stated, the arbitrator should "take account of the fact that *full* and *effective* implementation is 'preferred.'"[21] This is consistent with the goal, set out in Article 21.1 of the DSU, for the "effective resolution of disputes."

13. The United States has not determined that legislation will definitively be required. The

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[18] Submission of Mexico, paras. 23-27.

[19] *See*, *Chile – Alcohol (Article 21.3(c))*, paras. 38-39, 42; *European Communities – Export Subsidies on Sugar*, Award of the Arbitrator, WT/DS265/33, WT/DS266/33, WT/DS283/14, 28 October 2005, para. 71.

[20] *Chile – Alcohol (Article 21.3(c))*, para. 39 (emphasis in original).

[21] *Chile – Alcohol (Article 21.3(c))*, para. 40 (emphasis added).

United States is considering whether the Section 123 process can be an effective means to achieve implementation or whether, instead, legislation will be required. This is a decision that must be made by the United States through continued consultations, and not by Mexico or an Article 21.3 arbitrator.

14. Later Mexico seeks to advance another standard and asserts that there is a "presumption in favor of administrative action."[22] Once again, Mexico does not provide a citation or other support for this "presumption," an omission that is particularly striking in light of the well-established principle, just discussed, that it is for the implementing Member to decide on the best course of implementation. Earlier in its submission, Mexico did quote from an arbitration that states, "absent evidence to the contrary," administrative action is likely to be faster than legislative action.[23] But even if this is true as a general matter, Article 21.3 of the DSU makes clear that the RPT is to be determined in light of "the particular circumstances."[24] This is recognized by the arbitrator cited by Mexico when he acknowledged that there may be "evidence to the contrary."

15. Similarly, the arbitrator in *Argentina – Hides* recognized that "while formal adoption of an amendatory [regulation] may, as a theoretical matter, require less time than the enactment of a new statute, debate within the [implementing Member's] government about the most suitable policies to be embodied in the amendatory [regulation] may well involve some additional

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[22] Submission of Mexico, para. 28.

[23] Submission of Mexico, para. 19 (*citing United States – Section 110(5) of the U.S. Copyright Act*, Award of the Arbitrator, WT/DS160/12, 19 February 2002, para. 34).

[24] *See also*, *EC – Chicken Cuts (Article 21.3(c))*, para. 49.

expenditure of time and administrative resources."[25] That well describes the situation faced by the United States. In the particular circumstances of this case – notably the intervention of federal elections and changes in Congress and the Administration, and the complexity of the required implementing measures – the time required of each path is the same and the United States has provided evidence demonstrating that this is so.

16. In this case, therefore, the arbitrator need not – and indeed should not – base its award on a preference between the two options that are being considered by the United States.

"Informal administrative implementation" is inadequate

17. Mexico asserts that employing some sort of "informal policy change" would be sufficient for U.S. implementation in this dispute.[26] This is incorrect. As the United States explained in its written submission, Section 123 provides requirements for the United States to meet in changing an agency antidumping regulation or practice in response to an adverse WTO report.[27] Indeed, Commerce has stated that "Section 123 of the Uruguay Round Agreements Act (URAA) governs changes in the Department of Commerce's (Department's) practice when a dispute settlement panel or the Appellate Body of the World Trade Organization finds such practice to be

[25] *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, Award of the Arbitrator, WT/DS155/10, 31 August 2001, para. 48.

[26] Submission of Mexico, paras. 29-33.

[27] Submission of the United States, paras. 35-39.

inconsistent with any of the Uruguay Round agreements."[28] And the United States has always so used Section 123. As an example, the United States used Section 123 after *U.S. – Zeroing (EC)* to modify Commerce's methodology in antidumping investigations with respect to the calculation of the weighted-average dumping margin.[29] Prior arbitrators have recognized that "standard practices . . . substantiated with relevant evidence" are what matters for determining the RPT.[30]

18. Mexico also argues that since the Statement of Administrative Action ("SAA") states that Section 123 applies to "a written policy guidance of general application," it must mean that Section 123 applies only where the practice is "written." For Mexico, therefore, Section 123 would not apply to a change to zeroing since it is an "unwritten" rule or policy.[31]

19. As an initial matter, neither Section 123 nor the SAA use the word "only" or otherwise limit the "practice" covered by Section 123 to a "written" practice. Furthermore, Mexico's characterization of zeroing as an unwritten rule of policy rather than as "practice" for purposes of this arbitration is contrary to what Mexico argued when before the Panel.[32] More importantly, the Panel agreed with Mexico that zeroing constitutes a deliberate policy of general and

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[28] *See*, Notice of Final Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act, 68 Fed. Reg. 37,125 (June 23, 2003) (Exhibit MX-25).

[29] *See*, Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Administrative Investigation: Final Modification, 71 Fed. Reg. 77,722 (Dec. 27, 2006) (Exhibit MX-11).

[30] *EC – Chicken Cuts (Article 21.3(c))*, para. 79.

[31] Submission of Mexico, paras. 29, 31-32.

[32] *See*, *US – Zeroing (Mexico) (Panel)*"), para. 7.89-7.94.

prospective application, the content of which is written in certain sections in the Anti-Dumping Manual and manifested in the computer programming code used to calculate dumping margins.[33]

20. Mexico also cites to a number of instances of a change to Commerce practice through administrative procedures less formal than Section 123.[34] However, these examples are irrelevant because they were not in response to WTO dispute settlement findings.[35] In *Compact Iron Works Fittings from China*, Commerce made a change to what must be demonstrated by non-market economy exporters seeking separate rates.[36] This had nothing to do with implementing a WTO report. Likewise, the policy bulletins cited by Mexico were not used to implement any WTO reports, and we are not aware of any instance where a policy bulletin has been used to implement a WTO report.

21. Finally, Mexico asserts that administrative implementation other than Section 123 can be completed in 60-90 days.[37] Mexico provides no evidence for this assertion, however, and, in fact, there is evidence to the contrary. For example, Commerce's change to the model-match methodology in several proceedings involving ball bearings using a process other than Section 123 took approximately 21 months.[38]

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[33] *US – Zeroing (Mexico) (Panel)*, para. 7.95.

[34] Submission of Mexico, para. 31.

[35] Submission of Mexico, paras. 31-32.

[36] *See*, Compact Iron Works Fittings and Accessories Thereof from the People's Republic of China, 58 Fed. Reg. 37,908 (July 14, 1993) (Exhibit MX-19).

[37] Submission of Mexico, para. 33.

[38] *See*, *SKF USA, Inc. v. United States*, 527 F.3d 1373 (Fed. Cir. 2008) (Exhibit MX-8).

22. Section 123 is specifically designed to address a situation involving a response to an adverse finding by the WTO with respect to an antidumping practice. There is no basis for an Article 21.3(c) arbitrator to declare that the United States cannot follow the procedures set forth in Section 123.

Section 123 will require 15 months

23. Having said that, Section 123 will require 15 months. In its submission, Mexico appears to misunderstand the operation of Section 123. For instance, Mexico mistakenly states that "the Section 123 process involves essentially two key stages."[39] In actuality, Section 123 is more properly understood as having three stages.[40] First, there is the initial preparatory process, which includes consultations with Congress, the private sector, and the submission of a report by USTR to Congress detailing the proposed amendment, discussing the reasons for drafting the amendment as is, and describing the advice provided by the private sector advisory committees.[41] As will be explained below, should the United States decide to pursue a Section 123 approach, the United States will continue to be in this stage until after January 20, 2009.

24. In the next stage (the stage that Mexico omits), Commerce must draft the proposed amendment, circulate the amendment for internal comment, modify the amendment based on

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[39] Submission of Mexico, para. 34.

[40] Submission of the United States, paras. 35-37.

[41] *See*, 19 U.S.C. § 3533(g)(1)(A); 19 U.S.C. § 3533(g)(1)(B); 19 U.S.C. § 3533(g)(1)(D).

those comments, and obtain approval for its publication in the *Federal Register*.[42] As stated in our submission, we estimate this process will take at least three months. Importantly, however, this cannot begin until the policymakers that must comment on and grant approval for the amended rule or practice are appointed. Appointments will take at least a month from the end of January, though in actuality this usually takes longer.

25. Finally, during the third stage, Commerce must allow for a reasonable time for the public to comment on the amendment, usually around 30 days, and the agencies must hold final consultations with Congress. After this Commerce may revise and issue the final amendment.[43] The amendment may not take effect until 60 days after these final consultations with Congress occur.[44] This final stage will take approximately three months.

26. Although these time periods are necessarily estimates (and not averages, as Mexico argues[45]), these estimates are not pulled from thin air. They are based on U.S. experience, and are the same as those put forward in the other arbitration during which Section 123 was considered, *U.S. – OCTG from Argentina*.[46] Notably, the arbitrator in that dispute largely accepted the U.S. estimates about the time Section 123 requires: the United States requested 15

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[42] *See*, 19 U.S.C. § 3533(g)(1)(C).

[43] *See*, 19 U.S.C. § 3533(g)(1)(F).

[44] 19 U.S.C. § 3533(g)(2).

[45] Submission of Mexico, para. 41.

[46] *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, Award of the Arbitrator, WT/DS268/12, 7 June 2005 (*"U.S. – OCTG from Argentina (Article 21.3(c)*"), para. 7.

months for a two-step implementation process (9 months for a Section 123 process, followed by 6 months for a Section 129 process); the arbitrator awarded 12 months, citing the ability for some of the Section 129 and Section 123 steps to overlap.[47]

27. Mexico's examples of U.S. practice also confirm that these are reasonable estimates. For instance, we request approximately three months to complete the final stage of Section 123, and Mexico confirms that in the past this stage has taken 74, 92, and 92 days.[48]

28. In contrast to these experience-based estimates, the time periods proposed by Mexico are based on misunderstandings of the U.S. legal system. For example, regarding the final stage of Section 123, Mexico states that "a 60 day turnaround is more than sufficient."[49] This is facially incorrect. By law, the amended regulation or practice cannot take effect until at least 60 days after consultations with Congress. Sixty days, therefore, cannot be "*more* than sufficient" – and time must still be allowed for public comment, consultations with Congress, and modifications to the proposed amendment if appropriate. Most strikingly, Mexico's description of the Section 123 process leaves out one full stage of the process: the time-consuming act of actually drafting, modifying, and obtaining approval for the proposed amendment.[50] Mexico's estimation that the Section 123 process may be completed in seven months is based on incorrect information and unsupported estimates. It is therefore unreasonable.

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[47] *U.S. – OCTG from Argentina (Article 21.3(c)*, paras. 51, 53.

[48] Submission of Mexico, para. 41.

[49] Submission of Mexico, para. 42.

[50] *See*, Submission of Mexico, para. 34.

U.S. elections will substantially delay implementation

29. Mexico also fails to meaningfully address the significant difficulties the November 4, 2008 elections and the resulting changes in Congress and the Administration pose for the United States. From the perspective of a Member who must implement during this period of uncertainty, however, this issue is of primary importance.

30. It is unreasonable to consider the U.S. elections and change in government to be mere inconveniences that may warrant the addition of one month to the RPT, as Mexico mischaracterizes the U.S. submission.[51] Perhaps the best way to demonstrate this is to quickly work through the Section 123 process which Mexico asserts, incorrectly in this case, is faster than legislation.

31. It must once again be stated that the United States is in the preparatory stage; while we have narrowed our implementation options to the two discussed in our submission, it remains to be determined whether Section 123 will be sufficient. Nevertheless, as stated above, Section 123 is a three-stage process. Even if the United States could complete the first stage today – which, as we have just explained, is impossible – the United States would still need to undertake and complete the final two stages. While these two stages can typically be expected to take 6 months, the upcoming months in this quadrennial presidential election year change that calculation. Thus, in this case, the three months necessary for the first stage would not be complete until after a new Congress is sworn-in, and a mere two weeks before the newly elected

[51] Submission of Mexico, para. 48.

President takes office and begins to name officials to his Administration. It is therefore inevitable that the new Administration officials, in consultations with new members of Congress, will have to approve the final amendment. And before they do so, there will be a review of and possibly changes to the amendment. It therefore is not reasonable to set an RPT that hinges on the assumption that these officials will simply sign off on whatever is decided by their predecessors.

32. Thus, the proper starting point for considering the drafting and approval stages of implementation, whether administrative or legislative, is at the point the new Administration officials take office – which we have optimistically estimated as the end of February 2009. This clearly requires more than the one month that Mexico allows, and in reality adds about 5 months to the process from today. A realistic RPT will take into account the need for the new Congress and new Administration to review and, if necessary, adjust implementation. This cannot be completed until August 2009.

The complexity of the implementing measure

33. Finally, Mexico cites an example of the use of Section 123 in another dispute as evidence that implementing in this dispute is not complex and can be achieved quickly.[52] Mexico does not, however, demonstrate why this dispute is particularly relevant to the present arbitration. Instead, the closest, though imperfect, analogy to the present case is the implementation of a new methodology other than zeroing in average-to-average comparisons in investigations following

[52] Submission of Mexico, para. 53.

U.S. – Zeroing (EC). In that dispute, the United States and the European Communities agreed to an RPT of 11 months,[53] and it took a little more than 11 months to complete the Section 123 process.[54] Likewise, the United States and Japan agreed, following *U.S. – Zeroing (Japan)*, that a reasonable period of time would be 11 months.[55] While these instances (like Mexico's example) are not arbitration awards, they do provide a useful and relevant benchmark for the RPT in this case.

34. When measured against this benchmark, Mexico's proposal of 7 months is unreasonably short. In contrast, the United States has explained why the election year and the complicating issue of how to allocate assessment of duties among importers warrants a longer period of 15 months.[56]

Conclusion

35. Mr. Feliciano, this concludes our statement. We thank you for your attention, and we look forward to answering any questions you may have.

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[53] *See*, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins: Agreement under Article 21.3(b) of the DSU*, WT/DS294/19, circulated 1 August 2006.

[54] From March 6, 2006 to February 22, 2007. *See*, Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation, 71 Fed. Reg. 11,189 (March 6, 2006) (Exhibit US-11); Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margins in Antidumping Investigations: Change in Effective Date of Modification, 72 Fed. Reg. 3787 (January 26, 2007) (Exhibit US-12).

[55] *See*, *United States – Measures Relating to Zeroing and Sunset Reviews: Agreement under Article 21.3(b) of the DSU*, WT/DS322/20, circulated 8 May 2007.

[56] *See*, Submission of the United States, para. 9.