UNITED STATES – CONTINUED EXISTENCE AND APPLICATION OF ZEROING METHODOLOGY

WT/DS350

OPENING STATEMENT OF THE UNITED STATES OF AMERICA AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

April 22, 2008

Mr. Chairman, members of the Panel:

1. The United States welcomes this opportunity to meet with the Panel again to discuss the issues raised in this dispute. In particular, we will respond to some of the arguments made by the European Communities ("EC") in response to the Panel's questions and in its second written submission. And we wish to thank you once again for opening this panel meeting to WTO Members and the public.

2. Today we will first explain why determining the margin of dumping in reviews makes sense on a transaction-specific basis. We will then comment on the relevant standard of review, discuss the proper role of adopted Appellate Body reports in the WTO dispute settlement system, and respond to the EC's continued attempt to have imposed on the United States an independent international obligation to eliminate so-called "zeroing." Second, we will briefly address our objection that the "application or continued application" of duties in 18 separate cases is not properly within the scope of this proceeding because the EC's identification of "duty as a measure" does not identify the specific measures at issue as required by Article 6.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"). Third, we will respond to the EC's argument that Article 2.4.2 of the Antidumping Agreement applies

to periodic reviews, refute the erroneous concept of "product as a whole," and demonstrate how a the EC's reading of Article 2.4.2 would render the targeted dumping provision *inutile*. Lastly, we offer a few words on the negotiating history of the Antidumping Agreement, which shows that no common understanding to prohibit zeroing could be reached in the Uruguay Round and that multiple attempts to include a prohibition on zeroing failed.

The U.S. Retrospective Duty System

3. The U.S. retrospective duty assessment system is more complex to operate, and requires a larger expenditure of administrative resources and personnel. However, it allows U.S. authorities to closely calibrate the imposition of antidumping duties to the actual levels of dumping during the period covered by a periodic review. In addition, it encourages exporters and importers to adjust prices on their own – either through the exporter reducing prices in their home market to bring down the "normal value," the importer and exporter agreeing to a higher "export price," or in the case of a related importer, if the importer raises its U.S. sales price – in order to eliminate dumping margins and avoid paying antidumping duties. Thus, in the United States the level of antidumping duties actually collected from importers typically declines sharply during the period covered by an order. This means that prices in the marketplace can adjust without the actual collection of duties.

Standard of Review

4. As the parties agree, the task of this Panel is set not only by Article 11 of the DSU, but also by the special standard of review found in Article 17.6(ii) of the Antidumping Agreement. Under Article 17.6(ii), when a panel, in applying the customary rules of interpretation of public international law, "finds that a relevant provision of the Agreement admits of more than one

permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations."

5. The existence of such a provision in the Antidumping Agreement confirms that WTO Members were aware that the antidumping text would pose particular challenges. In many instances, the antidumping text permits more than one interpretation because it was drafted to cover multiple antidumping systems around the world and long-standing differences regarding methodology. Thus, the negotiators indicated that panels and the Appellate Body should respect a permissible interpretation of the Antidumping Agreement, even if that interpretation would not be the one favored by the panel or Appellate Body.

6. Here, the EC asserts that in applying the customary rules of interpretation to the provisions at issue, there is no question that the only permissible interpretation is one which finds a blanket requirement to average together in all types of proceedings the price margins for all import transactions of a particular product.[1] The United States has demonstrated that there is no text, nor any necessary implication in the text, that establishes any such general requirement in the Agreement. As the United States has demonstrated, the correct interpretation, applying the rules in the Vienna Convention, is one which does not lead to such a general requirement. But even were the interpretation proposed by the EC permissible, the interpretation advanced by the United States would be equally permissible for purposes of Article 17.6(ii).

The Role of Adopted Appellate Body Reports

7. The EC would like this Panel to believe that *stare decisis* exists in the WTO dispute

[1]EC Second Written Submission, para. 19.

settlement system, at the very least on a *de facto* basis. In its second written submission, the EC claims that it "is not arguing that the DSU contains an express rule providing that panels are legally bound" by prior Appellate Body reports, but then asserts that "panels . . . should follow the findings of the Appellate Body in prior cases."[2] The EC even appears to argue that the WTO is a common law system by referring to the "substantial and consistent case-law of the Appellate Body."[3]

8. The Appellate Body has stated that its reports are not binding, except with respect to resolving the particular dispute between the parties to that dispute.[4] To the extent that the reasoning in prior Appellate Body reports is persuasive, those reports may be taken into account, but they have no *stare decisis* effect. The Ministerial Conference and the General Council have *exclusive authority* to adopt binding interpretations of the covered agreements under Article IX:2 of the WTO Agreement.

9. Article 11 of the DSU requires a panel to make an objective assessment of the matter before it, including an objective assessment of the facts and the applicability of and conformity with the covered agreements. And under Articles 3.2 and 19.2 of the DSU, the findings and recommendations of a panel or the Appellate Body, or the rulings and recommendations of the DSB, cannot add to or diminish the rights and obligations provided in the covered agreements. A panel cannot simply adopt prior findings on an issue without undertaking its own objective assessment of the matter before it. Nor can a panel follow prior findings if the panel considers

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[2]EC Second Written Submission, paras. 39-40.

[3]EC Second Written Submission, para. 19.

[4]*US–Softwood Lumber Dumping (AB)*, para. 111 (citing *Japan–Alcohol Taxes (AB)* and *US–Shrimp (Art. 21.5)(AB)*).

that those prior findings would add to or diminish the rights or obligations of the parties to the dispute before the panel.

10. The panels in *US – Zeroing (Japan)* and more recently *US – Zeroing (Mexico)* have rejected the rationale of prior Appellate Body reports finding zeroing in reviews inconsistent with the Antidumping Agreement and GATT 1994.[5] Both panels recognized their obligation to carry out an objective assessment under Article 11 of the DSU. As the panel concluded in *US – Zeroing (Mexico)*, "[i]n light of our obligation under Article 11 of the DSU . . . we have felt compelled to depart from the Appellate Body's approach."[6] This Panel likewise is charged under Article 11 with undertaking an objective assessment of the matter before it and cannot make findings or recommendations that add to or diminish the rights and obligations in the covered agreements.

11. Attempting to respond to the U.S. argument that adopted Appellate Body reports may be taken into account to the extent that they are persuasive, the EC asserts that "[e]ither findings in prior cases are legally relevant, or they are not."[7] The EC believes that once reports have been adopted by the Dispute Settlement Body ("DSB"), they are "legally relevant" to the disposition of a dispute, and no other interpretation of the covered agreements is allowed. The EC has invented its notion of "legally relevant" out of whole cloth: as just explained, if a prior report's reasoning is persuasive or helpful, it should be taken into account, but that does not mean that a panel is bound by it.

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[5] *US – Zeroing (Japan) (Panel)*, para. 7.99 and n. 733; *US – Zeroing (Mexico)(Panel)*, para. 7.106.

[6] *US – Zeroing (Mexico) (Panel)*, para. 7.106.

[7] EC Second Written Submission, para. 20.

12. The EC tries to find support in the text of Article 11 of the DSU for its view on the binding nature of prior Appellate Body reports.[8] An interpretation under the customary rules of treaty interpretation supports no such reading. It is difficult to see how Article 11, which calls for an "objective assessment," means that panels should blindly follow adopted Appellate Body reports, particularly in light of Article IX:2 of the WTO Agreement by which only the Ministerial Conference and General Council may adopt authoritative interpretations.

13. The EC relies on the first sentence of Article 11, which states that "the function of panels is to assist the DSB in discharging its responsibilities under this understanding and the covered agreements."[9] To the EC, this sentence means that by following adopted Appellate Body reports, panels will somehow assist the DSB in meeting its responsibilities. The DSB's role, however, is to help Members resolve individual disputes, and not to adopt binding interpretations of the covered agreements outside the context of a specific dispute, which would run counter to the prohibition in DSU Article 3.2 on adding to Members' obligations. It is by adopting working procedures, hearing the parties, and making findings and recommendations on claims that panels help the DSB "administer these rules and procedures and . . . the consultation and dispute settlement provisions of the covered agreements."[10] The first sentence in Article 11 does not say or imply anything about a need or requirement to follow past Appellate Body reports, nor does any other provision of the DSU.

14. The EC, in interpreting Article 11, also relies for contextual support on the reference to

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[8]EC Second Written Submission, para. 26.
[9]EC Second Written Submission, para. 29.
[10]DSU Article 2.1.

"security and predictability" in Article 3.2 of the DSU. However, the reference to "security and predictability" in Article 3.2 does not support the EC's mis-reading of Article 11. Rather, Article 3.2 explains that the dispute settlement system is a central element in providing security and predictability to the *multilateral trading system*. The dispute settlement system serves that function by following both the procedural and substantive rules to which WTO Members have agreed. That is, the system serves that objective when panels make the "objective assessment" with which Members have tasked them (as opposed to the rote acceptance of prior reports that the EC urges), and when panels do not add to or diminish the rights or obligations of Members. By contrast, the security and predictability of the multilateral trading system is not preserved when a panel or the Appellate Body creates rights or obligations to which the Members did not agree. When the Appellate Body has departed from the proper interpretation of the covered agreements, as in disputes on zeroing, panels should be mindful of the obligation under DSU Articles 3.2 and 19.2 to preserve the rights and obligations of Members when interpreting and applying the covered agreements. Article 3.2 of the DSU therefore does not assist the EC's argument with respect to the meaning of Article 11.

Article XVI:4 of the WTO Agreement

15. The EC once again repeats its expansive and erroneous argument that under Article XVI:4 of the WTO Agreement, the adopted Appellate Body reports on zeroing impose an "independent international obligation" on the United States to eliminate zeroing.[11] We will not repeat all of our arguments in this regard today,[12] but emphasize a few key points. Most

[11]EC Second Written Submission, para. 63.
[12]*See, e.g.*, U.S. First Written Submission, paras. 157-64.

importantly, there is no support for the EC's interpretation in the DSU or elsewhere in the covered agreements. The EC's proposed interpretation is also inconsistent with the well-established proposition that Appellate Body and panel reports "'are not binding, except with respect to resolving the particular dispute between the parties to that dispute.'"[13] The Appellate Body cannot adopt authoritative interpretations of the covered agreements, nor can its reports create an obligation independent of the covered agreements. Treating prior Appellate Body reports as binding outside the scope of the original dispute would add to the obligations of the United States and other Members, inconsistent with Articles 3.2 and 19.2 of the DSU.

16. The EC would like the Panel to believe that Articles 3.2, 3.4, 3.8, and 17.14 of the DSU actually support its reading of Article XVI:4.[14] The EC's argument distorts the plain text of the DSU. As we have just explained, Article 3.2 cannot justify a reading of Article XVI:4 that adds to a Member's obligations under the covered agreements. In addition, Article 3.4 only relates to the "matter" under consideration in a specific dispute, and requires that the DSB's "settlement of the matter" shall be "in accordance with the rights and obligations under this Understanding and under the covered agreements." In other words, a finding under Article XVI:4 that adds to a Member's obligations under the covered agreements cannot be reconciled with Article 3.4. Article 3.8 is concerned with the rebuttal of the presumption of nullification and impairment by the responding Member in cases where there is an infringement of the covered agreements. The EC is wrong to assert that under Article 3.8, "any WTO Member can invoke nullification and

[13] *US – Softwood Lumber Dumping (AB)*, para. 111 (*quoting Japan – Alcohol Taxes (AB)*).
[14] EC Second Written Submission, para. 64.

impairment when an infringement has been found and adopted by the DSB."[15] Lastly, Article 17.14 only states that an adopted Appellate Body report shall be "unconditionally accepted by the parties to the dispute," which means acceptance of the findings and recommendations in the context of that specific dispute, and not in any and all future disputes that appear to be, or are asserted to be, similar. No other reading is possible. And in making its argument, the EC has blatantly ignored prior Appellate Body language on this issue while arguing that Appellate Body findings are binding.

17. The EC argues that "treating [Article XVI:4] as a purely consequential claim when a violation of another measure has been found would render this provision inutile."[16] As panels have recognized, there is no "independent" basis for a claim under Article XVI:4.[17] Instead, a finding of inconsistency with a provision of the covered agreements automatically gives rise to a finding of inconsistency with Article XVI:4. Neither panels nor the Appellate Body have ever treated Article XVI:4 differently.

Scope of this Dispute

18. The United States will not repeat today its three preliminary objections to the scope of the EC's claims. Instead, we will focus on one set of alleged "measures" that are the subject of the U.S. objection that under Article 6.2 of the DSU, the EC has failed to identify the specific measures at issue. Those alleged "measures" are the so-called "application or continued application" of antidumping duties pursuant to the antidumping duty orders in 18 cases as

[15]EC Second Written Submission, para. 64.
[16]EC Second Written Submission, para. 66.
[17]*US – OCTG from Mexico (Panel)*, para. 7.189; *US – Antidumping Act of 1916 (EC) (Panel)*, para. 6.223; *US – Antidumping Act of 1916 (Japan) (Panel)*, para. 6.287.

identified in the EC's panel request.

19. The EC has introduced the concept of "duty as a measure."[18] It now would like the Panel to treat any application or continued application of duties – at whatever level and whenever and however determined – in the 18 identified cases as some type of free-standing measure that has a life of its own beyond the 52 particular determinations identified in its panel request.[19] The EC ignores the fact that, for any given importation, the antidumping duty imposed or assessed depends on a particular administrative determination, whether that be an original investigation, assessment review, new shipper review, or changed circumstances review. Separately, the continued existence of an antidumping duty order depends on an underlying sunset review.[20] In other words, individual determinations are the focus of dispute settlement because the duty assessed, or the decision to continue imposing that duty pursuant to an antidumping order, is dependent on the actions of the administering authority in the relevant proceeding.

20. The EC's panel request, to fulfill the requirements of DSU Article 6.2, must identify the specific determination leading to the particular application or continued application of an antidumping duty, and cannot merely refer to the application or continued application of a duty in a general and detached way. The EC did not identify such determinations, nor could it have, because, by its own admission, the EC is trying to sweep in any subsequent and not-yet-taken determinations related to the application or continued application of duties in 18 cases.[21] As

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[18]EC Answer to Panel Question 1(a), para. 7; EC Second Written Submission, paras. 54, 57.

[19]EC Answer to Panel Question 2, para. 17; *see also* EC Answer to Panel Question 2, para. 13; EC Answer to Panel Question 3, para. 20; EC Answer to Panel Question 5(b), para. 28.

[20]AD Agreement, Articles 1, 5, 7, 9, 11.

[21]EC Response to Request for Preliminary Rulings, para. 47.

prior panels have recognized, a measure that did not even exist at the time of panel establishment cannot be within a panel's terms of reference.[22] Nor can the EC have consulted on a measure that does not exist at the time of the consultation request, yet such consultations on a measure are a precondition for requesting a panel with respect to that measure.[23] This Panel should reject the EC's attempt to include in the scope of this proceeding indefinite subsequent measures that did not exist at the time of panel establishment.

21. My colleague will now discuss issues related to the EC's claims under the Antidumping Agreement and the GATT 1994.

Article 2.4.2 of the Antidumping Agreement

22. The EC has focused much attention on the alleged proper reading of Article 2.4.2 of the Antidumping Agreement under the Vienna Convention. It is the EC's position that any time a Member makes "a systemic examination or inquiry" as to dumping, that Member is conducting an investigation subject to the disciplines of Article 2.4.2. Such an approach fails to appreciate the fundamental distinctions between investigations that determine the *existence* of dumping, and assessment reviews in which *final liability* is determined, even though such distinctions are recognized in the Antidumping Agreement.

23. The requirements of Article 2.4.2 of the Antidumping Agreement do not extend beyond Article 5 investigations. It is only "during" an Article 5 "investigation phase," that a Member establishes "the existence of margins of dumping."[24] The U.S. interpretation, applying the rules

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[22] *US – Upland Cotton (Panel)*, paras. 7.158-7.160.
[23] DSU Art. 4.7.
[24] AD Agreement, Article 2.4.2.

of interpretation as reflected in Article 31 of the Vienna Convention, is supported by the text of the Antidumping Agreement. Articles 1, 2.4.2 and 5, read together, establish that a unique determination as to the "existence" of dumping is made in Article 5 investigations. Outside of the Article 5 investigation phase, the task of an authority is not to determine whether dumping "exists." Instead, the Antidumping Agreement provides that in Article 9.3.1 assessment proceedings challenged by the EC, the task of the United States is to determine "the amount of the anti-dumping duty" and the "final liability for payment of anti-dumping duties."

24. To read, as the EC would have it, "during the investigation phase" as synonymous with "period of investigation," denies meaning to the unique "investigation phase" terminology in Article 2.4.2. Although numerous provisions in the Antidumping Agreement refer, for example, to the "period of investigation," the term "investigation phase" appears only in Article 2.4.2. The word "phase" in the context of the Antidumping Agreement recognizes that authorities will determine dumping margins in distinct contexts. Specifically, the "investigation phase" refers to the distinct phase in which the existence of dumping sufficient to justify the imposition of an antidumping duty is determined. The relationship between the term "investigation phase" and "the existence of margins of dumping" must be given meaning and may not be read out of the Agreement.

25. Because Article 2.4.2 is, by its terms, limited to establishing the existence of margins of dumping "during the investigation phase," it has no bearing on any segment of an antidumping proceeding other than the original investigation phase. Under Article 9.3, the collection and assessment of antidumping duties on specific entries has a separate and distinct purpose that necessarily occurs after the imposition of an antidumping duty order in the original investigation.

26. To force the requirements of Article 2.4.2 with respect to the *existence* of margins of dumping during the investigation phase, into Article 9.3*,* the EC seeks to impose an obligation whereby dumping liability would be determined on an exporter-wide basis in assessment reviews.[25] This approach divorces the amount of antidumping duty assessed on an import from the dumping margin associated with that import transaction. Nothing in the text of Article 9.3 supports such a result.

27. Interpreting Article 9.3.1 to require that final liability be assessed based on the totality of the exporter's transactions ignores a key commercial reality. In the real world, it is the *importers* to whom the sales at less than normal value are made, and it is the importers who actually pay the antidumping duties. This commercial reality is recognized explicitly in Article 9.3.2, and implicitly throughout Article 9.3. This cannot be ignored if the antidumping duties are to be an effective remedy to "offset or prevent" dumping.

The Erroneous Concept of "Product as a Whole"

28. The EC's erroneous argument that zeroing is prohibited depends on margins of dumping calculated in periodic reviews relating solely and exclusively to the "product as a whole" – and that margins of dumping *not* be calculated based on individual transactions. The concept of "product as a whole," however, was originally derived from the phrase "all comparable export transactions" in the first sentence of Article 2.4.2. The Appellate Body in *US – Softwood Lumber Dumping* based its finding on the phrase "all comparable export transactions" by interpreting the term "margins of dumping" and the "all comparable export transactions"

[25]EC Second Written Submission, paras. 117,119; EC Answer to Panel Question 8, para. 45.

language in an "integrated manner."[26] By asserting that the "obligation not to zero primarily derives from the requirements in Article VI of the *GATT 1994* and in Articles 2.1 and 9.3 of the *Anti-Dumping Agreement*," but *not* Article 2.4.2,[27] the EC applies "product as a whole" in a manner that is detached from the underlying textual basis in the first sentence of Article 2.4.2 of the Antidumping Agreement.

29. Furthermore, the EC's own arguments prove too much. The EC states: "Thus, it is only on the basis of aggregating all these 'intermediate values' that an investigating authority can establish margins of dumping for the product under investigation as a whole."[28] And the EC further states: "The European Community fails to see how margins of dumping can properly be established for the product as a whole without aggregating all of the 'results' of the multiple comparisons."[29] If that were true, then a margin of dumping could never be determined for there could always be another import to average into the margin. If anything less than all transactions is not a proper margin of dumping, then when would an administering authority have all the transactions? The Antidumping Agreement does not specify a particular time period that may be used to define the universe of transactions to be averaged. If it is necessary to average "all" the transactions, then first, the margin would always be changing as new transactions were averaged together with all transactions since the beginning of the antidumping duty order. And second, the margin would never be final as there could always be new import transactions occurring that would need to be averaged in. Similarly, in considering Article 9.3.1 and 9.3.2, how could an

[26]*US – Softwood Lumber Dumping (AB)*, paras. 85-93.
[27]EC Second Written Submission, paras. 117-18.
[28]EC Second Written Submission, para. 80.
[29]EC Second Written Submission, para. 81.

importer ever know whether to ask for a refund when the margin of dumping is continually changing? And for imports during what period of time would the importer make such a request? In order to determine the margin of dumping, all the exporter's transactions would need to be averaged, not just with respect to that importer, and the list of transactions would never close.

30. Because of this problem, we should note that if negotiators had intended to use the "product as a whole" approach advocated by the EC, then they would have had to have specified the time period to consider. The simple fact that the negotiators did not deal with this time period issue is itself sufficient to show that the EC's approach is not provided for in the text.

31. Another fundamental problem with the EC's proposed "product as a whole" approach is that it is contrary to the way in which "product" is used in discussing antidumping duties. Other panels have correctly rejected the "product as a whole" approach by looking at the way in which "product" is used in Article VII of the GATT 1994. Perhaps even more directly relevant is the use of the term "product" in Article II:2 of the GATT 1994. There, it provides that:

> Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product:
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> ...
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> (b) any anti-dumping or countervailing duty applied consistently with the provisions of Article VI.

Here, the term "the importation of any product" must mean a particular transaction. A Member would not impose a duty on "the importation of any product as a whole." A duty imposed on "the importation" refers to the particular transaction. And we would note that this is the same manner in which product is used in Article II:1. Under the EC's reading that "product" means "product as a whole," a Member could impose higher ordinary customs duties on some transactions and lower duties on others and not breach the Member's tariff binding as long as the

average of the ordinary customs duties applied to all transactions was less than the bound rate.

Targeted Dumping

32. While the targeted dumping provision might be an exception to the normal rules for establishing the existence of margins of dumping in Article 2.4.2, it is not an exception to the fair comparison requirement of Article 2.4. If zeroing is found to violate the fair comparison requirement of Article 2.4, as the EC advocates, then such a prohibition would also apply to the methodology listed in the second sentence in Article 2.4.2. Under the EC's interpretation, which would require the averaging of all transactions for any calculation of the dumping margin, the result under the targeted dumping provision is mathematically equivalent to the result under the first sentence of Article 2.4.2, thus rendering the targeted dumping provision a nullity. This outcome is to be avoided under the customary rules of treaty interpretation.

33. The EC does not deny the result of mathematical equivalence if zeroing is prohibited in both symmetrical and asymmetrical comparisons. Rather, the EC suggests that in a targeted dumping scenario, a Member might remedy the mathematical equivalency problem by "re-set[ting] the parameters of the investigation"[30] and only calculating a margin for transactions falling within the pattern. There is no textual support for this proposed interpretation, and it is flatly inconsistent with the EC's insistence that a margin of dumping may only be calculated for the totality of the exporter's sales, i.e., "the product as a whole." The language of Article 2.4.2 says nothing about selecting a subset of transactions when conducting a targeted dumping analysis. In other words, to the extent that there is any obligation to calculate a margin of

[30]EC Second Written Submission, paras. 116, 246.

dumping for the "product as a whole," or on an exporter-wide basis, as the Appellate Body has found, nothing in the text of the second sentence of Article 2.4.2 creates an exception to that obligation. Instead, the second sentence is only an exception to the first sentence's obligation to normally make symmetrical comparisons in an investigation.

Uruguay Round Negotiating History

34. During this dispute, the EC, in support of its argument that zeroing must be prohibited, has relied on a revisionist version of the negotiating history.[31] The key terms that have been cited by the Appellate Body in its zeroing reports for the most part date back to the GATT 1947, the Kennedy Round Antidumping Agreement, and the Tokyo Round Antidumping Code. The only new language is the phrase "all comparable export transactions" in Article 2.4.2, which is limited to investigations and thus should not be at issue here. The rest were part of long-standing antidumping terminology, which the negotiators turned to when developing the WTO Antidumping Agreement. As the negotiating history makes clear, these terms did not acquire a new meaning during the Uruguay Round.

35. During the Uruguay Round, the negotiators were well aware of zeroing, or as it was referred to at the time – "negative dumping." While the negotiations were underway, Japan and Brazil challenged the EC's zeroing practices in two disputes under the Tokyo Round Antidumping Code. In both cases, panels found that the Code did not prohibit zeroing. Several Members submitted proposals during the Uruguay Round, including detailed textual changes, designed to require WTO Members to consider "negative dumping" or "non-dumped

[31] *See, e.g.*, EC Second Written Submission, paras. 221-24.

transactions." None of their textual proposals appeared in the final Uruguay Round Antidumping Agreement. Instead, the provisions of the Antidumping Agreement that are at issue here reflect standard language from prior agreements that were interpreted by Tokyo Round Code dispute settlement panels as not requiring consideration of "negative dumping" or aggregation of individual transactions.

36. The lack of any explicit textual reference in the Antidumping Agreement to zeroing or "negative dumping" speaks for itself. No common understanding was reached on prohibiting zeroing in the Uruguay Round. No common understanding could be reached because, despite extensive efforts by some Members, their proposals were firmly opposed by the United States, Canada – and even the EC – Members who continue to use zeroing today, either by assessing antidumping duties on an import-specific basis, or, in the case of the EC, pursuant to the application of the "targeted dumping" provision in Article 2.4.2.

Conclusion

37. Mr. Chairman, members of the Panel, the EC has asked this Panel to read an obligation into the Antidumping Agreement and GATT Article VI, notwithstanding the lack of any textual basis for the obligation the EC proposes. The United States respectfully urges the Panel to reject the EC's claims. Dispute settlement plays a major role in the WTO system, but it cannot, and should not, seek to substitute for the WTO Members, who ultimately must bear the final responsibility for negotiating agreements to further open markets and strengthen the global trading system. If WTO Members left out certain provisions for lack of consensus, Article 3.2 of the DSU makes it plain that it is *not* the job of panels or the Appellate Body to write them into the Agreement. Indeed, interpretations that go beyond the existing text of the WTO agreements

– whatever the good intentions of those advancing the interpretations – fundamentally undermine the willingness of Members to agree to further market-opening commitments as some Members will simply refuse to negotiate mutually beneficial commitments and instead seek unilateral gain through the dispute settlement system.

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