UNITED STATES – LAWS, REGULATIONS AND METHODOLOGY FOR CALCULATING DUMPING MARGINS ("ZEROING")

WT/DS294

CLOSING STATEMENT OF THE

UNITED STATES OF AMERICA

AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

April 27, 2005

Mr. Chairman, members of the Panel:

1. On behalf of the United States delegation, I would again like to thank you and the members of the Secretariat for the work that you have done and will do in this dispute. We look forward to receiving your written questions and the opportunity it provides to continue our dialogue.

2. I would like to start out with a few comments on the issues falling under the topic of "measures" and the mandatory/discretionary distinction, and then my colleague will conclude with some comments on the substantive antidumping issues.

The EC's "As Such" Claims

3. With respect to the mandatory/discretionary distinction, although we discussed the distinction in this morning's session, the EC did not say anything new. The EC cannot cite a single panel or Appellate Body report that has adopted the EC's approach and, as we have noted, the panel in *Korea – Commercial Vessels* expressly rejected that approach. At this point, I simply refer the Panel to paragraphs 40 to 45 of the U.S. second written submission.

4. Turning to some of the specific alleged "measures" that make up the EC's "as such" claims, as we noted in paragraph 56 of the U.S. second written submission, in the EC's replies to the Panel's first set of written questions, the EC essentially said that it is challenging the entire Manual. In paragraph 58 of its opening statement at this meeting, the EC does not deny that it is challenging the entire Manual. Instead, the EC simply lists certain portions of the Manual that it identified in its first written submission, and omits any discussion of the other portions of the Manual that, in its replies, the EC affirmatively stated that it is challenging.

5. As the United States explained in paragraphs 51-59 of its second written submission, the Appellate Body found in *US – Gambling* that in order to make a *prima facie* case, a complaining party cannot "simply submit evidence and expect the panel to divine from it a claim of WTO-inconsistency." The EC has failed to explain how the entire Manual runs afoul of U.S. WTO obligations. And the same thing is true for most, and perhaps all, of the individual portions that the EC listed. To list pieces of the Manual is not an explanation that meets the standard articulated in *US – Gambling*. Thus, while we believe that the EC also has failed to demonstrate that the Manual mandates a WTO breach, the Panel does not even need to reach that issue because the EC has failed to make a *prima facie* case with respect to either the Manual as a whole or to its individual portions.

6. Finally, with respect to the EC's claims regarding the Commerce computer program, in paragraph 60 of its opening statement at this meeting, the EC does not identify any lines of computer code other than those set out in paragraphs 21 and 37 of its first written submission. The EC states that it is challenging other measures, but that is obvious. Thus, the Panel must

find that insofar as computer programs are concerned, the EC's claims are limited to the referenced lines of code.

7. Mr. Chairman, members of the Panel, there are just a few additional points that the United States would like to address in closing, responding to comments by the EC in its second written submission and during this Panel meeting. These points relate to: (1) targeted dumping; (2) importer-specific assessment; and (3) the balance between retrospective and prospective systems. Finally, we will wrap things up with a final comment on Article 2.4.2.

Targeted Dumping

8. As the United States discussed during the first panel meeting and in its written submissions, it is important to identify precisely where in the Antidumping Agreement any alleged obligation to provide an offset or credit for non-dumped sales lies. To date, the only place the Appellate Body has found such an obligation has been with respect to average-to-average comparisons in Article 5 investigations, and we will not repeat that discussion here. What we do wish to return to, however, is the impact of the EC's argument on the targeted dumping provision.

9. The EC's position with respect to targeted dumping has been a moving target, if you will. Initially, their position was that zeroing is prohibited under Article 2.4, as well as Article 2.4.2, because it is unfair. The United States noted that targeted dumping is an exception to symmetry and not an exception to the fair comparison requirement and, if a fair comparison meant no "zeroing", as a mathematical matter, the EC would render the targeted dumping provision a nullity. At the first meeting, the EC sought to deny this mathematical reality, but has never supported that denial. Now, they have completed their turn-about by asserting that, in fact, so-

called "zeroing" may be necessary under the targeted dumping provision – apparently abandoning any remaining claim that "zeroing" is inherently unfair.

10. The EC's current story for "zeroing" under the targeted dumping provision is contained in paragraph 47 of their opening statement for this panel meeting. Therein, the EC appears to have stepped entirely through the looking glass. The EC position reflected in paragraph 47 appears to be the following: the EC believes that zeroing, normally, would constitute an adjustment to export price that is not based on a difference that has been demonstrated to affect price comparability. However, in the context of targeted dumping, there is a **pattern of export prices** which differ significantly among different purchasers, regions or time periods. This pattern of export prices, in addition to justifying the targeted dumping analysis, somehow establishes an affect on price comparability **with normal value** such that the export prices must be adjusted in a manner akin to "zeroing." A rather remarkable line of reasoning.

11. Nevertheless, there is a nugget within that line of reasoning with which the United States can agree. The concern expressed by the EC is that, without something more, non-dumped prices in, for example, distinct market A cannot necessarily simply offset or reduce non-dumped prices in distinct market B. That, of course, is precisely part of the rationale for the United States' rejection of an offset obligation. This is an issue which is not unique to targeting among markets. Any time an investigating authority has the results of multiple, distinct comparisons – from comparing different models, sales at different levels of trade, sales to different customers, or even, simply sales of distinct imports – it will have separate results that, for reasons undistinguishable from the EC's targeted dumping reasoning, cannot and should not simply be offset.

Importer-Specific Assessment

12. I would like to take just a moment to illustrate the effect of the EC's rejection of importer-specific assessment. While I will use a new exhibit to illustrate the point,[1] it is actually just another version of the chart which the EC provided as Exhibit EC-52. This version contains a series of transactions identical to those on the first page of EC-52. The only distinction is that in this version, we have associated customers with the transactions.

13. The United States uses this chart to illustrate that there is a basic logic and fairness that supports the U.S. importer-specific assessment. Using the transactions in the illustration, and assuming that the customers identified also serve as the importer, under the U.S. assessment system, importer/customer 4 will pay no antidumping duties because none of its imports were dumped. Customer 1, on the other hand, will face a total dumping liability of 25 (5 for model A plus 15 for model B plus 5 for model C) because all of its imports were dumped.

14. The EC's insistence on an exporter-oriented assessment process would, under any of the margin calculation methodologies, even without "zeroing," require some assessment of antidumping duties on the non-dumped imports of importer/customer 4. The United States suggests that, when examined in this light, the U.S. system cannot be said to be unfair.

Balance Between Retrospective and Prospective Systems

15. In its opening statement, the European Communities repeated its contention that the U.S. interpretation of the AD Agreement would result in "unequal treatment between prospective and retrospective assessment systems" because "Members using the prospective system of duty

[1] Exhibit US-3 (attached).

collection collect on the basis of the margin established during the original investigation, which must be established without zeroing".[2] In contrast, the EC contends, the U.S. interpretation would mean that retrospective systems are entitled to collect duties on the basis of "a margin inflated by zeroing" during Article 9 proceedings.[3]

16. The specter of unequal treatment conjured up by the European Communities has no legal or factual basis. This is for two principal reasons. First, the EC's argument assumes that Article 5 investigation phase margins are the basis for duty collections in all prospective systems. On the contrary: Members with prospective normal value systems will collect antidumping duties on the basis of comparisons of those prospective normal values with export prices as they occur on imports after the imposition of the measure. These antidumping duties need not be limited by the margins of dumping calculated during the Article 5 investigation phase.

17. Second, even Members with prospective *ad valorem* systems are not locked into any *ad valorem* dumping margins they may find during the Article 5 investigation phase. Such Members may conduct Article 11.2 reviews at any time to update those margins so that the amount of dumping duty collected corresponds to the "actual margin of dumping of the exporter concerned."[4] Article 2.4.2 is no more applicable to such Article 11.2 reviews than it is to Article 9.3 assessment proceedings, and there is no obligation under the Agreement that Members provide offsets in such "changed circumstance" reviews.

[2] EC Opening Statement at para. 65.
[3] EC Opening Statement at para. 64.
[4] EC Opening Statement at para. 65.

Article 2.4.2

18. Finally, with respect to Article 2.4.2, as we have said, many provisions in WTO agreements are the result of deliberate compromises. Not infrequently, these compromises involve contentious issues on which compromise is necessary to conclude an agreement and a negotiating round. Article 2.4.2 is precisely one such provision. To the extent that proper recognition of this compromise might create, in anyone's view, a gap in the Agreement, filling those gaps is an issue for negotiations, not for dispute settlement.

19. Mr. Chairman, Members of the Panel, again, we thank you and the members of the Secretariat for the time you have devoted to this dispute.