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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE EUROPEAN COMMUNITIES

WT/DS294

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

April 9, 2008

Mr. Chairman, members of the Panel:

1. First, we would like to thank you and the Secretariat for opening this meeting to the public.

2. I would also like to thank you for agreeing to serve on the Panel. We do not intend to offer a lengthy statement, as our written submissions refute the substantive arguments that the European Communities ("EC") raised in its written submissions. We would, however, like to focus on a few points concerning the EC's argument.

3. As we begin this panel meeting, it is important to recall the purpose of an Article 21.5 proceeding, which is to consider the "existence or consistency with a covered agreement of measures taken to comply with the [DSB's] recommendations and rulings." A complaining Member may not use a compliance proceeding to challenge measures that it could have challenged in the original panel proceeding but did not. Nor may a complaining Member use Article 21.5 to challenge measures that are not measures taken to comply. This is because

Members only agreed to the truncated, expedited procedures under Article 21.5 in the specific case involving a measure taken to comply, and did not agree to have these different dispute settlement procedures used in the case of measures not taken to comply.

4. To identify the proper scope of any Article 21.5 proceeding, the appropriate starting point is the DSB's recommendations and rulings. According to the DSB recommendations and rulings in this dispute, 15 determinations by the U.S. Department of Commerce ("Commerce") in antidumping investigations were found inconsistent with a covered agreement.[1] The recommendations and rulings also include "as applied" findings of a breach with respect to 16 Commerce determinations in administrative reviews.[2] The original panel and the Appellate Body declined to make findings concerning the EC's "as such" claim against zeroing in administrative reviews.[3] Thus, the DSB's recommendations and rulings were limited to "as applied" findings.

5. Turning to the 15 antidumping investigations, by the time the DSB adopted its recommendations and rulings, Commerce had already revoked 3 of the antidumping orders resulting from those investigations. With respect to the other 12 investigations where antidumping orders remained in place, Commerce conducted proceedings under U.S. domestic law, called Section 129 proceedings, to recalculate the margins of dumping. The Section 129 determinations resulted in the revocation of two additional orders.[4] Later, Commerce revoked 4

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[1] *US – Zeroing (EC) (Panel)*, para. 8.1 (a).
[2] *US – Zeroing (EC) (AB)*, para. 263(a)(i).
[3] *US – Zeroing (EC) (AB)*, paras. 263(c) and (g)(ii).
[4] Case Numbers 1 and 6 respectively in the EC's annex.

more orders as a result of sunset reviews.[5] Thus, with respect to the 15 determinations made in investigations, 9 concern antidumping orders that are now revoked. To be precise, for all nine of the revoked antidumping duty orders, no antidumping duties will be assessed on entries of the goods made after the effective date of the revocation.

6. Turning to the 16 administrative reviews, we note that the purpose of such reviews is to determine the final assessment rate on imports that occurred before the review commenced, and to calculate a new cash deposit rate that will be applicable to subject imports occurring after the determination is made.

7. What is noteworthy for purposes of this proceeding is that the 16 administrative reviews in question all involved entries that occurred *prior to* the adoption of the DSB recommendations and rulings. As the EC concedes, implementation of WTO obligations is prospective.[6] Nevertheless, the EC contends that the United States was obligated to refund duties in respect of entries that were made prior to the adoption of the recommendations and rulings. In other words, the EC attempts to argue that the United States was effectively required to provide retroactive relief – i.e., refunds of duties collected on prior entries solely as a result of the WTO dispute. However, in view of the principle of prospective relief to which even the EC subscribes, the United States was under no obligation to do so.

8. Commerce has revoked the antidumping duty orders relating to three of the administrative reviews in their entirety.[7] Moreover, with respect to another antidumping duty

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[5] Case Numbers 2, 3, 4 and 5 respectively in the EC's annex.
[6] EC Second Written Submission, para. 77.
[7] Case Numbers 16, 17, and 26, respectively, in the EC's annex

order, Commerce has now excluded two of the companies that were the subject of the EC's "as applied" challenge from that antidumping duty order.[8]

9. Notwithstanding these revocations, and the fact that the EC accepts that relief is prospective only, the EC nevertheless contends that the United States has failed to bring its measures into compliance. The EC advances this argument by challenging an additional 54 determinations, identified in the annex to its Article 21.5 panel request ("the EC's annex"), and made subsequent to the 31 determinations it originally challenged in its "as applied" claims. The EC asserts that these subsequent determinations were part of the original dispute, are measures taken to comply, or somehow constitute "omissions."

10. Today, we will expose the hollowness of the EC's argument concerning these additional 54 determinations. We will not go through each of those determinations in this oral statement. Instead, we will highlight the main reasons why these determinations are not within this Panel's terms of reference. We are, however, willing to answer any questions that the Panel may have regarding each of these determinations.

11. As an initial matter, the United States notes that in its written submissions, we have shown that the EC did not identify these "subsequent reviews" as measures in its Article 21.5 panel request.[9] Therefore, they are not within the Panel's terms of reference.

12. Moreover, contrary to the EC's assertions, these subsequent determinations were not part of the original dispute. They were not identified in the EC's original panel request. Neither the original panel nor the Appellate Body made any findings with respect to these determinations.

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[8] Case Number 19 in the EC's annex.

[9] U.S. First Written Submission, paras. 33-35; U.S. Rebuttal Submission, paras. 12-17.

Indeed, some of these determinations did not even exist when the EC made its original panel request.

13. In addition, these determinations cannot be considered "amendments" to the 31 determinations originally challenged. Commerce amends its determinations to correct a ministerial error, or as a result of litigation. The EC understood this, and specifically identified in its original panel request those determinations that had been amended. In this context, the term "amendments" specifically refers to those corrected Commerce determinations. The term "amendments" does not refer to the 54 additional determinations identified in the EC's annex, which cover distinct periods of time and, in some cases, distinct companies and which, therefore, are separate and distinct from the 31 determinations originally challenged by the EC.

14. Turning to the issue of whether these additional determinations are "measures taken to comply," the EC relies on *Softwood Lumber* to support its argument. However, it is important to note that in that dispute, the Appellate Body cautioned that "not . . . every assessment review will necessarily fall within the jurisdiction of an Article 21.5 panel."[10] Indeed, "[a]s a whole, Article 21 deals with events *subsequent* to the DSB's adoption of recommendations and rulings in a particular dispute."[11] And the *Softwood Lumber* dispute indeed involved a determination that was made *after* the DSB had adopted its recommendations and rulings and that was published very close in time to the measure that both parties agreed was a measure taken to comply. In that dispute, the Appellate Body first cautioned that there was no finding that an administrative review is *per se* a "measure taken to comply," but rather the analysis was more nuanced.

[10] *US – Softwood Lumber CVD Final (Article 21.5) (AB)*, para. 93 (footnote omitted).
[11] *US – Softwood Lumber CVD Final (Article 21.5) (AB)*, para. 70 (italics in original).

Furthermore, in concluding that an aspect of an administrative review *did* come within the terms of reference of an Article 21.5 proceeding, the Appellate Body found significant both this fact of timing as well as the fact that the responding Member acknowledged that the determination at issue was made "'in view of' the recommendations and rulings of the DSB."[12]

15. Even if we accept the principle that determinations made "in view of" recommendations and rulings can be brought within the terms of reference of an Article 21.5 proceeding, it cannot be said in *this* dispute that the 54 additional determinations were made "in view of" the DSB's recommendations and rulings. Of the 54 additional determinations, 16 are determinations in sunset reviews. On this point, the EC's original "as applied" claims did not include any challenges to determinations in sunset reviews. Consequently, neither the original panel, nor the Appellate Body, made any findings in this dispute, whether "as such" or "as applied," with respect to sunset reviews. These sunset reviews are, therefore, not part of the terms of reference.

16. Moreover, in 11 of the sunset reviews, Commerce issued its determination regarding the likelihood of a continuation or recurrence of dumping *before* the DSB had even adopted its recommendations and rulings in this dispute. Four resulted in the revocation of the antidumping orders. In the one remaining sunset review determination, the interested parties did not raise, and Commerce made no mention of, the issue of non-dumped sales.[13] Thus, this determination could not have been made "in view of" the DSB's recommendations and rulings.

17. Two of the additional determinations identified by the EC were made in changed

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[12] *US – Softwood Lumber CVD Final (Article 21.5) (AB)*, para. 84 (citing U.S. additional written memorandum, para. 12).

[13] *See* Issues and Decision Memorandum from Notice of Final Results of Expedited Sunset Reviews of the Antidumping Duty Orders: Certain Pasta from Italy and Turkey (February 5, 2007). (Exhibit US-25)

circumstances reviews. Commerce made both of these determinations before the adoption of the DSB's recommendations and rulings. Moreover, both determinations addressed whether one company was the successor in interest of a second company, and was therefore entitled to the cash deposit rate already established for that second company. Commerce did not recalculate any margins of dumping in these two changed circumstances reviews. Neither of these determinations, therefore, can be said to have been made "in view of" the DSB's recommendations and rulings, which concerned Commerce's treatment of non-dumped sales.

18. The remaining 36 determinations were made in administrative reviews. Commerce made its determinations in 26 of these reviews before the DSB adopted its recommendations and rulings.

19. Of the remaining 10 determinations, 4 gave no indication that Commerce's treatment of non-dumped sales was an issue in the review.[14] Another 4 were made before the end of the reasonable period of time. In those determinations, Commerce made clear that the determinations were *not* being issued in view of the recommendations and rulings.[15] Thus, the factual predicate in *Softwood Lumber* – the Appellate Body's conclusion that the United States

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[14] *See* Issues and Decision Memorandum from the Final Results of the Administrative Review of Stainless Steel Bar from France (May 23, 2006) (Exhibit US-26); Issues and Decision Memorandum from the Final Results in the 2004-2005Administrative Review of the Antidumping Duty Order on Stainless Steel Bar from Germany (July 17, 2006) (Exhibit US-27); Issues and Decision Memorandum from the Final Results of the Administrative Review of Stainless Steel Wire Rod from Sweden (April 4, 2007) (Exhibit US-28); Issues and Decision Memorandum from the Final Results of the Antidumping Duty Order on Granular Polytetrafluoroethylene Resin from Italy (January 9, 2007) (Exhibit US-29).

[15] *See* Issues and Decision Memorandum from the Final Results of the Administrative Review of Stainless Steel Sheet and Strip in Coils from Germany; July 1, 2004 through June 30, 2005, p. 10 (December 13, 2006) (Exhibit US-30); Issues and Decision Memorandum from the Antidumping Duty Administrative Reviews of Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom for the Period of Review May 1, 2004, through April 30, 2005, pp. 11-12 (July 14, 2006) (covering determinations in case numbers 29, 30 and 31 in the EC's annex) (Exhibit US-31).

acknowledged that the administrative review was conducted "in view of" the recommendations and rulings[16] – does not exist here.

20. In one of the two remaining determinations, the 2005-2006 administrative review of Stainless Steel Bar from the United Kingdom, no party specifically raised the issue of non-dumped sales. However, one party raised the issue of the recalculation of the "all others" rate from the Section 129 determination. In response, Commerce stated that the recalculation of the all others rate from the Section 129 determination was not challengeable in the 2005-2006 administrative review. Commerce further noted that because the new all others rate did not take effect until April 23, 2007, any imports covered by this review that were subject to an all others rate were subject to the all others rate in existence *before* the recalculation.[17] Thus, again, this determination was not made "in view of" the DSB's recommendations and rulings.

21. That leaves only the determination in the 2004-2005 administrative review of Hot-Rolled Steel from the Netherlands. As an initial matter, the EC's original "as applied" challenge covered only Commerce's determination in the investigation of Hot-Rolled Steel from the Netherlands, and not any determinations from subsequent administrative reviews of the order. Commerce complied with the DSB's recommendations and rulings in the Section 129 determination covering this investigation when it granted offsets for non-dumped sales in the recalculation of the margin of dumping. Indeed, that Section 129 determination resulted in the

[16] *US – Softwood Lumber CVD Final (Article 21.5) (AB)*, para. 84 (citing U.S. additional written memorandum, para. 12).

[17] Issues and Decision Memorandum from the Antidumping Duty Administrative Review on Stainless Steel Bar from the United Kingdom – March 1, 2005, through February 28, 2006, pp. 10-11 (July 30, 2007). (Exhibit US-32)

revocation of the antidumping order on Hot-Rolled Steel from the Netherlands with respect to all imports on or after the date of revocation. The United States, therefore, had no further obligation with respect to the Appellate Body's specific "as applied" finding, which was made only with respect to that investigation determination.

22. Moreover, Commerce's determination in the 2004-2005 review cannot be said to have been made "in view of" the DSB's recommendations and rulings. In addressing the issue of non-dumped sales, Commerce stated, "With respect to the specific administrative reviews at issue in [the *US – Zeroing (EC)*] dispute, the United States has determined that each of those reviews has been superseded by a subsequent administrative review and the challenged reviews are no longer in effect."[18] Thus, Commerce clearly stated its position that the DSB's recommendations and rulings did not require Commerce to take any action with respect to the treatment of non-dumped sales in this particular review.

23. In summary, the EC has failed to show that any of these 54 subsequent determinations have the required timing and connection with the DSB's recommendations and rulings to qualify as "measures taken to comply." All of these additional determinations are outside of the terms of reference of this Panel.

24. Finally, the EC argues that these additional determinations constitute "omissions" which can be reviewed by this Panel. As the United States has argued in its written submissions, the EC's argument on this point is contradictory. That is, the EC is arguing simultaneously that the

[18] Issues and Decision Memorandum from the 2004-2005 Administrative Review of Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Antidumping Duty Administrative Review, p. 13 (May 15, 2007). (Exhibit EC-12)

measures taken to comply both exist and do not exist at the same time.[19]

25. In summary, by attempting to include these additional 54 determinations within the scope of this Article 21.5 proceeding, the EC seeks to gain the benefit of an "as such" finding where the Appellate Body expressly declined to make such a finding.

26. Lastly, with respect to the EC's claims involving injury, we note again that the EC has failed to demonstrate that these claims are within the terms of reference of this proceeding. The EC raised these claims in the original proceeding, and the original panel affirmatively declined to make findings on them. The Appellate Body noted the panel's action and did not disturb it. Because the DSB did not make recommendations and rulings in respect of these claims, the United States cannot be faulted for a failure to comply – there was nothing to comply with.

27. The United States recalls that the orders in question have been revoked.[20] Petitioners appealed the determination that resulted in revocation, but that appeal has been dismissed.[21] Thus, the antidumping duty orders in question no longer exist.

28. Mr. Chairman, members of the Panel, this concludes our opening statement. We would be pleased to respond to any questions you may have.

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[19] United States, First Written Submission, para. 45; United States, Rebuttal Submission, para. 10.

[20] *See, e.g.,* U.S. Second Written Submission, para. 64.

[21] Carpenter Technology et al. v. United States, Ct. No. 08-000082, (Ct. Int'l Trade March 31, 2008) (notice of dismissal). (Exhibit US- 33)