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

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

February 18, 2008

INTRODUCTION

1. Proceedings under Article 21.5 address disagreements "as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings [of the DSB]." A panel composed under Article 21.5, therefore, begins with the recommendations and rulings of the DSB, and examines measures that a Member has taken pursuant to those recommendations and rulings to determine if that Member is in compliance.

2. The European Communities ("EC"), however, attempts to expand the scope of these proceedings by incorporating claims regarding measures entirely distinct from those measures it originally challenged in its "as applied" claims and which were not measures taken to comply.

3. As demonstrated below, the United States has implemented the DSB's recommendations and rulings, and thus has complied with its obligations under the DSU. This Panel should reject the EC's claims of non-compliance and its effort to enlarge the obligations of the United States.

PRELIMINARY RULING REQUEST

4. Article 21.5 of the DSU applies when there is a disagreement as to the existence or consistency with a covered agreement of a measure taken to comply with recommendations and rulings of the DSB. Thus, the scope of an Article 21.5 compliance panel proceeding is inherently limited – it may only examine a measure that is taken to comply, and then only if that measure is specified in the request for the establishment of a panel.

5. The United States requests preliminary rulings concerning the EC's apparent effort to include certain determinations within the terms of reference of this proceeding, including certain administrative reviews and sunset reviews that are not measures taken to comply with the recommendations and rulings of the DSB in the original proceeding. A number of these measures also were not identified in the EC's Article 21.5 panel request.

6. The only measures that were the subject of the DSB recommendations and rulings were the investigations and administrative reviews listed in the annexes to the EC's original panel request. The EC pursued a challenge against zeroing in administrative reviews "as such" but did not prevail. Upon reviewing the EC's first submission, it appears that the EC seeks to include within the terms of reference determinations that are not properly within the terms of reference for two reasons: first, because they were not identified in the EC's Article 21.5 panel request, as required by Article 6.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), and second, because those determinations were not subject to the recommendations and rulings of the DSB, nor are they measures taken to comply.

7. Article 6.2 of the DSU provides that a panel request shall "identify the specific measures at issue." The key passage in the EC's Article 21.5 request is paragraph 7. This paragraph plainly states that the measures at issue are the investigations and administrative review determinations from the original proceeding. In its submission, however, the EC appears to take a different approach. The EC seeks to transform the "reviews" referenced in its panel request as

separate and distinct from the "measures at issue" into "measures" within the terms of reference. Under Article 6.2, however, the EC was obliged, *in its panel request*, to "identify the specific measures at issue." The only measures identified as "measures in question" were the investigations and administrative reviews from the original proceeding. Therefore, any "measures" other than those reviews are not "measures" subject to findings in this proceeding.

8. For the foregoing reasons, the United States requests that the Panel reject the EC's attempt to use its first submission to expand the terms of reference beyond the specific measures identified in its panel request, i.e, the 16 administrative reviews in the original proceeding.

9. The EC's attempt to use its submission to expand the measures within the terms of reference of this proceeding is flawed for a second reason. The scope of an Article 21.5 proceeding is limited to the issue of the existence or consistency of measures to taken to comply.

10. Pursuant to Article 6.2 of the DSU, in its request for the establishment of a panel in the original proceeding, the EC was required to "identify *the specific measures at issue*" (emphasis added). That identification in turn informs the question of what is a "measure taken to comply."

11. There must be an express link between the alleged measures taken to comply and the DSB's recommendations and rulings. Accordingly, in assessing whether a challenged measure is a measure taken to comply, the Panel must first look to the DSB's recommendations and rulings. Nonetheless, not every measure that has some connection with, or that could have some impact upon a measure taken to comply may be scrutinized in an Article 21.5 proceeding. Rather, such measures falling within the competence of an Article 21.5 panel are those "taken *in the direction of, or for the purpose of achieving* compliance [with the DSB's recommendations and rulings]."

12. Here, however, the EC seeks to expand the terms of reference beyond the inquiry into the existence or consistency of measures taken to comply. Precisely what the EC seeks to include is something of a moving target.

13. The United States recalls that the EC challenged 16 administrative reviews, and the Appellate Body concluded that those reviews were inconsistent with the Antidumping Agreement. Thus, those 16 reviews were the subject of the DSB recommendations and rulings. None of the other "measures" the EC seeks to include in these proceedings – such as subsequent reviews or assessment instructions – was the basis for a DSB recommendation or ruling.

14. In the EC's original panel request, the EC identified determinations made by Commerce in sixteen administrative reviews, but specifically challenged *particular margins* in those determinations. The EC also challenged *multiple reviews* of the same product. Thus, in the original proceeding, the EC treated each review as a separate measure and in fact challenged specific margins within each such measure. Moreover, while the Appellate Body found that Commerce's determination of margins of dumping "as applied" in the sixteen administrative

reviews was inconsistent with certain WTO obligations, the Appellate Body denied the EC's request that it find Commerce's methodology for calculating margins of dumping in administrative reviews to be "as such" inconsistent with any WTO obligations.

15. This is consistent with the fact that in each administrative review, Commerce examines different facts, a different time period, and a different set of transactions. Thus, in its initial panel request, the EC recognized that a determination from one administrative review is separate and distinct from a determination made in a subsequent administrative review.

16. The EC cannot ignore the consequences of this. Accordingly, the EC cannot bring entirely new and distinct determinations concerning different periods of time into this compliance proceeding simply because those determinations involved the same subject merchandise. Rather, the scope of the DSB's "as applied" recommendations and rulings are limited to those specific determinations that the EC indicated that it was challenging in its original panel request. Anything else would be directly contrary to the fact that the DSB's recommendations and rulings were limited to these 16 administrative reviews "as applied" and explicitly did not include an "as such" recommendation or ruling.

17. The EC apparently understood this, as it filed a second challenge to Commerce's calculation methodology in an entirely separate DSB proceeding. In the *US – Zeroing (EC) II* panel request, for example, the EC identifies the determination in the administrative review of Certain Pasta from Italy covering sales made by PAM from July 1, 2002 through June 30, 2003 as an "as applied" measure. This very same determination is also identified by the EC as a review in the annex to its panel request that is "related to" the "measures in question." The EC recognized that these subsequent determinations are distinct measures and not measures taken to comply with the DSB's recommendations and rulings in this dispute.

18. Further undermining the EC's contention that subsequent reviews are measures taken to comply is the EC's argument that it is, in fact, challenging the U.S. *"omissions"* to take the necessary measures to comply. The EC cannot have it both ways: if the United States failed to comply by "omission," then any corresponding finding against the United States should be that a measure was *not* taken to comply, not that subsequent determinations are not consistent with U.S. obligations.

19. Many of the distinct administrative review determinations identified by the EC in its 21.5 panel request cannot be considered measures taken to comply because they pre-date the adoption of the DSB's recommendations and rulings. "As a whole, Article 21 deals with events *subsequent* to the DSB's adoption of recommendations and rulings in a particular dispute." Determinations made by a Member prior to the adoption of a dispute settlement report are not taken for the purpose of achieving compliance and cannot be within the scope of an Article 21.5 proceeding.

20. According to the EC, the U.S. implementation obligations with respect to the "as applied" claims extend to distinct determinations which supercede the measures described in its original panel request. To this end, the EC is attempting to use these Article 21.5 proceedings to obtain the effect of an "as such" finding that the Appellate Body expressly declined to make.

21. The Panel will recall that the EC made an "as such" claim against Commerce's methodology for calculating margins of dumping in administrative reviews in its initial panel request. The original panel rejected this claim. The Appellate Body also declined to find that Commerce's calculation methodology in administrative reviews was inconsistent with U.S. WTO obligations "as such." Rather, the Appellate Body limited itself to "as applied" findings concerning the sixteen Commerce determinations originally challenged by the EC.

22. The EC, however, would have the United States recalculate the margins of dumping in any subsequent determination which happened to involve the same products that were the subject of the measures challenged in the initial panel request. That is, the EC seeks the benefit of an "as such" finding, when neither the original panel nor the Appellate Body made one in this dispute. The panel should reject the EC's efforts.

23. The EC also attempts to challenge certain sunset reviews. The United States recalls that the EC did not challenge any sunset reviews in the original proceeding and, thus, there are no DSB recommendations or rulings relating to sunset reviews. Consequently, the sunset reviews identified in the EC's 21.5 panel request cannot be within the terms of reference of this panel.

24. The EC relies on *US – Zeroing (Japan)* for support. However, that dispute only confirms the fundamental flaw in the EC's posture. In *US – Zeroing (Japan)*, Japan in its panel request in the original proceeding expressly challenged sunset reviews and included a claim that the United States had acted inconsistently with Article 11.3. By contrast, in its panel request in the original proceeding, the EC did not challenge sunset reviews nor set out a claim concerning Article 11.3. (Indeed, the EC appears to have recognized that claims against sunset reviews must be made in the original panel request, because it has expressly done so in its other zeroing dispute against the United States.) The EC cannot cure its failure to pursue a claim in the original proceeding by seeking to include it in a compliance proceeding.

25. In addition, the EC's Article 21.5 panel request did not identify the sunset reviews as measures within the terms of reference of this proceeding. Rather, the sunset reviews are simply identified as "reviews" related to *the measures in question.* Therefore, with respect to those reviews, the EC did not "specify the measures at issue" as required by Article 6.2.

26. Thus, the United States respectfully requests the Panel to find that the only measures within the terms of reference of this proceeding are the 15 original investigations and 16 administrative reviews referenced in paragraph 7 of the EC's Article 21.5 panel request.

ARGUMENT

27. The EC's claims regarding the Section 129 determinations on Stainless Steel Bar from France, Germany, Italy and the United Kingdom should be rejected because these claims concern measures that are no longer in effect. Commerce revoked the orders covering Stainless Steel Bar from France, Germany, Italy and the United Kingdom effective as of March 7, 2007.

28. The Section 129 determinations, which resulted in a change to the all others rates, became effective on April 23, 2007. Thus, imports made on or after April 23, 2007, from exporters or producers who did not have their own cash deposit rate were subject to the posting of a cash deposit at the new all others rate. However, the revocation of the antidumping duty orders on Stainless Steel Bar from France, Italy and the United Kingdom became effective as of March 7, 2007. Pursuant to this revocation, the United States will refund any cash deposits posted on imports of stainless steel bar from these countries made on or after March 7, 2007 and those imports will not be subject to any final assessment of antidumping duties. Alternatively, the EC also has failed to demonstrate that the calculation of the all others rates from the Section 129 determinations was inconsistent with the AD Agreement.

29. Consistent with Article 6.10, in the original investigations Commerce limited its examination to the largest percentage of the volume of the exports from the country in question which could reasonably be investigated. Commerce then calculated an all others rate to apply to imports from those exporters or producers who did not have their own margin of dumping, consistent with Article 9.4. In the Section 129 Determinations, Commerce recalculated the rates for the selected respondents as well as the all others rate. For the three stainless steel bar determinations challenged by the EC, each of the margins of dumping Commerce calculated were either zero or *de minimis*, or based on facts available. Article 9.4 does not address this situation, and Commerce determined the simple average of the margins of dumping calculated in each of the Section 129 Determinations to establish the all others rate for that determination.

30. The EC's contention here is not with the reasonableness of the methodology Commerce employed. Rather, the EC's arguments are results-oriented, pointing to the fact that the resulting all others rates were higher than those calculated in the original investigations. Should the Panel reach this claim, which it need not, the EC has failed to demonstrate that Commerce acted inconsistently with Articles 6.8, 6.10 or 9.4 of the AD Agreement, and the Panel should so find.

31. The EC contends that the United States acted inconsistently with the AD Agreement and GATT 1994 by maintaining the orders with respect to Stainless Steel Bar from France, Germany, Italy and the United Kingdom without reconsidering the issue of injury after the Section 129 Determinations found that some of the exporters originally investigated were not dumping. The Panel should reject this contention because it concerns measures that are no longer in effect.

32. Pursuant to the sunset reviews discussed above, the United States revoked the orders on Stainless Steel Bar from France, Germany, Italy and the United Kingdom effective March 7, 2007. Thus, contrary to the EC's contention, the United States no longer maintains antidumping duties on products subject to these orders. Indeed, the revocation is effective more than one month prior to the end of the reasonable period of time. The United States will refund the cash deposits on any imports occurring on or after March 7, 2007. Additionally, these imports will not be subject to any final assessment of antidumping duties in the future.

33. As a procedural matter, the United States notes that the EC asserted these claims in the original proceeding, and the original panel declined to consider them. Should the EC pursue these claims even though the order has been revoked, the United States reserves its right to request a ruling from the Panel that such claims are not within its terms of reference.

34. Turning to the EC's claims regarding the determination in the investigation of Certain Hot-Rolled Carbon Steel Products from the Netherlands, the United States has complied with the recommendations and rulings of the DSB by providing offsets for non-dumped sales when it recalculated the margin of dumping in the Section 129 determination. As a result of the Section 129 determination, the antidumping duty order was revoked effective April 23, 2007. Moreover, as a result of a subsequent Commerce determination in a sunset review, the revocation of the antidumping duty order became effective as of November 29, 2006. All cash deposits made on imports occurring on or after November 29, 2006 have been or will be refunded. Additionally, imports made on or after November 29, 2006 are not subject to any final assessment of antidumping duties. Thus, the EC's claims concern a measure that is no longer in effect.

35. In its First Written Submission, the EC raised two arguments concerning the determination in the investigation of Certain Hot-Rolled Carbon Steel Products from the Netherlands. First, the EC argued that the United States has assessed antidumping duties pursuant to determinations made in subsequent administrative reviews, where Commerce continued to deny offsets for non-dumped sales. Second, the EC contends that as a result of a rescission of an administrative review, the United States assessed antidumping duties at the cash deposit rate established in the original investigation.

36. These final assessments are the result of determinations distinct from the determination made in the investigation. With respect to the EC's first argument, those assessment instructions were issued pursuant to the determination made in the 2004-05 administrative review. With respect to the EC's second argument, those assessment instructions were issued pursuant to the determination (in that case to terminate) the 2005-06 administrative review.

37. Neither of these two subsequent determinations are within the scope of this Article 21.5 proceeding. The EC's original panel request identified only Commerce's determination in the investigation of Certain Hot-Rolled Carbon Steel Products from the Netherlands. Similarly, the original panel's "as applied" findings covered only Commerce's determination from the

investigation. Thus, the Panel should reject the EC's claims as beyond the scope of this Article 21.5 dispute.

38. Turning to Commerce's Section 129 determination concerning the investigation of Stainless Steel Wire Rod from Sweden, Commerce complied with the recommendations and rulings of the DSB by providing offsets for non-dumped sales in the recalculation of the margin of dumping. As a result of the Section 129 determination, Commerce revoked the antidumping duty order on Stainless Steel Wire Rod from Sweden effective April 23, 2007.

39. The EC contends that the United States has established new cash deposit rates in Stainless Steel Wire Rod from Sweden based on an administrative review that Commerce published after concluding the Section 129 determination. The EC's statement of facts, however, is in error.

40. Commerce did publish the amended final results of the 2004-05 administrative review of Stainless Steel Wire Rod from Sweden on May 9, 2007. In those amended final results, Commerce did state that it would notify CBP of the revised cash deposit resulting from the review, that the cash deposit rate would be effective as of the date of publication, and that "the cash deposit requirement shall remain in effect until further notice." However, on May 10, 2007, Commerce provided "further notice" by issuing instructions to CBP informing it of the revocation resulting from the Section 129 determination. These instructions informed CBP that any cash deposits paid on imports of wire rod from Sweden made on or after April 23, 2007, were to be refunded. All imports made on or after April 23, 2007, would not be subject to the final assessment of antidumping duties.

41. As a result of the revocation of the antidumping duty order on stainless steel wire rod from Sweden, Commerce did not issue new cash deposit instructions to CBP based on the determination made in the 2004-05 administrative review. Accordingly, the United States requests that this Panel reject the EC's claim regarding the Section 129 determination in Stainless Steel Wire Rod from Sweden because Commerce provided offsets for non-dumped sales in the recalculation of the margin of dumping and that measure is no longer in effect.

42. In this proceeding – a compliance proceeding – the EC argues for the first time that in the *original* investigation of stainless steel sheet and strip in coils ("SSSS") from Italy, Commerce made a calculation error. Although the EC could have made these claims in the original dispute, it did not. Therefore, as discussed below, the EC's claims are beyond the terms of reference of this proceeding.

43. Second, the EC has failed to make a prima facie case with respect to the claims asserted.

44. Finally, Commerce's decision not to consider the respondent's argument, when raised for the first time in the section 129 proceeding, is fully consistent with an investigating authority's right to the orderly conduct of its proceedings.

45. In the underlying dispute, the EC obtained DSB recommendations and rulings with respect to Commerce determinations in sixteen administrative reviews. For the reasons set forth in this section, the United States has taken measures to comply with respect to each of those determinations, and as a result of those measures, the United States has complied with those recommendations and rulings.

46. In some instances, the United States has revoked the antidumping duty order giving rise to the determinations challenged by the EC. Under U.S. law, the United States no longer has the authority to collect cash deposits, or assess antidumping duties, on products subject to a revoked antidumping order which are imported on or after the date of revocation. This is the situation with respect to the four of the sixteen determinations challenged by the EC. With respect to the remaining reviews that the EC challenged, the cash deposit rate established in the challenged determination (the only aspect of the administrative review that could – absent the U.S. compliance – have continued beyond the expiration of the RPT), is no longer in effect. To the extent that a cash deposit rate is currently in effect with respect to these same products from the same Member States of the EC, that is the result of a separate determination of dumping made in a separate administrative review examining distinct facts during a subsequent period of time.

47. Turning first to the antidumping duty orders revoked by the United States, these orders form the basis under U.S. law for the authority to impose antidumping duties. That is, without an antidumping duty order in place, the United States cannot collect cash deposits and assess antidumping duties on imports made on or after the date of revocation.

48. In its annex to its panel request, the EC acknowledges that the following antidumping orders have been revoked in whole or with respect to certain companies identified in the EC's original panel request:

(1) Industrial Nitrocellulose from France (revocation effective August 1, 2003)
(2) Industrial Nitrocellulose from the United Kingdom (revocation effective July 1, 2003)
(3) Certain Pasta from Italy (revoked for Ferrara effective February 9, 2005, and for Pallante on November 29, 2005); and
(4) Stainless Steel Sheet and Strip in Coils from France (revocation effective July 27, 2004).

49. By way of example, with regard to Industrial Nitrocellulose from France, the United States revoked the antidumping duty order effective August 1, 2003. This means that the United States ceased collecting cash deposits on imports occurring on or after that date, and such

imports incur no antidumping duty liability. Therefore, as of the date of the EC's panel request in this Article 21.5 proceeding (and, in fact, as of the expiry of the reasonable period of time established in this dispute), no imports are affected by that antidumping duty order, and the measure challenged by the EC in the underlying proceeding has been terminated. The same is true with respect to the other antidumping duty orders that the United States has revoked. The elimination of these orders has thus brought the United States into compliance with the recommendations and rulings related to those orders.

50. Turning to Commerce's determinations in the remaining administrative reviews challenged by the EC in its initial panel request, the United States has implemented the recommendations and rulings because each of those reviews has been superceded by Commerce determinations in subsequent administrative reviews. The chart attached as Exhibit US-17 specifies the subsequent Commerce determinations that have superceded each of the administrative reviews subject to the DSB's recommendations and rulings. The determinations in these subsequent reviews cover the same merchandise and the same exporters or producers identified by the EC. As noted above, however, the subsequent reviews examined a wholly different set of sales transactions occurring during a different period of time. In these subsequent determinations, Commerce calculated new margins of dumping, and put in place new cash deposits for the companies examined. As a result, the cash deposit rates that had been established in the determinations that the EC originally challenged have been superceded, because cash deposit rates from a determination in one administrative remain in effect only until a determination in a subsequent administrative review establishes a new cash deposit rate – once Commerce issues a determination in a subsequent administrative review involving the same merchandise and the same exporter or producer, the former cash deposit rate is terminated.

51. Consequently, as of the date of the EC's panel request in this Article 21.5 proceeding (and in fact, as of the expiry of the reasonable period of time established in this dispute), no further entries are subject to antidumping rates established in the administrative reviews that the EC challenged in the underlying proceeding. Accordingly, because the challenged determinations, and in particular their cash deposit rates, have been superceded, the United States has brought the challenged measures into compliance with the DSB's recommendations and rulings.

52. In this connection, the United States notes that it is puzzled by the occasional references in the EC's first submission to "definitive assessment of duties" and "collect[ion] of duties pursuant to liquidation instructions" after April 9, 2007 (the end of the reasonable period of time established in this dispute). While the point of these references is not at all clear, the United States assumes that the EC remains faithful to its long-held and oft-repeated position that, for purposes of assessing compliance with the rulings and recommendations of the DSB relating to duties, one examines the treatment accorded to goods entered on or after the expiration of the reasonable period of time. The EC took a similar view when it implemented the

recommendations and rulings of the DSB in the dispute *EC – Customs Classification of Frozen Boneless Chicken Cuts*.

53. Indeed, this EC position follows logically from the fact that the WTO dispute settlement provides prospective relief, not retrospective relief. For example, Article 19.1 of the DSU provides, "Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement" (footnotes omitted). The ordinary meaning of the term "bring" is to "[p]roduce as a consequence," or "cause to become." These definitions give an indication of future action. Furthermore, under DSU Article 3.7, "the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements." The withdrawal of the inconsistent measure is meant to provide a prospective solution to the nullification or impairment of the benefits accruing under the covered agreements, and not to provide compensation for any past harm.

54. Furthermore, in a WTO dispute challenging an antidumping or countervailing duty measure, the measure in question is a border measure. Accordingly, eliminating a WTO-inconsistent antidumping or countervailing duty measure prospectively at the border will constitute "withdrawal" of the measure within the meaning of DSU Article 3.7. And in this case, by superceding the administrative reviews at issue in the underlying proceeding, the United States has withdrawn the challenged measures.

55. The EC claims that the United States breached Article 21.3 and Article 21.3(a) by implementing its measures taken to comply on April 23, 2007, two weeks after the conclusion of the reasonable period of time. The EC fails to explain how U.S. implementation of the recommendations and rulings of the DSB constituted a breach of Article 21.3 or Article 21.3(a).

56. Contrary to the EC's assertion, the report in *Australia – Salmon* does not support the EC's position. That panel simply concluded that the measures taken to comply did not exist at the end of the reasonable period of time. The panel made no finding that Australia had breached Article 21.3, or any of its subparagraphs, as a result. By contrast, the United States does find support for the futility of such a finding in the report in *US – Upland Cotton (21.5).* There, the panel explained that a finding of a breach of Article 21.3 would "be of little relevance to the effective resolution of disputes."

57. This Panel should decline to make the suggestion requested by the EC. A Member retains the right to determine the manner of implementing DSB recommendations and rulings. The question in this proceeding is the existence or consistency of the measure taken to comply, not what future actions the United States should take to ensure compliance.