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

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

April 10, 2008

Mr. Chairman, members of the Panel:

1. In this closing statement, we will address three of the major issues discussed during this meeting.

2. First, the United States and the EC agreed in written submissions that WTO relief is prospective. In its submissions, the EC took pains to describe the U.S. duty assessment system and the fact that "final" liability attaches at a point later in time than entry. Thus, it is the EC that emphasized the relevance of a retrospective system to the issues in this dispute. We responded by pointing out that "final" liability is not germane to the question of when a Member's duty to provide relief is triggered. We pointed out that the date of entry of the good is the only date upon which to evaluate whether relief is due. To conclude otherwise would be to discriminate against Members like the United States for having a retrospective duty assessment system, one expressly provided for under Article 9.3.1 of the Antidumping Agreement. As we explained, and as the original panel found, in a retrospective system, liability attaches at the time of entry, but final

liability attaches at a later date. By contrast, in a prospective system, final liability is determined at the time of entry. This is precisely the distinction the EC emphasized when, as recently as its rebuttal submission, it referred to the "particularities of the US system of duty assessment."[1] If final liability is the relevant point for assessing whether relief must be provided, then Members with prospective systems will have no implementation obligations in respect of entries made prior to the expiry of the reasonable period of time, but Members with retrospective systems will have such obligations in the event that final liability is calculated *after* the expiry of the RPT.

3. Notably, as of this week, the EC seems to be abandoning its theory that the determination of final liability *after* importation is "particular" to retrospective systems, implying that it is equally applicable to prospective systems. Perhaps this new theory reflects acknowledgment of the fact that, otherwise, using final liability as the basis for establishing implementation obligations would put retrospective systems at a disadvantage. However, the EC's sudden change of position is not supported by the text of Articles 9.3.1 and 9.3.2, its written submissions,[2] or the panel report,[3] all of which make clear that calculation of "final liability" *after* importation is a facet "particular" (to borrow the EC's term) to the U.S. retrospective system.

4. In addition, the EC yesterday argued that the *Ikea* case is an example of how the EC provides retrospective relief. *Ikea* does not stand for the proposition that the EC provides retrospective relief *in connection with its implementation of recommendations and rulings.* In

[1] *See* EC Second Written Submission, para. 69.
[2] *See* EC Second Written Submission, paras. 69-76.
[3] Panel Report, para. 2.4.

the *Ikea* case, the European Court of Justice expressly *rejected* the notion of refunding the duties on that basis.[4] Instead, the Court found that zeroing was inconsistent with paragraph 2(11) of the EC's basic regulation and was "a manifest error of assessment with regard to Community law."[5] On *that* basis – that zeroing was inconsistent with the EC's own regulations, rather than the Antidumping Agreement – the Court ordered repayment of duties.[6] Thus, the EC may in some circumstances provide refunds under its municipal law; but that does not mean that there is any WTO obligation to do so.

5. We have great trouble reconciling the EC's current litigation position – that entries made before the end of the reasonable period of time are subject to refunds – with: (1) EC statements to the contrary, as cited in our first submission at paragraph 100, in which the EC makes clear that it will not provide reimbursements for prior entries; (2) the very nature of "prospective relief"; and (3) the EC's emphasis on the fact that "final liability" attaches at a later point in time in a retrospective system.[7] If we accept the theory proffered by the EC this week – that refunds must be given on imports dating back to some undetermined date preceding the expiry of the RPT – the question of "final" liability particular to a retrospective assessment system would be irrelevant.

6. Second, the EC has relied heavily on *Softwood Lumber* for the proposition that these "subsequent reviews" have a sufficient "nexus" to the 15 investigations and 16 administrative reviews found to be inconsistent "as applied" in the original proceeding. The EC's reliance is

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[4] *See* Paragraphs 35, 67, and 69 (Exhibit US-34).
[5] Paragraph 56 (Exhibit US-34).
[6] Paragraph 69 (Exhibit US-34).
[7] *See, e.g.*, EC Second Written Submission, paras. 69-76.

misplaced for factual and legal reasons.

7. First, as we noted yesterday, the assessment reviews covered distinct sales during distinct periods of time and could address different companies. As an illustration, we would call the Panel's attention to the cases concerning pasta from Italy. In the investigation, Commerce examined the sales of seven different Italian pasta companies. In the assessment review for the 2001-02 period, Commerce examined a total of ten companies, nine of which had not been examined in the original investigation. Similarly, in the assessment review for the 2002-03 period, Commerce reviewed eight companies, none of which was examined in the original investigation.

8. Furthermore, we note that the legal and factual distinctions between the two types of proceedings with respect to the issue of zeroing are more relevant here than was the case in *Softwood Lumber*. There, the issue was the pass-through of subsidies – and the legal basis for the panel's consideration did not differ as between the investigation and the administrative review. With respect to the issue of zeroing, however, that is not the case. Even the EC implicitly recognized this by referring to "model zeroing" in investigations and "simple zeroing" in reviews. This distinction flows through to the legal bases for the findings against zeroing – which rely significantly on the text of Article 2.4.2 and, in particular, the phrase "all comparable export transactions" in the context of investigations. In the context of reviews, however, that textual basis is absent and the Appellate Body has, instead, relied on the term "product" and the non-textual phrase "product as a whole" to find that a margin of dumping cannot be calculated in a proceeding using zeroing. Given the distinctions in the factual and legal basis for the findings

on investigations as compared to reviews, it would be inappropriate to find that there is a sufficiently close nexus to address the subsequent reviews in an Article 21.5 proceeding.

9. Moreover, as we noted yesterday, to conclude that one administrative review always has a nexus to the previous administrative review would run counter to the Appellate Body's admonition in *Softwood Lumber* that administrative reviews are not *per se* measures taken to comply. One administrative review routinely succeeds another. To conclude on that basis that subsequent reviews are measures taken to comply would undermine the Appellate Body's express limitation of its findings in this dispute to the measures "as applied." It would also contradict the Appellate Body's view that Article 21.5 proceedings "logically must be *narrower*" than the original proceedings.[8] Were the EC to prevail on its claims in this regard, the scope of these proceedings that the matter covered would be nearly 3 times *greater* than those covered by the original proceedings.

10. Our last point concerns due process. The United States has raised serious concerns about the EC's Article 21.5 panel request. The EC dismisses these concerns as merely "formal." With respect, the United States finds that a disturbing position to take. The provisions in the DSU were specifically negotiated and agreed upon, and they cannot be casually dismissed whenever adherence to those provisions proves inconvenient.

11. In addition, the EC's view on the mutable nature of "words" goes far to explain what the United States has found to be an ever-shifting scope of challenged measures, both in the original proceeding and here. For example, the United States understood from the EC's panel request

[8] *US – Softwood Lumber (CVD) (21.5),* para. 72 (emphasis added).

that it was not challenging the subsequent reviews themselves, but rather was presenting them as evidence of the undermining of U.S. measures taken to comply (that is, the EC was attempting to assert that these subsequent reviews resulted in the "non-existence" of measures taken to comply in the language of Article 21.5) in respect of the 15 investigations and 16 administrative reviews that were the subject of the DSB recommendations and rulings in the original proceeding. We did not consider that the subsequent reviews themselves would be transformed into "measures taken to comply," or measures that were part of the DSB recommendations and rulings, which is how the EC began to describe them in its first written submission. In the original panel request, the EC identified certain reviews "as amended." In its submissions in the original proceeding, the EC then referred to "any amendments," a term not found in the panel request *except* to refer to determinations amended under U.S. law. The EC now seeks to construe the phrase "any amendments" to mean any subsequent acts relating to the original challenged measures. That is a far cry from the limited and specific use of the term "amended" in the original panel request.

12. Similarly, in its panel request in this proceeding, the EC specifically referred to the "measures in question" as the 15 investigations and 16 administrative reviews found to be inconsistent "as applied" in the original proceeding. Now the EC considers that the scope of the measures in this proceeding is not limited to the measures it identified *as* measures in its panel request, but rather extends to any of the reviews listed in the Annexes to its panel request. To be sure, a Member is not necessarily obliged to refer to the measures in question as "measures"; but when a Member expressly uses the term "measure" – a term of art referenced in Article 6.2 – to describe certain determinations, it can be reasonably inferred that *not* describing other

determinations as "measures" has meaning, and that those determinations are in fact not measures subject to challenge in the proceeding. Under Article 6.2 of the DSU, the complaining party bears a clear obligation to identify, in its panel request, "the *specific* measures at issue."[9] In that way, the responding Member and potential third parties are provided clear notification of the measures at issue. It is not for the responding Member to have to guess which measures are at issue, nor should the responding Member or potential third parties bear the adverse consequences of what the complaining party may later decide was an ill-advised word choice.

13. It is evident that the EC wishes to undo the limited "as applied" findings of the Appellate Body – while accusing the United States of declining to accept those same findings unconditionally. However, these results cannot be obtained at the expense of the procedural requirements set out in the DSU, both in Article 6.2 and in Article 21. These concerns are not "merely formal" but flow from the results of the particular negotiation and agreement by WTO Members.

14. The EC has also stated repeatedly in this proceeding that the "words" don't really matter. This is a somewhat astonishing position to take in a dispute involving matters of treaty interpretation. The United States is reminded of similar views taken by Humpty Dumpty in *Through the Looking Glass.* "When I use a word, it means just what I choose it to mean." Alice replies, "The question is whether you can make words mean so many different things." And Humpty Dumpty responds: "The question is, which is to be master – that's all."

15. Words do in fact matter – Members negotiated and agreed on specific words in the

[9] Emphasis added.

covered agreements. Complaining parties may not "choose to be master" by giving words different meanings over the course of a proceeding depending on what will net the best result. That is precisely why due process matters.

16. Finally, we once again would like to thank the Panel and the Secretariat for their work in this matter, and for opening this meeting to the public.