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 REBUTTAL SUBMISSION OF THE UNITED STATES OF AMERICA

March 17, 2008

I. Introduction

1. In the original proceeding, the EC prevailed with respect to its "as applied" claims involving 15 investigations and 16 administrative reviews. The EC did not prevail with respect to its "as such" claims. It seems clear, then, that the questions before this compliance panel pertain to U.S. compliance with the findings concerning those specific investigations and reviews. The United States has removed the border measures in question. The United States has therefore complied with the recommendations and rulings of the DSB.

II. The EC's Claims under Articles 8.3 and 21.5

2. At the outset, the United States wishes to address the EC's claims, advanced for the first time in its rebuttal submission, concerning Articles 8.3 and 21.5. Specifically, the EC has asked the Panel to rule on its own composition, and, in particular, to find that it was not composed in a manner consistent with Articles 21.5 and 8.3 of the DSU. It would be tempting for a responding party to agree with such a claim, as it would mean the panel in question had no authority to make findings on either of these claims, or the claims in the panel request. However, taking that position would do an injustice to the dispute settlement system, and thus the United States simply points out that it is struck by the irony in the EC's self-defeating, illogical, and unsupportable claim.

3. These claims are not within the terms of reference of this Panel because they are not part of the "matter" referred to the DSB by the EC in its panel request. These claims are not about a measure identified in that panel request. In fact it is unclear, in light of DSU 6.2 and 7.1, how such a claim could ever be within the scope of a panel's terms of reference.

4. At the same time, the United States would like to note that the EC did not have the permission of the United States to disclose anything that the United States may or may not have said during the panel composition process. The United States is deeply concerned by the EC's unilateral actions in this regard. The United States therefore requests the Panel to strike from the record any discussion of the panel selection process (other than the EC's own selective allegations concerning its own positions) and request that third parties destroy or return this information.

III. The EC's Arguments Go Beyond the Terms of Reference of this Panel

5. The EC's response to the U.S. request for a preliminary ruling only reinforces the deficiencies in the panel request. It is telling that the EC felt the need to include an entire section defending its view on the scope of a proceeding that *it* initiated – before the United States had even filed its first submission. Typically a complaining Party *understands*, and does not doubt, that its submission is consistent with the terms of reference in its panel request and therefore feels no need to make anticipatory assertions in that regard.

6. The EC contends that the "subsequent determinations" identified in the Annex to its panel request in this proceeding were part of the terms of reference of the original proceeding, that they

are measures taken to comply, and that they are "omissions". For instance, not only is the EC arguing that these determinations are measures from the original proceeding as well as measures taken to comply, but the EC also argues that measures taken to comply both exist and do not exist, at the same time. These propositions are, of course, mutually contradictory.

7. While the United States understands why the EC has great difficulty in finding a legal theory to justify why this Panel should consider those determinations to fall within its terms of reference, and why the EC would therefore write a series of contradictory arguments in the hopes that one of them might find favor, the United States regrets that – by the rebuttal submission – the complaining party in this matter has been unable to simplify matters for the Panel.

8. The United States also regrets that the EC would resort to characterizing the U.S. arguments in connection with the preliminary ruling request as "so patently absurd as to barely require further comment." Having articulated that view, the EC nevertheless goes on to present two pages of commentary that does not address the basic question.

9. The crux of the matter is simple: why would the EC elect to refer in its panel request to the determinations in the 15 investigations and 16 administrative reviews as "measures" – a term with a particular meaning in the context of Article 6.2 of the DSU – but to all other determinations referenced in that request as "reviews"? The EC's own jurisdictional plea in its first submission exposes the EC's awareness that the panel request would be read just that way, and thus the EC took great pains to argue, or overargue, that the panel request should be read more broadly.

10. The United States is not ignoring or deliberately misconstruing the express terms of paragraph 7 of the panel request. The EC acknowledges that the panel request refers to "reviews *related to* the measures in question." The EC appears to assume that the words "related to" transform the "reviews" into "measures" included within the terms of reference for purposes of its panel request. However, nowhere does the panel request state that those reviews are in fact the measures in question.

11. The EC continues to contend that its reference to "omissions" brings the reviews in the Annex within the terms of reference. However, an omission is a failure to act, not an action; the reviews are "actions"; and the reviews are therefore not omissions. Thus, a fair reading of the panel request does not allow subsequent reviews to be read into the word "omission."

12. Finally, the United States would note that the EC has used a variety of terms to characterize its views on the measures at issue. The EC uses "subsequent reviews," "assessment instructions," and "amendments." The EC appears to use them somewhat interchangeably, which adds to the confusion.

13. In the view of the EC, the subsequent reviews listed in the Annex to its panel request were actually measures from the *original* dispute. It appears that the EC relies upon the use of the phrase "amendments" from the original proceeding as support for this proposition. The EC has failed to establish that these subsequent reviews are "amendments." The EC has failed to establish that the subsequent reviews were part of the original proceeding.

14. The EC, in its original panel request, directly referenced amended determinations in the context of U.S. antidumping law. U.S. law provides a procedure to correct or remove any faults or errors in a Commerce antidumping determination. Thus, the reference to "amendments" has a precise meaning in the context of this dispute. It refers to corrections to the measures identified in the original proceeding; but it does not refer to *subsequent* determinations, which involve different entries, different time periods, and perhaps even different parties. The Annex to the original dispute itself reflects this fact. In Annex II, the EC lists *as separate "cases"* multiple administrative reviews relating to the same order. The EC's own original panel request therefore confirms that the phrase "amendments" did not refer to subsequent determinations, and that the argument that the EC makes in this proceeding is therefore incorrect.

15. Similarly, sunset reviews are not amendments "to the original measures" either, despite the EC's assertion to the contrary. As noted above, administrative reviews are distinct proceedings because they involve different time periods and transactions. Sunset reviews are distinct from investigations and administrative reviews because they determine whether the expiration of an antidumping duty would be likely to lead to the continuation or recurrence of dumping and injury. They do not determine antidumping duty liability.

16. Thus, a determination in a sunset review is not a mere correction or removal of the faults or errors from an investigation, but rather a separate determination for a separate purpose based on different evidentiary standards. Like many of the other determinations listed in the EC's annex to its Article 21.5 panel request, these sunset review determinations did not exist at the time of the establishment of the original panel.

17. A further flaw with the EC's attempt to expand the terms of reference to include the subsequent determinations listed in the Annex is that many of these determinations did not yet exist at the time of the establishment of the original panel. A matter may only be referred to a panel if "final action has been taken by the administering authorities." AD Agreement, Article 17.4. Measures that are not yet in existence at the time of panel establishment are not within a panel's terms of reference under the DSU.

18. The EC's original "as applied" claims could not be as broad as the EC now contends because that would mean that the EC's claim encompassed Commerce determinations and actions that were not in existence at the time of the establishment of the original panel. The original panel was established at the March 19, 2004 DSB meeting. Yet most of the subsequent

determinations identified by the EC in its annex to its Article 21.5 panel request were made *after* March 19, 2004.

19. The United States would further note that those determinations listed in the Annex were made *prior* to the EC's original corrected panel request. Thus, the EC is using the concept of "subsequent determinations" to include in this proceeding determinations that it *could* have included not only in its original panel request, but in its corrected request. This is still a further expansion of the findings in the original proceeding.

20. The EC further maintains that the subsequent determinations listed in its annex to its Article 21.5 panel request are measures taken to comply, and are thus within the scope of this proceeding.

21. The EC has asserted that these determinations are "closely connected" to the original investigations and administrative reviews identified in the original proceeding. Whether a determination has *a* connection to the DSB recommendations and rulings is not sufficient to bring that determination within the scope of an Article 21.5 proceeding. As the Appellate Body stated, not every measure that has "some connection with," "could have an impact on," or could "possibly undermine" a measure taken to comply may be scrutinized in an Article 21.5 proceeding.

22. It is clear that not only is the EC seeking to have the Panel transform the as applied findings of the original proceeding to *future* events, but it is also trying to go back in time to have the Panel extend these findings to *past* events. However, the Panel's terms of reference are clear. They are limited to the determinations in the 15 investigations and 16 administrative reviews, and not to reviews occurring prior to the adoption of the recommendations and rulings in this dispute.

23. The EC maintains that it is not only challenging these subsequent determinations as measures taken to comply. Rather, the EC argues that it is challenging the "*omissions or deficiencies*" of the United States as reflected in these subsequent determinations. This only further demonstrates, however, that the EC is attempting to gain the benefits of an "as such" finding, when the Appellate Body declined to make one.

24. That is, the "as applied" findings made by the original panel and the Appellate Body covered the determinations made in the 15 investigations and 16 administrative reviews identified by the EC in its original panel request. As demonstrated above, the "as applied" findings did not cover the subsequent determinations identified by the EC in the annex to its Article 21.5 panel request.

25. An "as applied" challenge concerns the "application of a general rule to a specific set of facts." By contrast, "an 'as such' claim challenges laws, regulations, or other instruments of a

Member that have general and prospective application . . . ." As demonstrated in the U.S. First Written Submission, the United States has removed the cash deposit rate established by the challenged determinations, and thus complied with the DSB's recommendations and rulings concerning the "as applied" claims.

26. The EC, however, complains of the "continued" use of the allegedly "same methodology" that was the subject of the DSB recommendations and rulings "when carrying out dumping determinations in the subsequent review proceedings." That is, the EC complains of the general and prospective application of the so-called "zeroing" methodology. Thus, despite the EC's contentions to the contrary, by seeking the application of the DSB's recommendations and rulings to "subsequent review proceedings," the EC is attempting to gain the benefit of an "as such" finding, when the Appellate Body declined to make one.

IV. The EC May Not Gain Retroactive Relief from the WTO Dispute Settlement System

27. When the DSB's recommendations and rulings concern a border measure, such as an antidumping duty, implementation occurs when the Member removes the border measure. Thus, the United States complied with the DSB's recommendations and rulings in two ways. First, with respect to some of the antidumping measures challenged by the EC, the United States revoked the antidumping duty orders, thereby removing the antidumping duty liability for entries occurring on or after the date of revocation. Second, the United States removed the border measure, the cash deposit rate, with respect to entries occurring on or after the date of implementation.

28. The text of GATT 1994 and the AD Agreement confirms that it is the legal regime in existence at the time that an import enters the Member's territory that determines whether the import is liable for the payment of antidumping duties.

29. The interpretive note to GATT Article VI clarifies that, notwithstanding that duties are generally levied at the time of importation, Members may instead require a cash deposit or other security, in lieu of the duty, pending final determination of the relevant information. Thus, the cash deposit serves as a place-holder for the liability which is incurred at the time of entry. Consistent with the interpretive note, final assessment in the U.S. system occurs after the date of importation. Indeed, a Commerce determination in an administrative review normally covers importations of the subject merchandise during the 12 months prior to the month in which the review is initiated.

30. Several provisions of the AD Agreement further demonstrate that determining whether relief is "prospective" or "retroactive" can only be determined by reference to date of entry. Thus, by implementing the DSB's recommendations and rulings regarding its antidumping measures with respect to entries made on or after the date of implementation, the United States

has complied with those recommendations and rulings. The United States has acted consistently with the principle of prospective implementation, as understood in the antidumping duty context.

31. This result is consistent with the effect that a finding of inconsistency would have on an antidumping measure in a prospective antidumping system. Under such systems, the Member collects the amount of antidumping duties at the time of importation. If an antidumping measure is found to be inconsistent with the AD Agreement, the Member's obligation is merely to modify the measure as it applies at the border to imports occurring on or after the date of importation. That is, the Member changes the amount of antidumping duties to be collected on importations occurring after the end of the reasonable period of time. The Member need not remedy the effects of the measure on imports that occurred prior to the date of implementation. That is, the Member is under no obligation to refund any antidumping duties assessed on importations occurring prior to the end of the reasonable period of time.

32. The EC argues that prospective implementation of the DSB's recommendations and rulings with respect to U.S. administrative reviews would make the U.S. system of duty collection "*untouchable*" and a "moving target." In this regard, the U.S. system is no different from a prospective antidumping system – the EC's system. An "as applied" challenge to the allegedly improper collection of antidumping duties in a prospective system would necessarily come after the duties have been collected. By that time, the complaining Member could not recover the duties collected. Morever, if the allegedly inconsistent collection continues during the pendency of the dispute, the complaining Member will be required to initiate further disputes in order to address the situation pursuant to the WTO dispute settlement system. This is the system to which the Members agreed, and it applies to all Members equally. This Panel should reject the attempts of the EC to gain a greater degree of relief from this system than that the Members provided for.

33. Finally, the United States notes that there is a fundamental problem with the EC's arguments in this dispute. In paragraph 72 of its Rebuttal Submission the EC argues, "Therefore, even if the products at the time of importation are potentially liable for anti-dumping duties, the US system of duty assessment implies that such a responsibility only materializes when the amount of the duties due for a particular period is determined pursuant to administrative review proceedings." If it were true that liability for antidumping duties only arose after the completion of an administrative review, this would mean that there would be no "final action" as required by Article 17.4 of the AD Agreement for the EC to challenge whenever Commerce issued a determination in an antidumping investigation. Rather, the EC could only challenge a Commerce antidumping duty determination after such a determination was made in an administrative review.

V. The New "All Others" Rate Resulting from the Section 129 Determinations in Stainless Steel Bar from France, Italy and the United Kingdom Is Consistent with the AD Agreement

34. Despite the revocation of the antidumping duty orders covering Stainless Steel Bar from France, Italy and the United Kingdom, the EC persists with its claim against the "all others" rate resulting from Commerce's Section 129 determinations. The EC's claim continues to be unfounded.

35. The EC contends that under Article 9.4 of the AD Agreement, the United States could not use zero or *de minimis* margins or margins based on facts available in calculating the new all others rate. This is despite the fact that these were the only margins remaining after Commerce recalculated the margins of dumping to implement the DSB's recommendations and rulings.

36. The EC contends that its alternative methods would be consistent with WTO obligations. Namely, the EC argues that Commerce could have continued to use the original all others rates. The EC, however, ignores the inconsistency of its own argument. The EC originally challenged Commerce's determinations in these investigations because Commerce did not grant offsets for the non-dumped sales. The original all others rates were based on the very margins of dumping challenged by the EC. Following the EC's logic in the original dispute, therefore, the original all others rates were tainted with the same inconsistencies present in the challenged margins of dumping. Accordingly, when implementing the DSB's recommendations and rulings, Commerce could not simply use those same all others rates.

37. Indeed, had Commerce used the original all others rates, as advocated by the EC in this dispute, and had an average of zero or *de minimis* margins and margins based on facts available resulted in lower all other rates, the United States anticipates that the EC would have claimed that the use of the original all others rates was inappropriate as the underlying margins were tainted with "zeroing." The EC's arguments in this dispute are thus clearly results-oriented, and not based on the obligations found in the AD Agreement.

VI. Stainless Steel Sheet and Strip in Coils from Italy

38. In its rebuttal submission, the EC continues to maintain that the alleged error in question is within the terms of reference of this Article 21.5 panel. Specifically, the EC contends that the alleged error is part of the measure taken to comply because it "was actually committed" in the context of the Section 129 proceeding. Additionally, the EC avers that it has established a *prima facie* case with respect to its claims, and that the United States could not disregard an "obvious mistake" in the Section 129 proceeding.

39. The EC's arguments are without merit. As we discuss below, the alleged error is an unchanged aspect of the original measure and, therefore, is not a part of the measure taken to comply. Moreover, the EC still has not made a *prima facie* case with respect to the claims asserted, nor has it put forth any authority to support its contention that the United States could not disregard an "obvious mistake" in the instant proceeding.

40. As a preliminary matter, the EC advances factual inaccuracies in support of its argument that the alleged error "was actually committed" in the Section 129 proceeding. The only change that Commerce made within the computer program applied to the part of the program that caused the program to disregard non-dumped comparisons. Once that part of the program was changed in a manner consistent with the DSB's recommendations and rulings, Commerce re-ran the program to calculate a revised margin for the respondent.

41. Commerce made no other changes to the program and made no changes to the sets of data used by the program to calculate the dumping margin. Moreover, to the extent that Commerce had found, in the original investigation, that the respondent had failed to provide information with respect to 84 transactions, the original program included certain information in order to address those transactions, using "the facts available." In the course of the Section 129 proceeding, Commerce made no changes to the program related to these 84 unreported transactions. Thus, to the extent that the EC contends that an error was made with respect to the treatment of these 84 unreported transactions, it is clear that the alleged error was not "actually committed" in the Section 129 proceeding as the EC asserts.

42. This fact is of critical importance because an unchanged aspect of the original measure is not a part of the measure taken to comply. The Appellate Body's decision in *EC – Bed Linen (21.5) (AB)* confirms this point.

43. The EC's alternative argument – that the alleged error is within the scope of this proceeding because it bears a close nexus to the measure taken to comply – is inapposite. In *Softwood Lumber*, there was an original investigation, which was found inconsistent with the covered agreements. The United States revised the determination relating to the original investigation. Canada argued that a separate measure, an administrative review, constituted a measure taken to comply. For the reasons described above, the Appellate Body concluded that, under those particular facts, the administrative review was within the scope of that Article 21.5 proceeding.

44. Here, however, there is no third measure. There is the original investigation and the measure taken to comply. Thus, this situation is analogous to *Bed Linen*, not *Softwood Lumber.* The EC failed to advance a claim (assuming *arguendo* that there is a basis in the Antidumping Agreement for such a claim) in the original proceeding, and is using the Article 21.5 proceeding to challenge an aspect of the original measure that was unchanged, and that the United States did not have to change, to bring its measure into compliance. Here, the EC is seeking precisely what it opposed (and the Appellate Body did not permit) in *EC – Bed Linen*: affording complaining parties a second bite at the apple.

45. In its first submission, the EC asserted that the United States' failure to address the alleged errors is inconsistent with various Articles of the AD Agreement. Even if, *arguendo*, this Panel could reach this claim (though for the reasons given in the previous subsection it should

not), the EC's claims fail. The United States rebutted the EC's arguments by noting that the EC failed to make a *prima facie* case with respect to the claims asserted. The EC has not responded to that argument, other than to assert that "the mere text of those provisions reflects the obligations that the United States, by failing to correct the error, has infringed."

46. As the United States noted in its first written submission, the Appellate Body has stated that "a *prima facie* case must be based on 'evidence *and* legal argument' put forward by the complaining party in relation to *each* of the elements of the claim." The EC, as the complaining party, bears the burden of coming forward with evidence and legal argument to establish a *prima facie* case of a violation. A bald assertion that a clerical error breaches a series of provisions is insufficient. Having failed at that task yet again, the United States respectfully requests that this Panel reject the EC's claims.

47. The EC argues that "obvious mistakes" should have been addressed in the Section 129 proceeding. According to the EC, the United States should have addressed all claims of error and, in fact, had ample time to do so. The EC is offering a test that is not found in the AD Agreement or the DSU – indeed, the EC offers no textual support for its assertion. Moreover, the EC's test would tend to create more problems than it solves. What is an "obvious" mistake? To whom? Why would "obvious" mistakes be exempt from the limitations on compliance proceedings, but "non-obvious" mistakes would not? And if the mistake were "obvious," why did the EC fail to raise it in the original proceedings?

48. To support its view that obvious mistakes should be corrected, the EC attempts to demonstrate that the United States *has* corrected mistakes in the past. Whether the United States has used section 129 proceedings to correct mistakes is not germane to the question at hand, which is whether the United States – or any other responding party – is *obligated* to do so.

VII. The United States Should Prevail on the Claims Regarding Injury

49. As the United States also noted in its first submission, the EC advanced these same claims, unsuccessfully, in the original proceeding. The EC does not dispute this fact; instead, the EC asks the United States to identify where in the original proceeding the EC made these claims. The United States notes that these claims appear in the corrected version of the EC's original Panel request under Section 3.2, "as applied claims."

50. The EC is precluded from pursuing these claims here. First, the original Panel did not find that the United States had breached its obligations with respect to Articles 3.1, 3.2, 3.5, and 5.8. Thus, the recommendations and rulings of the DSB did not pertain to any findings on these claims, and the United States was under no obligation to take a measure to comply with respect to such claims.

51. Second, not only were the claims not part of the DSB's recommendations and rulings, but the original Panel specifically found those claims unavailing, stating it "perceive[d] no need to pronounce on the dependent claims raised by the European Communities" under, *inter alia*, Articles 3.1, 3.2, 3.5, and 5.8 of the AD Agreement. The reasons given by the original Panel for dismissing the claims similarly apply to compel rejection of the EC's reiterated argument here. Now, as in the original proceeding, it is not necessary for the Panel to address dependent claims where the United States has implemented the DSB's recommendations with respect to the violations found. As the original Panel stated, "[d]eciding such dependent claims would provide *no additional guidance* as to the steps to be undertaken by the United States *in order to implement our recommendation regarding the violation on which it is dependent."*

52. The Appellate Body noted and did not disturb the original panel's treatment of the injury claims. The EC now argues, however, that the United States was in fact obliged to take steps with respect to the injury claims. Yet that argument contradicts the express finding of the original panel that no such steps would need to be taken.

53. The EC includes a brief statement that its claim "refers to new measures (*i.e.*, measures taken to comply) and, thus, new claims can be made against them." The EC, however, is not making "new claims." The EC is trying to resuscitate failed claims from the original dispute. The Appellate Body has clarified that "adopted panel and Appellate Body reports must be accepted by the parties to a dispute" and compliance bodies will decline to revisit original panel and Appellate Body reports that have been adopted and accepted by the parties. Because the original panel rejected the EC's injury claims in the original dispute on the basis that addressing them would provide no further guidance to the United States for purposes of implementation, the EC is precluded from renewing those claims here.

VIII. The EC Has Failed to Provide A Textual Basis for Its Article 21.3 Claim

54. In its first submission, the United States explained that there is no textual basis for the EC's claim of a breach of Article 21.3. The EC has continued to fail to explain the textual basis for its claim. The EC asserts that Article 21.3 "requires WTO Members to comply *immediately* with the recommendations of adopted DSB reports." Article 21.3 does no such thing. Indeed, Article 21.3 *acknowledges* that immediate compliance may be impracticable and thus confers a right on the *responding* Member to a reasonable period of time.

55. The EC's reliance on *Australia – Salmon (21.5)* is of no help in this regard. The panel in that dispute did not find a breach of Article 21.3, which is what the EC is requesting here. In that context, the EC's attempt to distinguish *US – Cotton Subsidies (Article 21.5) (Panel)* is unavailing. The panel in that dispute squarely rejected the claim the EC is advancing here: a breach of Article 21.3.