UNITED STATES – CONTINUED EXISTENCE AND APPLICATION OF ZEROING METHODOLOGY

WT/DS350

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

January 30, 2008

Mr. Chairman, members of the Panel:

1. On behalf of the United States' delegation, I would once again like to thank you and the members of the Secretariat for your work on this dispute. We appreciated the opportunity to provide you with preliminary thoughts on your questions and look forward to providing you with additional comments in our written responses and our second submission.

2. The United States would like to thank the Panel again for opening this hearing to the public. We note that three third parties took the opportunity to make public statements. WTO Members and the public have had an opportunity to see the Panel's professionalism and impartiality, which can only strengthen the credibility of the WTO dispute settlement system.

3. The issue of the role of Appellate Body reports in WTO dispute settlement has been raised several times over the last two days. To be clear, the United States is not asking the Panel blindly to follow the four panel reports that have not found a general prohibition on zeroing in the Antidumping Agreement, nor have we asked you to ignore Appellate Body reports finding zeroing to be WTO-inconsistent in certain circumstances. What we have asked you to do, and are confident you will do, is to fulfill your function to make an objective assessment of the matter before you and not to add to or diminish the rights and obligations of Members. As part of that, we have asked you to consider whether previous panel reports on this issue are persuasive; we

believe they are. We have also asked you to consider whether previous Appellate Body reports on this issue are persuasive; we have explained they are not. The Panel will have to make its own consideration and decision on the relevance of these reports as previous panels confronted with claims against so-called zeroing have done.

4. The United States would like to address one set of the alleged measures that the EC has asked the Panel to consider, and that was the basis for considerable discussion at yesterday's panel meeting – the so-called "application or continued application" of specific antidumping duties in 18 cases as identified in the EC's panel request. The EC's attempt to clarify that set of supposed "measures" has caused even further confusion; the United States would like to shed light on how it believes the Panel should approach the question of whether such "measures" exist and, to the extent they do, whether they fall within the Panel's terms of reference.

5. As we discussed yesterday, the EC's panel request dropped the reference to the so-called "zeroing" methodology that was contained in its consultation request, but added the alleged "measure" of "the continued application of, or the application of the specific anti-dumping duties resulting from the anti-dumping orders" in 18 cases listed in its Annex. Moreover, the EC listed the 38 investigation and administrative review final determinations from its consultations request plus an additional 14 administrative reviews and sunset reviews.

6. By virtue of DSU Articles 4 and 6, the additional "measures" contained in the EC's panel request are not properly before the Panel. Under those provisions, a Member must first request consultations on a measure before requesting a panel. It cannot identify the measure for the first time in its panel request. Significantly, in this dispute, the EC's panel request did not "narrow" its

consultations request as the EC suggested to us yesterday. Instead, it broadened its panel request inconsistent with the DSU.

7. The "application or continued application" of antidumping duties has been the subject of considerable confusion for the United States. Under Article 6.2 of the DSU, the EC was obligated to identify the specific measures at issue, and the Panel's terms of reference under Article 7.1 of the DSU are limited to those specific measures. Therefore, the only specific measures identified by the EC's panel request must be those applications of duties actually contained in the EC's consultation request. As an initial matter, the EC's request appears to ask the Panel to decide whether it is the "continued application" or the "application" that is at issue. The EC as the complaining party is the one that must decide this in identifying the "measures" that it is challenging.

8. Furthermore, the application or continued application of duties resulting from 18 separate orders maintained in place or calculated pursuant to the "most recent" measure refers to the "most recent" determination identified in the Annex to the panel request for each of the 18 orders and otherwise properly before the Panel. In other words, the "application" of the duties under the 18 orders would be at least 18 different measures, although in referring to the various administrative and sunset reviews and original investigations the EC appears to refer to a large multiple of 18. The "continuing application" is unclear – to the extent that the EC intends to refer to unspecified determinations or the application of duties under an order after the date of the panel request, then the EC panel request fails to conform to Article 6.2 of the DSU. The panel request cannot identify "specific" measures if they are not specified or if they do not exist at the time of

identification.

9. Perhaps in recognition of the failings of its panel request, the EC has again tried to rewrite these measures. In its Response to the U.S. Request for Preliminary Rulings, the EC noted that the "most recent" determination also included "any subsequent measure."[1] Under the DSU, "any subsequent measure" could not be a measure subject to dispute settlement if it did not exist as of the time of the Panel's establishment.

10. The reference in the EC's request to unspecified "most recent" proceedings would also appear to reach unspecified past antidumping determinations. To illustrate, with respect to *Ball Bearings from Germany*, which is case III in the EC's Annex to its panel request, the EC identified a number of administrative reviews and a number of particular companies. However, there is also at least one other rate currently in effect – known as the all others rate. It is unclear whether the EC's reference to the "application or continued application" of antidumping duties would include that rate. This is relevant for the U.S. defense and for the Panel's analysis because it would raise distinct legal and factual issues related to this rate that have not otherwise been discussed. At a minimum, the Panel should be aware that the all others rate currently in effect in this case, among others, is the result of the original investigation determination. In this specific case, that determination was made in 1989. There are clearly certain additional legal issues that must be considered if the EC is asserting that the obligations in the Antidumping Agreement apply to dumping margins calculated more than five years before the Agreement's conclusion. Similar or additional issues might arise with respect to the other cases identified by the EC depending on

[1] EC Response to Request for Preliminary Rulings, para. 47.

the full breadth of what the EC means by the phrase "application or continued application."

11. Unfortunately, the problems with the EC's approach do not end here. Yesterday, the EC seemed to be saying that the "application and continued application" of antidumping duties resulting from 18 orders was intended to encompass the application of zeroing in the 18 cases listed in the Annex. The EC also claimed that the "application and continued application" was possibly part of some sort of combined "as applied/as such" measure – what Japan recognized this morning to be "a new kind of measure."[2]

12. The EC's attempted redefinition of this alleged measure cannot be reconciled with its panel request. That document refers to "the continued application of, or the application of the specific anti-dumping duties " in 18 cases. The United States fails to see how that phrase could be interpreted to refer to the application or continued application of "zeroing." This description also lacks specificity. The EC would like to assert now that it included a generalized reference to the application of "zeroing" in 18 broadly-defined cases without identifying the exact determination where it was actually applied, indeed explicitly trying to sweep in determinations that the United States has not even made.

13. The United States asks the Panel to ponder how such a purported measure could in any way be part of an "as such" claim, when it refers to the "application" of something. The EC has stated explicitly that it "has decided not to ask this Panel to rule again on the inconsistency of the United States' zeroing methodology in original investigations and in review investigations 'as

[2] Japan Oral Statement, para. 3.

such.'"[3] It is unclear whether the EC has again changed its mind.

14. It would appear that what the EC really would like is to have this Panel impose some sort of continuing obligation on the United States to eliminate "zeroing" based on non-binding Appellate Body reports in disputes other than the current dispute. As the United States explained, an obligation to provide offsets in administrative reviews is found nowhere in the covered agreements, and the EC cannot play games with the identification of measures in an effort to accomplish what the WTO agreements have not established.

15. This Panel should reject the "application or continued application" set of measures as outside its terms of reference. The supposed measures were not identified in the consultations request and the EC's request also fails for lack of specificity.

16. Mr. Chairman, members of the Panel, we appreciate this opportunity to present these closing comments and look forward to continuing to work with you on these issues.

[3] EC First Written Submission, para. 2.