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

WT/DS294

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

April 22, 2005

I. THE PANEL SHOULD REJECT THE EC'S CLAIMS CONCERNING METHODOLOGIES IN ASSESSMENT PROCEEDINGS AND REVIEWS

A. The EC Has Failed to Establish That Article 2.4.2 Applies Outside of an Investigation within the Meaning of Article 5

1. The essential question before this panel is whether Article 2.4.2 is limited to Article 5 investigations. Not only does a critical examination of each of the words in this phrase, independent of one another, support the U.S. position, but when the phrase "the existence of margins of dumping during the investigation phase" is considered in its entirety, it is clear that the obligations in Article 2.4.2 do not extend beyond an investigation within the meaning of Article 5.

2. The use of the terms "investigation," "existence," and "initiated" creates a linkage that ties Articles 1, 2.4.2 and 5 together in such a way that confirms that the drafters were referring to Article 5 investigations when they provided that the Article 2.4.2 comparison methodologies are to be used to establish "the existence of margins of dumping during the investigation phase." An analysis begins with the text of Article 1, which provides as follows:

> An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to *investigations initiated* [1] and conducted in accordance with the provisions of this Agreement ... .
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> [1]The term "*initiated*" as used in this Agreement means the procedural action by which a Member formally commences an investigation as provided in Article 5.

3. Article 1, when read with its footnote, provides that "investigations initiated and conducted in accordance with the provisions of this Agreement" are investigations initiated pursuant to Article 5. Article 5 then defines the nature of the investigation for which it provides: "[A]n investigation to determine the *existence*, degree and effect of any alleged dumping shall be initiated ... ." Thus, Article 1 defines the "initiation" of the investigation phase that leads to an antidumping measure as "the procedural action by which a Member formally commences an investigation as provided in Article 5." Article 5.1, in turn, provides that investigations are initiated upon a written application, or pursuant to other specified conditions, to determine the "existence, degree and effect" of alleged dumping. Because there is only one type of investigation provided for in Article 5, and footnote 1 to Article 1 explicitly links Article 1 to "an investigation as provided in Article 5," Article 1 can only be referring to Article 5 investigations.

4. To complete the linkage between Articles 1, 2.4.2, and 5, the term "existence" as it is used in Article 5.1 of the AD Agreement must be considered. The word "existence" is used in connection with the term dumping in only one other place in the AD Agreement besides Article 5.1. The ordinary meaning of the word "existence" is "the fact or state of existing; actual possession of being; a mode or kind of existing; dealing with the existence of a mathematical or philosophical entity." The word "existence" before the phrase "of margins of dumping" indicates that Members are to determine the "existence of [the] mathematical or philosophical entity"

referred to as "margins of dumping." This "existence" is a necessary part of an Article 5 investigation which may lead to applying an antidumping measure consistent with Article 1.

5. This reasoning is consistent with that adopted by the Appellate Body in *US – OCTG from Argentina*. The Appellate Body relied on the use of the term "anti-dumping investigations" in Article 3.3, the lack of any mention in Article 3.3 of injury analyses undertaken in any proceeding other than Article 5 investigations, and the absence of a cross-reference to Article 11 in order to find that Article 3.3 on its own does not address cumulation in sunset reviews. The Appellate Body's analysis is consistent with the linkage between Article 3.3 and Article 5.1 through the use of the term "effects" and "effect," respectively, in those provisions.

6. The drafters' intent to limit Article 2.4.2 exclusively to Article 5 investigations is further demonstrated by the use of the *definite* article "the" before the term "investigation phase", rather than the indefinite article "an". The ordinary meaning of the article "the" is "designating one or more persons or things already mentioned or known, particularized by context, or circumstances, inherently unique, familiar or otherwise sufficiently identified." (Emphasis added). If, as the EC contends, the term "investigation" in the context of Article 2.4.2 may be interpreted in generic terms, rather than as a term of art referring to the Article 5 phase, then the use of the *indefinite* article "an" would have been much more appropriate. But that is not what the Agreement says.

7. The EC suggests that the Panel narrow its consideration to the term "investigation." The EC complains that any time a Member makes "a systematic examination or inquiry" as to dumping, that Member is conducting an investigation subject to the disciplines of Article 2.4.2. The contrived nature of the EC's approach is apparent. For example, among the various alternative definitions that the EC posits for the meaning of "during the investigation phase" in Article 2.4.2, it claims that the phrase may be read as synonymous with the term "period of investigation."

8. The EC's interpretation would deny any meaning to the drafters' decision to utilize the unique "investigation phase" terminology in Article 2.4.2. As the panel in *Argentina – Poultry* found: "Article 2.4.2, uniquely among the provisions of Article 2, relates to the establishment of the margin of dumping 'during the investigation phase.'" Numerous provisions in the AD Agreement refer to a "period of investigation," and the drafters' use of the term "investigation phase" must have been deliberate and must be given meaning.[1]

[1] *See, e.g.*, *EC – Hormones (AB)*, para. 164. In this regard, as the United States noted in its response to the Panel's first set of questions, the negotiating history of the AD Agreement supports the distinction between "period of investigation" and "investigation phase." By using both terms in the same provision, the text of the Ramsauer draft is consistent with providing distinct meanings to each of those phrases. In that context, the Ramsauer draft suggests that the term "during the investigation phase" was intended to be synonymous with the time in which the investigating authority examines pricing behavior that occurred within the period of investigation.

9. The emptiness of the EC's effort to deny a specific meaning to the term "investigation phase" is highlighted in its response to Questions 12 and 15 from the Panel.[2] When asked whether its interpretation of the term "investigation" would leave any aspect of an antidumping proceeding outside of its coverage, the EC admitted only to "the possibility of pre or post investigation 'phases' within a proceeding." Thus, when this response is considered in the context of the phrase "during the investigation phase," it is clear that the EC's approach would deny any meaning to what otherwise appears, on its face, to be limiting language.

B. Article 2.4 Contains No Independent and Overarching Requirements With Respect to Offsetting and Symmetry

10. The EC commenced this dispute arguing, among other things, that the fair comparison requirement of Article 2.4 is an independent and overarching obligation that applies to any phase of an antidumping proceeding, that this fair comparison requirement requires a symmetrical comparison (average-to-average or transaction-to-transaction), and that this fair comparison requirement obligates Members to offset any dumping found with any non-dumped transactions. At this stage in the dispute, there appears to be little left of these EC positions.

11. The United States emphasizes that it does not dispute that Article 2.4 is applicable to Article 9.3.1 assessment proceedings. In assessment proceedings, Members must make fair comparisons between normal values and export prices. In each of the assessment proceedings challenged by the EC, the United States did make fair comparisons between normal values and export prices within the meaning of Article 2.4.

12. The United States contests, however, the EC's suggestion that the first sentence of Article 2.4 creates an obligation – the extent of which is unstated in the AD Agreement – that is independent of the remainder of Article 2.4, that applies after the comparisons between normal value and export price are made, and that is results-oriented. When asked to justify its assertion that the fair comparison requirement is independent of, and extends beyond, the remainder of Article 2.4, the string of quotations the EC provided is unconvincing. The United States has previously addressed the *dicta* contained in the Appellate Body Report in *EC – Bed Linen* regarding fair comparison upon which the EC relies. The quotations provided in paragraphs 100 through 105 of the EC's answers to the Panel's questions do not suggest an independent meaning for the first sentence of Article 2.4. In each quotation, the fair comparison requirement is discussed in the context of the remainder of Article 2.4. With respect to the quotations provided in paragraphs 106 to 110, they are of no relevance to the issues in this dispute, because they involve the use of the word "overarching" in connection with provisions other than Article 2.4. The EC did not provide any explanation of their relevance to the interpretation of Article 2.4.

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[2] At no point has the EC sought to give meaning to, or otherwise address, the use of the term "existence" in the first sentence of Article 2.4.2. In fact, while the EC provides some discussion of the phrase "margins of dumping" in the first sentence of Article 2.4.2, it ignores the immediate context of that phrase, which is its location in the broader phrase "the existence of margins of dumping."

13. A critical aspect of the EC's Article 2.4 claim has been its assertion that Article 2.4 creates an obligation to conduct a symmetrical analysis in an assessment proceeding (*i.e.*, average-to-average or transaction-to-transaction). To the extent that the AD Agreement contains an obligation to conduct a symmetrical comparison, that obligation is found in Article 2.4.2, not Article 2.4. The obligations of Article 2.4.2 are limited to Article 5 investigations. The fact that the symmetrical comparison methodologies provided for in the first sentence of Article 2.4.2 are made "subject to" the provisions of Article 2.4 governing fair comparison belies any claim that the fair comparison requirement includes a symmetry obligation independent of Article 2.4.2. In fact, in response to a question from the Panel, the EC as much as admitted that its effort to read a symmetry obligation into the fair comparison requirement would nullify the first sentence of Article 2.4.2. The EC stated that "the first sentence of 2.4.2 merely recalls the norm contained in Article 2.4 that fairness implies equal and symmetrical treatment in normal circumstances. The second sentence clarifies that in cases of targeted dumping symmetrical treatment may be departed from when certain conditions are met." Because the EC interpretation would deny meaning to an entire sentence, it must be rejected.

14. The AD Agreement explicitly provides for the use of asymmetrical comparisons in at least two places, neither of which is identified as an exception to the "fair comparison" requirement of Article 2.4. First, asymmetrical comparisons are expressly provided for in the targeted dumping provision – the second sentence of Article 2.4.2. There is no basis for interpreting the provision as an exception to the fair comparison requirements of Article 2.4.

15. Second, Article 9.4(ii) of the AD Agreement expressly provides for the use of asymmetric comparisons by Members with prospective normal value systems. Nothing in Article 9.4 suggests that this methodology was provided as an exception to the fair comparison requirement of Article 2.4 or the criteria for using the targeted dumping methodology of Article 2.4.2. In fact, the EC has not provided any textual basis to explain how Article 9.4(ii) could constitute an exception to a notional independent, fair comparison-based "symmetry" requirement.

16. The EC cannot reconcile its contention that the "fair comparison" requirement creates a general obligation to offset dumping margins with the remaining text of the AD Agreement. Because application of the targeted dumping methodology will yield the same result as an average-to-average comparison if, in both cases, non-dumped comparisons are allowed to offset dumped comparisons, an offset requirement would render the targeted dumping exception in Article 2.4.2 a complete nullity. The EC appears to have accepted this mathematical certainty. In its answers, the EC has recognized that "zeroing" is not prohibited *per se* under the Agreement, because "zeroing" is permissible when applying the targeted dumping methodology of Article 2.4.2 "if the conditions for a targeted dumping analysis are fulfilled."

17. This latest position, however, cannot be squared with the EC's contention that "zeroing" is prohibited under Article 2.4. The targeted dumping methodology is not an exception to the fair comparison requirement of Article 2.4; it is an exception to the symmetrical comparison

requirements for investigations set forth in the first sentence of Article 2.4.2. Having asserted that "zeroing" is an "impermissible adjustment to export price", the EC has failed to explain how this "adjustment" becomes "permissible" when the targeted dumping methodology is used.[3]

C. Article 9.3.1 Does Not Require an "Exporter-Oriented" Analysis

18. The EC also asserts that the United States must undertake an exporter-oriented approach to Article 9.3.1 assessment proceedings. The EC's position, however, is unsupported by the plain text of the AD Agreement. By its terms, the function of an Article 9.3.1 assessment proceeding is to determine "the final liability for payment of anti-dumping duties." This function is fundamentally different from that of Article 2.4.2, which sets forth the comparison methodologies to be used to establish the "existence of margins of dumping during the investigation phase."

19. Antidumping duties, like other duties or tariffs, are paid by importers. Accordingly, the United States provides for the assessment of antidumping duties on an import- and importer-specific basis. Importers are not liable for antidumping duties for non-dumped transactions. During an assessment proceeding, the United States reviews individual import transactions and calculates antidumping duty liability for each of them with reference to a contemporaneous normal value. Importers are then charged antidumping duties commensurate with the amount of dumping that actually occurred with respect to the imports for which they were responsible. In this way, the United States provides that, consistent with Article 9.3 of the Agreement, "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2."

20. The EC proposes an approach that divorces the amount of antidumping duty assessed with respect to an import from the dumping margin associated with that import transaction. The EC contends that investigating authorities must assess antidumping duties based on the aggregated pricing behavior of exporters, without regard to the margin of dumping actually associated with the particular import transaction.

21. The EC effectively turns Article 9.3 on its head when it argues that "it is not, however, a question of 'compensating' an importer for a 'negative margin'" because "the only relevant margin of dumping is that of the exporter." This argument reflects the EC's effort to force the Article 2.4.2 investigation phase provisions (which focus on the existence of margins of dumping) onto Article 9.3 (with its focus on duty liability). However, the provisions of Article 2.4.2 are irrelevant to Article 9.3.1 assessment proceedings. As the Appellate Body explained in *EC – Bed Linen*: "[The] requirements of Article 9 do not have a bearing on Article

[3] The United States notes that it disagrees with the EC's characterization of "zeroing" as an adjustment to price. The United States does not adjust the export price based on the difference between the export price and normal value as suggested by the EC, whether in Article 5 investigations, Article 9 assessment proceedings, or in any other phase of an antidumping proceeding.

2.4.2, because the rules on the *determination* of the margin of dumping are distinct and separate from the rules on the *imposition and collection* of anti-dumping duties."

D. The EC Has Failed to Support Any Claims Under Article 11

22. In its response to the Panel's request that the EC explain the basis for its claim under Article 11, the EC provided a non-response. The EC simply asserted that "the conduct of retrospective assessments in the United States must be consistent both with the provisions of Articles 2.4, 2.4.2 and 9.3, and with the provisions of Article 11." The EC failed, however, to provide the requested explanation, despite the EC's own recognition that "United States 'periodic reviews' of the amount of duty correspond to and fit within Article 9.3 of the Anti-Dumping Agreement." The United States has demonstrated that the EC's claims under Articles 2.4 and 2.4.2 should be rejected. In the absence of any justification or explanation of the EC's Article 11 claims and how they relate to Article 9.3 assessment proceedings, the EC has failed to make its *prima facie* case with respect to its Article 11 claims.

E. Because the Challenged Measures Are Based on a Permissible Interpretation, the Panel Should Find Them to Be in Conformity with the AD Agreement

23. Based on the foregoing, the United States believes that the provisions of the AD Agreement at issue are clear, and that the challenged measures are based on *the* correct interpretations of those provisions. However, even if the Panel should find, after applying customary rules of interpretation of public international law, that the provisions of the AD Agreement at issue admit of more than one permissible interpretation, the challenged measures are based on a permissible interpretation of those provisions. Interpreting "during the investigation phase" under Article 2.4.2 as referring to an investigation under Article 5 is a permissible interpretation. Likewise, interpreting Article 2.4 as containing no independent and overarching requirements with respect to offsetting and symmetry is a permissible interpretation. Therefore, because the challenged measures rest on permissible interpretations, Article 17.6(ii) of the AD Agreement requires the Panel to find that those measures are in conformity with the AD Agreement. As found by the panel in *Argentina – Poultry*, "[I]n accordance with Article 17.6(ii) of the *AD Agreement*, if an interpretation is 'permissible', then we are compelled to accept it."

II. THE PANEL SHOULD REJECT THE EC'S "AS SUCH" CLAIMS

A. The Panel in *Korea – Commercial Vessels* Rejected the "No-Discretion" Rule Proposed by the EC

24. According to the EC, if a measure provides authorities with the discretion to act in a WTO-inconsistent manner, a panel can find such a measure to be WTO-inconsistent "as such." The United States reiterates that the panel in *Korea – Commercial Vessels* rejected the very approach advocated by the EC in this dispute. Significantly, the EC has not been able to cite to a single panel or Appellate Body report that has applied the EC's approach to the

mandatory/discretionary distinction. Although the EC invokes the panel report in *US – Section 301*, the panel in that dispute found, rightly or wrongly, that the obligation at issue – Article 23 of the DSU – proscribed a Member's right to maintain certain types of discretionary measures. The EC has not alleged, let alone demonstrated, that the obligations at issue in this dispute are of that nature. In summary, the answer to the EC's lament that "*[t]here is no perfect solution to the 'as such' problem*", is that the EC is the only one that sees a "problem." Panels and the Appellate Body have not had a "problem" in applying the traditional mandatory/discretionary distinction.

B. The EC Has Failed to Demonstrate that the Measures at Issue Mandate WTO-Inconsistent Action or Preclude WTO-Consistent Action

25. Applying the proper mandatory/discretionary distinction to the "measures" at issue in this dispute, it is apparent that the EC has failed to demonstrate that the "measures" mandate a WTO breach. With respect to the challenged provisions of the Tariff Act of 1930 and Commerce's regulations, the EC has failed to demonstrate that they mandate a WTO breach. With respect to the other alleged "measures," the EC has failed to demonstrate that they mandate anything at all. In this section, the United States notes some of the deficiencies in the EC's arguments with respect to particular challenged "measures."

1. Commerce "Practice"

26. The EC has clarified that it is challenging Commerce "practice" as a separate measure. However, the EC has failed to explain how the repeated application of one measure – such as a statute – in the same manner gives rise to a separate and autonomous "measure." When panels have been asked to find that a "practice" of the type described by the EC constitutes a measure that can be challenged "as such," they have uniformly declined. When to distinguish the situation in this dispute from that confronting the panel in *US – India Steel Plate*, the EC gave a non-answer. The EC's answer to Question 51 also does not address the issue of whether "practice" can be considered a measure that can be subject to an "as such" challenge in WTO dispute settlement. Moreover, the EC has failed to argue, let alone demonstrate, that Commerce "practice" mandates a breach within the meaning of the mandatory/discretionary distinction. Here, the United States can do nothing other than to refer the Panel to its prior arguments on this point, which stand unopposed.

2. The Commerce Manual

27. The EC has failed to demonstrate that the Commerce Manual mandates a WTO breach. The Manual is a non-binding document that does not "mandate" anything at all. The EC's arguments to the contrary are based upon its flawed approach to the mandatory/discretionary distinction.

28. An even more fundamental flaw, is that the EC has failed to identify the specific portions of the Manual that allegedly mandate the WTO-inconsistent behavior about which the EC complains. By failing to do so, the EC has failed to make its *prima facie* case.

29. In *US – Gambling*, the Appellate Body emphasized the importance of the requirement that a complaining party make its *prima facie* case. According to the Appellate Body:

> … it is incumbent upon a party to identify in its submissions the relevance of the provisions of legislation – the evidence – on which it relies to support its arguments. It is not sufficient merely to file an entire piece of legislation and expect a panel to discover, on its own, what relevance the various provisions may or may not have for a party's legal position.

30. The EC has failed to demonstrate how or why each portion of the Manual that it is challenging is inconsistent with U.S. WTO obligations. In its Question 53, the Panel essentially asked the EC to identify the portions of the Manual that it is challenging. The EC replied that it "is challenging each part of the Manual referenced in the factual part of its first written submission, considered both in isolation and together, including the instruction to use the Standard AD Margin Program." However, the cited portions of the EC first submission identify *the entire Manual* as a measure that the EC is challenging. Thus, if the EC is to be taken at its word, it is challenging the entire Manual because the entire Manual is referenced in its first written submission.

31. The EC has not explained how the entire Manual runs afoul of U.S. WTO obligations. Most of the Manual has nothing to do with the subject of this dispute. Even where the EC cites to more specific portions of the Manual in the referenced portion of its first submission, these portions would appear to have nothing to do with this dispute, and the EC has failed to explain how these specific portions are WTO-inconsistent.

32. In short, to paraphrase the Appellate Body, the EC has filed the entire Manual and expects the Panel to discover, on its own, what relevance the various provisions of the Manual may or may not have for the EC's legal position. While the EC keeps referring to its desire to "cover all the bases," we do not see this as any different from Antigua's approach in *US – Gambling*. As the Appellate Body has indicated, such an approach is neither sufficient nor acceptable.

3. The So-Called "Standard AD Margin Program"

33. The EC has failed to demonstrate that what it calls the "Standard AD Margin Program" is a "measure" or, assuming that it is a measure, that it mandates a WTO breach.[4] The computer program does not "mandate" anything at all. The EC's arguments to the contrary are based upon its flawed approach to the mandatory/discretionary distinction.

34. In response to the Panel's Question 58 the EC gave a non-answer. The EC responded that they are "laws, regulations or administrative procedures ... ." Is the EC seriously contending that a line of computer code is a "law" or a "regulation"? If it is, then it has failed to demonstrate why that is so.

35. In response to the Panel's Question 72, the EC incorrectly asserts that it is not necessary that the "Standard AD Margin Program" prescribe a result. Even assuming *arguendo* that lines of computer code can constitute a measure, in order to be found WTO-inconsistent "as such" they must mandate a WTO breach; *i.e.*, they have to prescribe a course of action. Tellingly, the EC cites to no authority for its remarkable assertion.

36. The EC also asserts that the Standard AD Margin Program is "just like the Regulations", presumably referring to Commerce's antidumping regulations. To the extent that the EC is asserting that the legal status of lines of computer code are the same as Commerce's regulations, it is, once again, incorrect. Under U.S. law, validly promulgated regulations are binding on Commerce, the public, and the courts. Commerce's computer programs are not binding on anyone.

37. Finally, the United States notes the memorandum of Ms. Owenby. Ms. Owenby acknowledges that the variables used depend upon the Commerce programmer. This further undermines the EC claim that there is a "standard" Commerce computer program, and emphasizes that the computer program used in any particular proceeding reflects policy choices, rather than mandating them.

4. Provisions of the Tariff Act of 1930

38. The EC has failed to demonstrate that the provisions of the Tariff Act of 1930 it has identified mandate a WTO breach. The Panel asked the EC to address the fact that the Federal Circuit has twice held that the statutory provisions cited by the EC do not require "zeroing." The EC's response declared this to be an inappropriate case for a "mechanistic" application of the

[4] The United States notes that notwithstanding the EC's statement that the measures at issue "include" the "Standard AD Margin Program in force" on a particular date, the EC also states that is challenging only "those specific lines of code, as set out in the first written submission of the [EC]." Because the only specific lines of code set out in the EC First Submission are the lines of code reproduced at paragraphs 21 and 37, the EC has limited its claims in this dispute to those lines of code.

mandatory/discretionary distinction, and then referred to the Standard AD Margin Program and the Regulations. The use of "mechanistic" is simply EC code language for its idiosyncratic and flawed approach to the mandatory/discretionary distinction.

39. As for the Standard AD Margin Program – whatever that may be – it is not a "measure" at all, let alone a mandatory measure within the meaning of the mandatory/discretionary distinction. With respect to the EC's reference to "the Regulations," Commerce's antidumping regulations do not address "zeroing." If the EC is referring to the provision of the regulations that it associates with the "symmetry" issue, the United States has previously addressed the EC's arguments.

40. The Panel asked the EC to comment on the U.S. argument that the EC had failed to make a *prima facie* case with respect to section 777A(d)(2) and sections 751(a)(2)(A)(i) and (ii) of the Tariff Act of 1930. With respect to its challenge to section 777A(d)(2) – but not sections 751(a)(2)(A)(i) and (ii) – the EC modified paragraph 217, line 2, of its first submission so that the words "given that" replace the word "if".

41. With respect to the EC's failure to make a *prima facie* case, the United States refers the Panel to the discussion of *US – Gambling*, above. With respect to the statutory provisions in question, the EC has not explained, let alone demonstrated, how the provisions operate in a WTO-inconsistent manner.

42. With respect to sections 751(a)(2)(A)(i) and (ii), the EC continues to assert that these provisions are WTO-inconsistent "if they mean" that asymmetry is required, so the original problem noted by the United States remains. However, even if the EC substituted "given that", this would not suffice to make its case. The EC has to explain why the statute that it quotes mandates the outcome to which it objects. Thus far, it has not done so, notwithstanding that the EC, as the complaining party, bears the burden of proof.

43. With respect to section 777A(d)(2), the EC does not even quote the provision. On its face, section 777A(d)(2) provides that "when" the average-to-transaction method is used in reviews under section 751, Commerce must use monthly weighted average prices to determine normal value. Section 777A(d) does not address the question of whether or when the average-to-transaction method must be used. The EC has failed to explain how the plain text of section 777A(d)(2) mandates WTO-inconsistent action.

5. The SAA

44. The EC has clarified that it is not challenging the Statement of Administrative Action ("SAA"). Given that the EC has clarified that it is not challenging the SAA as a separate

measure in and of itself, the Panel need not decide whether the SAA can be treated as a separate "measure."[5]

III. THE PANEL SHOULD REJECT THE EC'S REQUEST THAT THE PANEL RECOMMEND THAT CERTAIN MEASURES BE REPEALED

45. In its first submission, the EC asked the Panel to recommend that the United States "takes the steps necessary to bring its measures into conformity with the cited WTO provisions." However, in its answers to the Panel's questions, the EC, without explanation, revised its position and asked the Panel to recommend that certain of the "as applied" measures "be repealed."[6]

46. However, the first sentence of Article 19.1 limits the recommendations of panels and the Appellate Body to recommendations that the Member concerned bring its measure into conformity with the covered agreement in question. Thus, Article 19.1 of the DSU precludes the type of recommendation sought by the EC.

47. The second sentence of Article 19.1 authorizes panels and the Appellate Body to "suggest" ways in which a measure could be brought into conformity. Should the EC repackage its request for a "recommendation" into a request for a "suggestion," the Panel nonetheless should reject the EC request. A Member generally has many options available to it to bring a measure into conformity with its WTO obligations. A panel should not prejudge by its suggestions the particular option a Member may choose. This is particularly true for the instant dispute, in which the EC has offered no explanation as to why "repeal" would be the only option available to the United States. Accordingly, the Panel should decline to suggest any particular method of implementation.

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[5] To be clear, the position of the United States is that the SAA does not constitute a separate measure in and of itself. *See US – Export Restraints*, para. 8.99.

[6] In this regard, the United States notes that in its first submission, the EC asserted that certain injury determinations by the ITC were inconsistent with Article 3 of the AD Agreement because the volume of imports determined to be dumped was purportedly inflated, as a result of the use of the so-called "zeroing" methodology. While it now asks the Panel to recommend that those measures "be repealed," the EC, in response to the Panel's Question 32, does not deny that its claims as to such measures are merely speculative, given that the EC cannot presume the results of an alternative margin calculation methodology permitted by the AD Agreement. The EC instead adopts the new position that the use of so-called "zeroing" somehow renders the injury determinations necessarily "unsound." The EC does not explain, however, how the use of "zeroing" necessarily caused the volume of dumped imports to be inflated, or how "zeroing" otherwise gives rise to an Article 3 claim. The EC's Article 3 claims remain speculative and should therefore be denied.

IV. THE TRANSACTION-TO-TRANSACTION METHOD IS NOT WITHIN THE PANEL'S TERMS OF REFERENCE

48. The Panel's questions to third parties contained questions concerning the so-called transaction-to-transaction method. While the United States generally disagrees with the answers of the third parties, we must note that transaction-to-transaction comparisons are not within the terms of reference of the Panel. However, the United States feels compelled to comment on the EC's assertion that the transaction-to-transaction method "was essentially intended for circumstances in which there are a few very large transactions ... ." Under Article 2.4.2, there is no hierarchy between the average-to-average method and the transaction-to-transaction method.

V. THE PANEL SHOULD REJECT THE EC'S CLAIMS REGARDING THE U.S. METHODOLOGY USED TO DETERMINE THE EXISTENCE OF MARGINS OF DUMPING IN INVESTIGATIONS

49. The United States believes that in *US – Softwood Lumber Dumping*, the Appellate Body erred in finding that the AD Agreement requires Members, in the investigation phase, to give credit for weighted average comparisons when the export price exceeds the normal value. While the United States recognizes that the Dispute Settlement Body adopted the Appellate Body report in *US – Softwood Lumber Dumping*, we feel compelled to point out for the Panel, in the context of the EC's claims in this dispute, the errors in the Appellate Body's reasoning.

50. With respect to the investigation phase, the EC's "as applied" and "as such" claims are based on its assertion that the AD Agreement requires an offset for non-dumped sales. However, neither the text of the AD Agreement nor its negotiating history recognizes the concept of "negative dumping margins," and the AD Agreement does not contain any obligations with respect to them. An offset requirement – if one existed – would apply to the *results* of comparisons, and would not pertain to the comparisons themselves. Therefore, Article 2.4 does not impose any such requirement. With respect to Article 2.4.2, it limits the use of average-to-transaction comparisons in the investigation phase, a common practice before the Uruguay Round. Neither the text of the AD Agreement nor its negotiating history suggest that the drafters agreed to require a credit for sales made at above normal value. Because such a requirement is antithetical to the historic manner in which antidumping investigations have been conducted by many Members, both before and after the completion of the Uruguay Round, and there is no indication in the text of an agreement to change this historic approach, such an obligation should not be created through the dispute settlement process on the basis of tenuous inferences.

A. The United States Does Not "Exclude" Non-Dumped Sales from Its Dumping Margin Calculation

51. The EC incorrectly contends that the United States "excludes" non-dumped transactions from its calculation of an overall margin of dumping in the investigation phase and that such exclusions are "unfair." When applying the average-to-average method, the United States

calculates multiple weighted average normal values, and compares each to a distinct set of weighted average export prices. Each average-to-average pairing is distinguished by a common set of variables establishing their comparability (*e.g.,* model, level of trade). Taken together, these groups of export transactions contain "all comparable export transactions." No export transaction is excluded.

52. For each comparison group, the U.S. compares the weighted average of all the normal values to the weighted average of all the export prices. However, the United States does not determine whether dumping "exists" so as to warrant the imposition of an anti-dumping measure. It simply calculates an amount of dumping for each comparison group. Consistent with the language in Article VI, paragraphs 1 and 2, of GATT 1994, when the weighted average export price for a group of transactions is less than its weighted average normal value, this difference is an amount of dumping. The totaling of these dumping amounts occurs subsequently, in order to determine whether the dumping margin for the product is above or below the *de minimis* standard. In this exercise, all export transactions are considered, because they are included in the figure by which the aggregate of the dumping amounts is divided. The result of this calculation is the percentage dumping margin against which the *de minimis* standard is applied.

53. The Appellate Body's ultimate finding in *US – Softwood Lumber Dumping* turned on a subsidiary finding that the U.S. practice of calculating intermediate "margins of dumping", while setting the results of those intermediate comparisons that resulted in "negative margins" to zero, was contrary to the requirements of Article 2.4.2. However, it is inaccurate to state that Commerce's intermediate stage calculations constitute a determination of whether dumping margins "exist" within the meaning of the AD Agreement. The calculation of an overall percentage dumping margin (*i.e.*, expressing the overall amount of dumping found during the investigation phase as a percentage of overall export sales), and using this percentage to determine whether dumping "exists" such that the imposition of an antidumping measure is justified, is only done in a separate step in order to satisfy the requirements of Article 5.8 of the AD Agreement.

54. The Appellate Body's understanding of the facts may have resulted from the use of terminology in U.S. law that has been interpreted as having a different meaning in the context of the AD Agreement. The Appellate Body effectively interpreted the term "margin of dumping" for AD Agreement purposes as applying only to the percentage margin for the product as a whole, against which the *de minimis* standard is measured. In the context of this dispute, the "margin of dumping" for AD Agreement purposes is equivalent to the "weighted average dumping margin" defined in section 771(35)(B) of the Act. U.S. law separately defines "dumping margin" in section 771(35)(A) as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." Nevertheless, the reference in U.S. law to the intermediate dumping amounts as "dumping margins" does not alter the fact that those intermediate dumping amounts were treated in a manner consistent with the AD Agreement and Article VI:1 and 2 of GATT 1994.

B. Article 2.4.2 Restricts the Use of the Average-to-Transaction Comparison Method in the Investigation Phase But Does Not Address the Offsetting of Negative Dumping

55. The negotiating history confirms that Article 2.4.2 does not require an offset for negative dumping. The Appellate Body's analysis would have benefitted from a consideration of this negotiating history.

56. Prior to the entry into force of the WTO Agreement, many users of the antidumping remedy, including the United States and the EC, determined the existence of dumping margins by using the average-to-transaction comparison method. Several delegations sought to negotiate a change in this practice in the Uruguay Round negotiations. The negotiations over this "asymmetry" issue were protracted and difficult. Article 2.4.2 of the AD Agreement was ultimately agreed upon specifically to address this "asymmetry" issue.

57. Separately, a number of signatories to the Tokyo Round Anti-Dumping Code, including the United States and the EC, utilized a methodology whereby they calculated the final overall margin of dumping for a company by aggregating the positive dumping amounts for comparisons where normal value exceeded export price and dividing that number by the aggregate of all export prices. So-called "negative margins" were not taken into account in aggregating the overall amount of dumping. This practice was well-known by the Uruguay Round negotiators and was referred to as "zeroing." Concurrent with the negotiations, the practice of "zeroing" was reviewed by two dispute settlement panels and was found to be consistent with the Anti-dumping Code. In the Uruguay Round negotiations, several delegations sought to prohibit "zeroing" and to require an offset for "negative dumping." No provision to require such offsetting was agreed to by the negotiators. While agreement was reached to address the "asymmetry" issue through, and to the extent provided for in, the language of Article 2.4.2 of the AD Agreement, the Agreement ultimately did not address the "zeroing" issue.

58. The EC also contends that the U.S. methodology used in the investigation phase is inconsistent with the AD Agreement because, in comparing weighted average normal values to weighted average export prices for comparable transactions, Commerce does not reduce the amount of dumping found on some comparisons based on the amount by which export price exceeds normal value on other comparisons. The EC argues that the U.S. approach is "inherently unfair" because Article 2.4.2 requires such an offset.

59. The EC bases its argument on the dictionary definition of "margin", arguing that "a margin is the amount by which one thing differs from another" and that given that normal value may be greater than or less than export price, "in both cases there is a margin." Such reasoning, cannot be reconciled with the context in which the term "margin" is used in the AD Agreement.

60. In the AD Agreement, the word "margin" is modified by the word "dumping," giving it a special meaning. Paragraph 2 of Article VI of GATT 1994 provides that "[f]or the purposes of

this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1." When read with the provisions of paragraph 1, the "margin of dumping" is the price difference when a product has been "introduced into the commerce of an importing country at less than its normal value"; *i.e.,* the price difference when the product has been dumped.

61. The provisions of the AD Agreement must be read in conjunction with Article VI of GATT 1994. While the AD Agreement does not provide a definition of "margin of dumping," Article 2.1 does define "dumping" in a manner consistent with the definition provided in Article VI. The express terms of Article VI provide that the *margin of dumping* is the amount by which normal value "exceeds" export price, or alternatively the amount by which export price "falls short" of normal value. Consequently, there is no textual support in Article VI of the GATT or the AD Agreement for the concept of "negative dumping."

62. Similarly, there is nothing in the text to suggest that the prevailing meaning of the term "dumping" is suspended for purposes of Article 2.4.2. Article 2.4.2 sets forth three comparison methods for establishing "the existence of margins of dumping" in an investigation. There is no reference in Article 2.4.2 to "negative margins," "negative dumping," or any other modification to the term "margin of dumping." Article 2.4.2 establishes an obligation for the administering authority to determine whether dumping "exists" based on certain methodological constraints. Nothing in Article 2.4.2 requires the expression of the margin of dumping as a percentage. Article 5.8 is the only place in the AD Agreement where the amount of dumping must be expressed as a percentage margin so that it may be measured against the *de minimis* standard. As the EC correctly recognized in *Argentina – Poultry*: "The Anti-Dumping Agreement does not require to express [sic] the margin of dumping as a percentage of the export price (except for the purpose of establishing whether it is de minimis). Nor does it prescribe any particular type of duties."

63. In the absence of any obligation in Article 2.4.2 to calculate an overall margin of dumping, let alone any obligations detailing the manner in which such a calculation must be performed, Article 2.4.2 cannot serve as the basis for finding a requirement to offset negative dumping.

VI. CONCLUSION

64. For the reasons set forth above, along with those set forth in the U.S. first written submission, oral statements at the first substantive meeting with the Panel, and responses to the Panel's questions, the United States requests that the Panel reject the EC's claims.