United States – Continued Existence and Application of Zeroing Methodology

(AB-2008-11 / DS350)

Oral Statement of the United States of America

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I. Introduction

1. Good morning, Madame Chairwoman and members of the Division. On behalf of the United States, we would like to thank you for the opportunity to appear before you today. As this is Mr. Baptista's last oral hearing as a member of the Appellate Body, we wish to take this opportunity to thank him for his many years of exemplary service to the WTO and its Members. We wish Mr. Baptista all the very best, both personally and in his future endeavors.

2. We commend the Appellate Body for its decision to make this hearing open for observation by all WTO Members and the public. The United States firmly believes that transparency in Appellate Body hearings promotes confidence in the WTO dispute settlement system overall and makes the WTO a stronger institution.

3. The topic of so-called "zeroing" has a certain familiarity in the context of dispute settlement. The topic is also a familiar one to WTO negotiators, who found that there was no agreement to require providing offsets. Because a conclusive resolution of the "zeroing" issue has proven elusive, this dispute and others like it raise important issues for the dispute settlement system.

4. In this opening, we highlight some significant issues that arise in this dispute. First, we note that the Panel properly excluded certain measures from this proceeding, and improperly considered others. The EC urges the Appellate Body to disregard the text of the Dispute Settlement Understanding ("DSU"); we respectfully urge you to reject the EC's approach.

5. Second, we focus on the Panel's disregard for the standard of review under Article 17.6(ii) of the AD Agreement. The Panel, like three panels before it, found that the use of zeroing by the United States in the 29 administrative reviews rested on a permissible U.S.

interpretation of the WTO Antidumping Agreement ("AD Agreement"). As we have demonstrated, the Panel was correct in this finding. However, the Panel nonetheless found against the United States. The Panel's finding, if not reversed, would render Article 17.6(ii) a nullity, and would improperly add to Members' obligations under the covered agreements. Separate and apart from whatever one might think about the topic of zeroing, this failure to respect Article 17.6(ii) is of very serious concern. At the end of the Uruguay Round negotiations, Article 17.6(ii) was key to the acceptance of the other provisions of the AD Agreement. We urge the Appellate Body to uphold it.

6. Lastly, the Panel considered various evidentiary issues of importance to the EC's *prima facie* case. The Panel properly understood, following an *objective assessment*, that the EC did not prove the use of zeroing in seven administrative reviews. However, the Panel failed to apply the same rigor to its analysis of the EC's unsupported factual assertions with respect to the eight sunset reviews.

7. We now discuss each of these aspects of this appeal in more detail.

II. The Panel's Preliminary Rulings

8. The Panel made three preliminary rulings on the EC's attempt to expand impermissibly the scope of the panel proceeding. We address each of the Panel's rulings in turn.

A. Article 6.2 of the DSU

9. The EC identified in its panel request the following "measures at issue":

> The continued application of, or the application of the specific anti-dumping duties resulting from the anti-dumping orders enumerated from I to XVIII in the Annex to the present request as calculated or maintained in place pursuant to the most recent administrative review or, as the case may be, original proceeding or changed

> circumstances or sunset review proceeding at a level in excess of the anti-dumping margin which would result from the correct application of the Anti-Dumping Agreement (whether duties or cash deposit rates or other form of measure).[1]

10. The EC's description was anything but clear. To the extent the EC was trying to include the application or continued application of duties related to unspecified antidumping determinations, the EC failed to identify the "*specific* measures at issue" as required by Article 6.2 of the DSU.[2]

11. The EC confirmed in response to a U.S. objection that it was trying to reach any and all "subsequent measures" related to the application or continued application of duties in 18 "cases."[3] In response to the Panel's questions, the EC belatedly introduced its concept of "duty as a measure."[4] The EC was not describing a "duty." Rather, the EC described something ambiguous and free-standing, with a life of its own beyond the 52 antidumping determinations identified in the EC's panel request. The EC also alleged that this contained the zeroing methodology that the EC said that it was not challenging "as such" in this dispute.

12. The EC ignored – and continues to ignore – that for any given importation, the duty imposed or assessed depends on an underlying administrative determination. This element of the EC's panel request, to fulfill the requirements of DSU Article 6.2, should have identified the specific determination related to the particular antidumping duty. However, the EC did not

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[1]WT/DS350/6 (11 May 2007).

[2]Emphasis added.

[3]EC Response to U.S. Preliminary Objections, paras. 47-48.

[4]EC Answer to Panel Question 1(a), Feb. 22, 2008.

identify such determinations, nor could it have, because, by its own admission, the EC was trying to include any not-yet-taken determinations related to the duties in 18 "cases." And a measure that did not exist at the time of the Panel's establishment could not be within the Panel's terms of reference.[5]

13. The Panel properly understood that the EC could not meet the requirements of Article 6.2 of the DSU by referring to duties in a general way, detached from any underlying determinations. As the Panel found, the EC's inclusion of the application or continued application of antidumping duties was an attempt to affect future determinations that the U.S. Department of Commerce ("Commerce") might make.[6] The Panel recognized that the EC's requested findings would address measures that did not exist at the time of panel establishment, nor during the panel proceedings.[7] This ground alone justified the Panel's finding that the identification of the alleged 18 "duties" failed to meet the specificity requirement of Article 6.2 and therefore fell outside the Panel's terms of reference.

14. The EC creates a false dichotomy with respect to the Panel's analysis by asserting that the Panel confused a substantive analysis as to what a "measure" is with a procedural analysis of specificity.[8] Whether something is a "measure" goes to the very question of what a Member may include in its panel request under the DSU, and therefore what may fall within a panel's terms of

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[5]*See, e.g.*, *US – Upland Cotton (Panel)*, paras. 7.158-7.160;

[6]Panel Report, para. 7.59.

[7]Panel Report, para. 7.59.

[8]EC Appellant Submission, paras. 55-56.

reference. In this sense, the question as to whether a "measure" exists is procedural, but more importantly, it is an issue presented by Article 6.2 and hence properly considered by the Panel. The Panel also correctly understood that if something is not a "measure," then it is not – and cannot be – a measure "specifically" identified within the meaning of Article 6.2 of the DSU.

15. The EC further accuses the Panel of improperly addressing *sua sponte* the issue of whether the so-called 18 "duties" were "measures."[9] Even if the United States had not raised this issue, the Panel, in conducting an objective assessment of the matter before it, had to be satisfied that the EC made a *prima facie* case as to the existence and precise content of the alleged "measures" identified in the panel request.[10] The Panel was not convinced – it properly concluded that what the EC described in its panel request was not a measure at all.[11]

B. The EC Included Measures That Were Not Final at the Time of the EC's Panel Request

16. The United States also asked the Panel to exclude four preliminary determinations as outside the Panel's terms of reference because they did not constitute *final* action pursuant to Article 17.4 of the AD Agreement. The Panel agreed with the United States, and the Appellate Body should affirm this finding.[12]

17. The EC looks for errors in the Panel's analysis where there are none. The Panel properly understood that the EC's challenge to preliminary determinations could not fall within the

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[9]EC Appellant Submission, para. 62.

[10]*US – Wool Shirts (AB)*, pp. 12-13; *US – Shrimp AD (Ecuador) (Panel)*, paras. 7.10-7.11.

[11]Panel Report, para. 7.56.

[12]Panel Report, paras. 7.70-7.77; 8.1(c).

"provisional measures" exception to the finality requirement under Article 17.4.[13] The EC cannot hide from that fact by alleging that the Panel somehow improperly examined the applicability of this exception.[14]

18. The EC also asserts that the four preliminary determinations fall within the so-called application or continued application of antidumping duties in 18 "cases" that was identified in its panel request.[15] Aside from the fact that those alleged measures were not within the Panel's terms of reference, the EC's argument suffers from another fatal flaw. None of the four preliminary determinations could be classified as final action to levy definitive antidumping duties. In other words, they could not serve as a basis for the application or continued application of duties and they did not meet the finality requirement of Article 17.4.

C. The EC Requested Establishment of a Panel on Measures Not Included in Its Consultations Request

19. The United States asked the Panel to exclude 14 measures that were identified in the EC's panel request, but not in its consultations request. The Panel improperly found that those 14 measures were within its terms of reference,[16] and the United States respectfully asks the Appellate Body to reverse.

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[13]Panel Report, para. 7.74.

[14]EC Appellant Submission, para. 85.

[15]EC Appellant Submission, para. 87.

[16]Panel Report, para. 7.28, 8.1(a).

20. As we have explained at length in our other appellant submission,[17] there is a progression between the measures discussed in consultations pursuant to DSU Article 4 and the measures included in a panel request, pursuant to DSU Article 6, which form a panel's terms of reference pursuant to DSU Article 7. Measures listed in a panel request, but not in a consultations request, cannot fall within a panel's terms of reference.

21. The Panel overlooked the textual basis for the U.S. preliminary objection.[18] It also misunderstood that the central question is whether the measures in the consultations request and panel request are essentially *the same measures*, and not whether they involve the "same dispute" or "same subject matter."[19]

22. The Appellate Body has found that the measures subject to panel establishment are defined by the consultations request, and that *separate, legally distinct* measures may not be added to a panel request.[20] The United States demonstrated the legal distinctiveness of the 14 additional measures. The Panel ignored this argument, applying instead a "striking similarities" test found nowhere in the text of the DSU.[21] To the Panel, just because the 14 measures involved the same merchandise from the same countries as the measures in the consultations request, they fell within its terms of reference. The Panel also confused the distinction between claims and

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[17]U.S. Other Appellant Submission, Part II.

[18]Panel Report, paras. 7.20, 7.22.

[19]Panel Report, paras. 7.23, 7.28.

[20]*US – Certain EC Product (AB)*, paras. 70, 82; *US – Customs Bond Directive (India) (AB)*, para. 295.

[21]Panel Report, para. 7.27.

measures – a Member may make the same claim as to two measures – as the EC did here – but that does not make the measures the same.

23. The EC, in its appellee submission, merely repeats the Panel's analysis and conclusions.[22] The EC, like the Panel, stresses the sameness of the "matter." However, the "matter," in the context of dispute settlement, involves the specific measures at issue and the legal basis of the complaint. It is this definition of "matter" which is the "key concept in defining the scope of a dispute that may be referred to the DSB under the [AD Agreement] and, therefore, in identifying the parameters of a panel's terms of reference in an anti-dumping dispute."[23] And as Article 4 of the DSU makes clear,[24] a Member may only proceed to a request for a panel with respect to a measure where the Member has requested consultations with respect to that measure. Here, the measures were not the same, and they were not properly before the Panel.

III. The Finding of Inconsistency With Respect to the Application of "Simple Zeroing" in the 29 Administrative Reviews at Issue

A. Article 17.6(ii) of the AD Agreement

24. A key issue in this appeal involves the proper application of Article 17.6(ii) of the AD Agreement, which a panel *must* take into account when interpreting provisions of the AD Agreement. As the Appellate Body has explained, Article 17.6(ii) supplements the standard of review under Article 11 of the DSU.[25] The terms of Article 17.6(ii) bear repeating. Pursuant to

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[22]EC Appellee Submission, Part II.

[23] *Guatemala – Cement I (AB)*, para. 70.

[24] *See e.g.,* Article 4.7.

[25]*US – Hot-Rolled Steel (AB)*, para. 62.

the first sentence of that provision, a panel is to interpret the relevant provisions of the AD Agreement in accordance with customary rules of interpretation of public international law. And, pursuant to the second sentence, "[w]here the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations."

25. The existence of such a provision in the AD Agreement confirms that Members were aware that the text would pose particular interpretive challenges. In many instances, the text permits more than one interpretation because it was drafted to cover varying and complex antidumping systems around the world and long-standing differences concerning methodology. The negotiators therefore indicated that it would be a *legal error* for a panel not to respect a permissible interpretation of the AD Agreement.

26. Three previous panels found that the application of zeroing by the United States in reviews rested on a permissible interpretation of the AD Agreement and did as was required under Article 17.6(ii) – they found that the United States had not acted in a WTO-inconsistent manner. After examining the EC's legal claims as to the use of "simple zeroing" in 29 administrative reviews, the Panel here concluded that "we are of the view that the position of the United States. . . reflects at least *one permissible interpretation* of the relevant provisions of the [AD Agreement]."[26] Nevertheless, the Panel disregarded the standard of review and found that

[26]Panel Report, para. 7.169, n. 131 (emphasis added).

the United States had acted inconsistently with respect to the 29 reviews at issue.[27] The Panel's finding represents a blatant misapplication of Article 17.6(ii) and should be reversed.

27. The Panel never explained its failure to apply Article 17.6(ii). But it did invoke DSU Articles 3.2 and 3.3 and argued that those articles provided a legal basis for its ultimate conclusion.[28] However, nothing in those articles, or elsewhere in the DSU, prevails over the requirements of Article 17.6(ii) to the extent there is conflict between them. To the contrary, Article 1.2 of the DSU explicitly makes the provisions of the DSU "subject to" the special or additional rules listed in Appendix 2 to the DSU, including Article 17.6(ii).

28. By disregarding the applicable standard of review under Article 17.6(ii), the Panel read that critical negotiated provision out of the AD Agreement and improperly added to the obligations, and diminished the rights, of the United States under the covered agreements. Such a result threatens the very "security and predictability" of the multilateral trading system that the Panel thought it was protecting.

29. The EC, in defense of the Panel, creates a false conflict between Article 11 of the DSU and Article 17.6(ii) – the EC reads Article 11 as requiring panels to adhere to the interpretation of the AD Agreement in prior Appellate Body reports on the same legal issues, even if panels, in undertaking their own objective assessment, view another interpretation of the AD Agreement as permissible.[29] However, Article 11 does not establish *stare decisis* in the WTO dispute

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[27]Panel Report, para. 7.183; 8.1(e).

[28]Panel Report, paras. 7.179, 7.182.

[29]EC Appellee Submission, paras. 65-66.

settlement system, nor does Article 11 require that prior, non-binding dispute settlement reports trump the standard of review in Article 17.6(ii).

B. The Panel's Permissible Interpretation

30. The AD Agreement permits Members to assess antidumping duties on dumped transactions in the full amount by which the export price is less than normal value. The Panel, like prior panels to address this issue, found no text in Article VI of the GATT 1994 and Articles 2.1 and 9.3 of the AD Agreement that requires offsets be provided to account for the extent to which other transactions are made at above-normal value prices.[30] The EC's claim that these issues have been conclusively resolved by fifteen past Appellate Body and panel reports is not supported by the facts.[31] The EC's fifteen past reports reduce to only three Appellate Body reports and the separate opinions of two dissenting panelists that involve a challenge to the U.S. calculation of dumping margins in administrative reviews and examine obligations with respect to assessment. Like prior panels, the Panel found unpersuasive the reasoning that led prior Appellate Body reports to conclude that the use of zeroing in administrative reviews is WTO-inconsistent.

31. As the Panel recognized,[32] the substantive issue can be understood as whether dumping and margins of dumping are concepts that have a meaning in relation to individual transactions,

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[30]Panel Report, paras. 7.162, 7.169, n. 112, n. 131; *US – Stainless Steel (Mexico) (Panel)*, para. 8.1(c); *US – Zeroing (Japan) (Panel)*, paras. 7.216, 7.219, 7.222, 7.259; *US – Zeroing (EC) (Panel)*, paras. 7.223, 7.284.

[31]EC Appellee Submission, para. 19.

[32]Panel Report, paras. 7.162-7.163.

or if they necessarily must refer to an aggregation of transactions. If the term "margin of dumping" can refer to the difference between export price and normal value for *individual transactions*, the U.S. assessment of antidumping duties in the 29 administrative reviews does not exceed the margin of dumping. The Panel was right to consider that such an interpretation was permissible.

32. The EC's challenge relies on a rigid and inflexible interpretation of the terms "dumping" and "margin of dumping" such that they have no meaning except in relation to an aggregation of all the transactions of a product under consideration taken as a whole. The text of the relevant provisions does not limit the ordinary meaning of the word "product", which can have an individual or a collective meaning, or both, depending on the context. That prices are set in individual transactions and that products are introduced into the commerce of an importing country pursuant to individual transactions supports the U.S. interpretation.

33. The EC's rigid interpretation is at odds with numerous other provisions of the GATT 1994 and the AD Agreement. This provides further contextual support for the conclusion that the EC's interpretation is not correct. For example, an obligation to account for other imports in assessing antidumping duties on a particular entry is contrary to the very concept of a prospective normal value system provided for in Article 9. Nor does the EC attempt to explain why, if refund proceedings under Article 9.3 require aggregation of transactions for the "product as a whole," Article 9.3 fails to provide for any time frame over which the transactions would be aggregated. In the absence of such a temporal limit, no current antidumping duty liability could

ever be determined until a measure was withdrawn because subsequent non-dumped transactions could yet offset the current "intermediate" results of transaction-specific comparisons.

34. Understanding the term "margin of dumping" as applying to individual transactions is particularly appropriate in the context of antidumping duty assessments, where duties are assessed on individual customs entries resulting from individual transactions for which importers are liable for payment. The fact that importers are the parties that actually pay the duties must not be ignored if the duties are to be an effective remedy to "offset or prevent" dumping as provided in Article VI:2 of the GATT 1994. Recognition of this fact does not contradict the notion that dumping results from the pricing behavior of exporters and producers. The issue is not who is dumping, but rather, whether the antidumping duty has the effect of offsetting or preventing the dumping if it does not equal the amount by which the export price is less than normal value. The antidumping duty can remedy injurious dumping by removing any incentive the importer has to import merchandise at less than normal value and by inducing the importer to increase the resale price to cover the expense of the duty, thereby preventing further injurious effect. If the duty is not equal to the amount by which the export price is less than normal value, these remedial effects would be nullified. This treats fairly priced transactions as a remedy for injurious dumping that supplants the AD Agreement remedy.

35. The EC's proposed interpretation results in perverse incentives and absurd results. By providing offsets that reduce the antidumping duty liability of a competitor, an importer paying prices in excess of normal value would be disadvantaged as compared to an importer paying less than normal value prices for merchandise from the same exporter. Such an approach diminishes

the incentive of importers to import fairly priced merchandise. The Panel shared these concerns about creating a competitive disincentive to engage in fair trade that could not have been intended by the drafters of the AD Agreement.[33]

36. The EC argues that obligations pertaining to the determination of injury and the methods of comparison in Article 5 investigations must necessarily carry over into Article 9 assessment despite the fact that the obligations are explicitly tied to Article 5 investigations. Article 5 investigations and Article 9 assessment differ in terms of their function within the AD Agreement. It cannot be assumed in the absence of any textual basis that the obligations that pertain to Article 5 investigations also pertain to Article 9 assessment. There is a diversity of approaches to assessment that exists among the Members. Thus, it is not surprising that the Members could not agree upon the same level of uniformity in obligations pertaining to Article 9 assessment as they were able to agree upon with respect to Article 5 investigations. Where Members did not agree upon obligations, it is not the function of dispute settlement to create them.

37. With respect to its interpretation of Article 2.4.2, the EC goes even further, suggesting that the phrase, "the existence of margins of dumping during the investigation phase" should be discounted because, according to the EC, it was, "added - *behind closed doors*."[34] Even if this were true – which it is not – such reasoning is absurd. The EC points to no legal reason why select portions of the AD Agreement must be discarded, or afforded less weight. That the EC

[33] Panel Report, para. 7.164.

[34] EC Appellee Submission, para. 34.

now desires to ignore a particular phrase that was included at the time the AD Agreement was negotiated cannot support its proposed interpretation. The negotiation of any agreement is, by definition, a compromise of all parties. By necessity, negotiated agreements will include statements or phrases agreed to by all, but not advocated by all. If one were to follow the EC's logic of insisting that dispute settlement panels and the Appellate Body discard portions of text merely because a party or parties that accepted it at the time, later find it objectionable, the compromises that are the basis of the entire agreements would be rendered void.

IV. The Panel's Examination of Evidentiary Issues

A. Administrative Reviews

38. The Panel's finding that the EC failed to establish a *prima facie* showing that zeroing was employed in 7 of the challenged administrative reviews is supported by the Panel's evaluation and consideration of the evidence before it. Pursuant to Article 17.6 of the DSU, appeals are limited to issues of law covered in the panel report and legal interpretations developed by the panel. The weighing of evidence, however, falls squarely within the panel's discretion. The Appellate Body, in assessing the panel's appreciation of the evidence, will not find a panel to have neglected its duty under Article 11 of the DSU merely because it may have reached a different conclusion. Rather, it must be shown that the panel exceeded the bounds of its discretion as the trier of fact.

39. Here, it was the EC's burden to demonstrate that zeroing was employed by Commerce in each of the challenged reviews. The Panel required that the EC provide Commerce-generated, documentary evidence that demonstrated zeroing had been used in each of the challenged

reviews. For these 7 reviews, the Panel found the submitted documentation insufficient because the Commerce-generated documents the EC submitted did not demonstrate zeroing had been employed. Furthermore, the EC never established that the remaining documentation submitted to the Panel was generated by Commerce during the conduct of the reviews. The Panel was thus unable to conclude, based on the evidence submitted, that zeroing had been employed in the 7 administrative reviews. As such, the EC failed to make a *prima facie* case with respect to the use of zeroing in the 7 reviews and excluded them from its findings.

B. Sunset Reviews

40. While the evidence supports the Panel's finding that no *prima facie* case was established as to the 7 challenged administrative reviews, it does not support the Panel's conclusion that the EC made a *prima facie* showing that zeroing was employed in the margins relied upon in the 8 challenged sunset determinations. The Panel failed to make an objective assessment of the evidence with respect to the sunset determinations because it failed to require that the evidence affirmatively demonstrate that the challenged methodology was actually employed in the underlying investigations.

41. A general statement in the *Federal Register* notice concerning Commerce's broader practice does not demonstrate that zeroing was actually employed in the margins relied upon. Because the Panel's conclusion lacks a sufficient evidentiary basis, the Panel failed to undertake an objective assessment of the matter before it.

VI. Conclusion

42. For all of the forgoing reasons, as well as those set out in our written submissions, we respectfully request that the Appellate Body reject the EC's appeal and affirm the Panel's findings that were the subject of that appeal. We also respectfully request that the Appellate Body reverse the Panel's findings that were the subject of the U.S. other appeal.

43. We thank you for your attention and look forward to answering your questions.