United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"); Recourse to Article 22.6 of the DSU by the United States (WT/DS294)

Closing Statement of the United States

May 21, 2010

1. Mr. Chairman, members of the Arbitrator, the United States would like to thank you for your time and attention to the voluminous amount of information in this phase of the dispute. We greatly appreciate your efforts. The United States also wishes to thank the staff of the Secretariat for their work in assisting the Arbitrator and in arranging for the logistics of this hearing. We close with three points for the Arbitrator to keep in mind as it continues to consider this matter.

2. First, the questions before the Arbitrator in this dispute are (1) whether the EU's proposed level of suspension of concessions is equivalent to the level of nullification or impairment, and if not, what level of suspension would be equivalent to the level of nullification or impairment, and (2) whether the EU has followed the principles and procedures set forth in Article 22.3 in making its request to suspend obligations under the DSU.

3. The EU's original request for authorization under Article 22.2 proposed suspension taking the form of either a 100% tariff on $311 million in trade, or a 13.18% tariff on $477 million. The EU has adjusted these proposals in every submission. Most notable of these are a 20% increase to the level of suspension, a quadrupling of the level of suspension in the first year, and a twenty-fold increase in the "reverse charge" component of Methodology 1. However adjusted, neither of these proposed levels of suspension is equivalent to the level of nullification or impairment.

4. Second, the burden of proof on the United States is with respect to whether the EU's proposed level of suspension is equivalent to the level of nullification or impairment. The United States is not required to either provide all evidence necessary for the EU to correct its flawed methodologies, nor is it required to perform any particular calculations or recalculations in order to satisfy its burden of proof. Once the United States has discharged that burden and the Arbitrator has decided to determine the correct level of suspension, there is no longer a burden of proof for the United States to meet. The United States has met its burden by (1) presenting a reasonable calculation of nullification or impairment that demonstrates that both of the EU's calculations yield levels of suspension that exceed the level of nullification or impairment, and (2) by identifying the various deficiencies and flawed assumptions in each of the EU's calculations that cause them to overestimate the level of suspension and make them inappropriate for determining the level of suspension.

5. Third, one of the underlying principles for authorizing suspension of concessions is maintaining the balance of trade benefits accruing to the parties. Where a member's measure is nullifying or impairing the benefits promised to another Member under the covered agreements, the Member whose benefits are being nullified or impaired is not required to continue providing the full level of its trade concessions to the member in breach. Under Article 22.4, the level of suspension may not exceed the level of nullification or impairment. This limit does not permit a Member to go back to recover past trade (much less lost profits), but is forward looking. That is, suspension is limited to the level at which benefits are being nullified or impaired.

6. In summary, the United States has demonstrated that the EU's two proposals for

authorization of suspension of concessions or other obligations grossly exceed the level of nullification or impairment in this case. The United States has set forth a methodology for calculating the level of nullification or impairment based on the most accurate data available, the best proxies available to estimate the actual impact of zeroing on antidumping margins, and the most specific economic factors available for the products at issue in this dispute. This methodology showed that the level of nullification or impairment should not be greater than $2.87 million. Further, the United States has shown that both EU methodologies exceed the level of nullification or impairment due to the flawed assumptions, numerous deficiencies, and the late addition of two unsubstantiated and unjustified upward adjustments to the level of suspension: a 20% increase and a quadrupling of the level of suspension in the first year. Finally, the EU has sought to circumvent the entire dispute settlement process in future cases and effectively turn the very specific "as applied" findings in a limited number of cases into an "as such" finding by unjustifiably seeking to suspend its obligations with respect to the DSU. The EU has clearly overreached in every aspect of its request for authorization for suspension. For the forgoing reasons, the United States respectfully requests that the Arbitrator reject the EU's request for authorization, and determine that the level of nullification or impairment is no greater than $2.87 million.