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

Recourse to Article 21.5 of the DSU by the European Communities

Report of the Panel

TABLE OF CONTENTS

Page

I. INTRODUCTION **1**

II. BACKGROUND **2**

A. INTRODUCTION 2
B. THE US ANTI-DUMPING SYSTEM 2
1. Original investigations *2*
2. Administrative reviews *3*
3. Sunset reviews *4*
C. FINDINGS BY THE PANEL AND THE APPELLATE BODY IN THE ORIGINAL DISPUTE 4
1. Panel *4*
(a) "As applied" claims – model zeroing in original investigations 4
(b) "As applied" claims – zeroing in administrative reviews 5
(c) "As such" claims 5
(d) Recommendation 6
(e) Dissenting opinion by one panelist 6
2. Appellate Body *7*
(a) "As applied" claims – simple zeroing in administrative reviews 7
(b) Zeroing "as such" in original investigations 7
(c) Zeroing "as such" in administrative reviews 7
(d) "As such" claims – USDOC Regulations 8
(e) Recommendation 8
3. DSB recommendations and rulings *8*

III. FACTUAL ASPECTS **9**

A. RELEVANT DEVELOPMENTS CONCERNING THE US MEASURES AT ISSUE IN THE ORIGINAL DISPUTE 9
B. MEASURES AT ISSUE 11

IV. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS **12**

A. EUROPEAN COMMUNITIES 12
B. UNITED STATES 14

V. ARGUMENTS OF THE PARTIES **14**

A. US REQUEST FOR PRELIMINARY RULINGS 14
1. United States *14*
2. European Communities *26*
B. PANEL COMPOSITION 32
1. European Communities *32*
2. United States *33*
C. VIOLATIONS WITH RESPECT TO ALL MEASURES COVERED IN THIS PROCEEDING 33
1. Whether the United States extended the measures challenged in the original dispute pursuant to sunset review proceedings which relied on dumping margins calculated with zeroing *33*
(a) European Communities 33
(b) United States 35
2. Whether the United States continues to collect anti-dumping duties and impose cash deposits inflated by zeroing after 9 April 2007, has failed to revoke the original orders entirely, and whether the 16 administrative reviews challenged in the original dispute have been "superseded" *36*
(a) European Communities 36
(b) United States 43
3. Whether the United States failed to put into effect new measures between 9 April and 23 April/31 August 2007 ..... *50*
(a) European Communities 50
(b) United States 52
D. VIOLATIONS WITH RESPECT TO SPECIFIC MEASURES (SECTION 129 DETERMINATIONS) 52

1. Whether there has been a violation in respect of case 11 – Stainless Steel Sheet and Strip in Coils from Italy *52*
(a) European Communities 52
(b) United States 55
2. Whether there has been a violation in respect of cases 2, 4 and 5 – Stainless Steel Bar from France, Italy and the United Kingdom ("all others" rate) *57*
(a) European Communities 57
(b) United States 60
3. Whether there has been a violation in respect of cases 2, 3, 4 and 5 – Stainless Steel Bar from France, Germany, Italy and the United Kingdom ("injury") *61*
(a) European Communities 61
(b) United States 63
4. Requests for findings *64*
(a) European Communities 64
(b) United States 66

VI. ARGUMENTS OF THE THIRD PARTIES 66

1. India *66*
2. Japan *68*
3. Korea *77*
4. Norway *81*

VII. INTERIM REVIEW 84

A. EC REQUESTS FOR REVIEW 85
B. US REQUESTS FOR REVIEW 87
C. REQUESTS BY BOTH PARTIES CONCERNING THE SAME ASPECTS OF THE INTERIM REPORT 91

VIII. FINDINGS 92

A. ORDER OF THE PANEL'S ANALYSIS 92
B. RELEVANT PRINCIPLES REGARDING STANDARD OF REVIEW, TREATY INTERPRETATION AND BURDEN OF PROOF 92
1. Rules of treaty interpretation *92*
2. Standard of review *92*
3. Burden of proof *93*
C. EC CLAIMS WITH RESPECT TO THE COMPOSITION OF THE PANEL 94
1. Main arguments of the parties *94*
2. Evaluation by the Panel *95*
D. US REQUEST FOR PRELIMINARY RULINGS 96
1. Whether the European Communities makes claims with respect to measures that were not identified in its panel request *96*
(a) Main arguments of the parties 96
(b) Main arguments of the third parties 98
(c) Evaluation by the Panel 98
2. Whether the "subsequent reviews" fall within our terms of reference *101*
(a) Arguments of the parties 101
(b) Arguments of the third parties 108
(c) Evaluation by the Panel 110
(i) Introduction 110
(ii) Whether the subsequent reviews are "amendments" to the measures at issue in the original dispute 116
(iii) Whether the subsequent reviews fall within our terms of reference as "omissions" or "deficiencies" in the US implementation of the DSB's recommendations and rulings 124
(iv) Whether the subsequent reviews are measures taken to comply because they have a sufficiently close nexus with the measures at issue in the original dispute and the DSB recommendations and rulings 125
Relevant legal principles *125*
Application of a nexus-based test in the context of trade remedy disputes *130*
Nature and effects *132*
Administrative reviews subsequent to original determinations or earlier administrative reviews (a and c) **134**

Sunset reviews subsequent to original determinations and earlier administrative reviews (b and d) ... 136
Temporal relationship ... 136
Application to the facts of this case ... 138
(v) Conclusion ... 141
E. EC GENERAL CLAIMS THAT THE UNITED STATES FAILED TO FULLY IMPLEMENT THE DSB'S RECOMMENDATIONS AND RULINGS ... 142
1. Introduction ... 142
2. EC claims with respect to subsequent sunset reviews ... 143
(a) Main arguments of the parties ... 143
(b) Main arguments of the third parties ... 144
(c) Evaluation by the Panel ... 144
3. EC claims with respect to subsequent administrative reviews and with respect to US actions to collect AD duties calculated with zeroing ... 147
(a) Main arguments of the parties ... 147
(b) Main arguments of the third parties ... 154
(c) Evaluation by the Panel ... 156
(i) Temporal aspect of the obligation to implement DSB recommendations and rulings with respect to AD measures in the case of a Member operating a retrospective duty assessment system ... 156
Whether the US obligation to implement extends to administrative reviews covering imports made before the end of the reasonable period of time ... 158
Whether the US obligation to implement extends to the liquidation of duties ... 165
(ii) Application to the facts of this dispute ... 168
EC claims concerning liquidation of entries after the end of the reasonable period of time pursuant to determinations of final liability made before that date ... 169
EC claims concerning assessment instructions and cash deposit rates ... 170
Case 1 (Hot Rolled Carbon Steel from the Netherlands) ... 170
Case 6 (Stainless Steel Wire Rod from Sweden) ... 172
Case 31 (Ball Bearings from the UK) ... 173
EC claims that the United States has failed to comply with the DSB's recommendations in the original dispute because it has failed to fully revoke the original investigation orders contested in the original dispute and EC claims that the administrative reviews at issue in the original dispute have not been superseded ... 175
F. REQUEST FOR FINDINGS REGARDING THE NON-EXISTENCE OF MEASURES TAKEN TO COMPLY BETWEEN 9 APRIL AND 23 APRIL/31 AUGUST 2007 ... 176
1. Main arguments of the parties ... 176
2. Evaluation by the Panel ... 177
G. EC CLAIMS OF VIOLATIONS CONCERNING CERTAIN SECTION 129 DETERMINATIONS ... 178
1. EC claims with respect to the Section 129 determination in case 11 (Stainless Steel Sheet and Strip in Coils from Italy) ... 178
(a) Main arguments of the parties ... 178
(b) Main arguments of the third parties ... 181
(c) Evaluation by the Panel ... 181
2. EC claims with respect to the Section 129 determinations in cases 2, 3, 4 and 5 (Stainless Steel Bar from France, Germany, Italy and the United Kingdom) ... 185
(a) Introduction and authority of the Panel to address claims with respect to revoked measures ... 185
(b) EC claims with respect to "injury" – Section 129 determinations in cases 2, 3, 4 and 5 ... 186
(i) Main arguments of the parties ... 186
(ii) Evaluation by the Panel ... 188
Whether the EC claims are properly before us ... 188
Substance of the EC claim ... 193
(c) EC claims with respect to the "all others" rate established in the Section 129 determinations in cases 2, 4 and 5 ... 195
(i) Main arguments of the parties ... 195
(ii) Arguments of the third parties ... 197
(iii) Evaluation by the Panel ... 197

IX. CONCLUSIONS AND RECOMMENDATION ... 200

LIST OF ANNEXES

ANNEX A

REQUEST FOR THE
ESTABLISHMENT OF A PANEL

Contents		Page
Annex A-1	Request for the Establishment of a Panel by the European Communities	A-2

TABLE OF CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
Argentina – Footwear (EC)	Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, 515
Argentina – Poultry Anti-Dumping Duties	Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003, DSR 2003:V, 1727
Argentina – Textiles and Apparel	Panel Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/R, adopted 22 April 1998, as modified by Appellate Body Report, WT/DS56/AB/R, DSR 1998:III, 1033
Australia – Automotive Leather II (Article 21.5 – US)	Panel Report, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather – Recourse to Article 21.5 of the DSU by the United States*, WT/DS126/RW and Corr.1, adopted 11 February 2000, DSR 2000:III, 1189
Australia – Salmon (Article 21.5 – Canada)	Panel Report, *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada*, WT/DS18/RW, adopted 20 March 2000, DSR 2000:IV, 2031
Brazil – Aircraft	Appellate Body Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R, adopted 20 August 1999, DSR 1999:III, 1161
Brazil – Aircraft	Panel Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/R, adopted 20 August 1999, as modified by Appellate Body Report, WT/DS46/AB/R, DSR 1999:III, 1221
Brazil – Aircraft (Article 21.5 – Canada)	Panel Report, *Brazil – Export Financing Programme for Aircraft – Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/RW, adopted 4 August 2000, as modified by Appellate Body Report, WT/DS46/AB/RW, DSR 2000:IX, 4093
Canada – Aircraft (Article 21.5 – Brazil)	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/AB/RW, adopted 4 August 2000, DSR 2000:IX, 4299
Canada – Wheat Exports and Grain Imports	Panel Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/R, adopted 27 September 2004, upheld by Appellate Body Report, WT/DS276/AB/R, DSR 2004:VI, 2817
Chile – Price Band System	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3045, and Corr.1
Chile – Price Band System	Panel Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/R, adopted 23 October 2002, as modified by Appellate Body Report, WT/DS207AB/R, DSR 2002:VIII, 3127

Short Title	Full Case Title and Citation
Chile – Price Band System (Article 21.5 – Argentina)	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS207/AB/RW, adopted 22 May 2007
Dominican Republic – Import and Sale of Cigarettes	Panel Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/R, adopted 19 May 2005, as modified by Appellate Body Report, WT/DS302/AB/R, DSR 2005:XV, 7425
EC – Bananas III (Article 21.5 – Ecuador)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by Ecuador*, WT/DS27/RW/ECU, adopted 6 May 1999, DSR 1999:II, 803
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EC – Bed Linen (Article 21.5 – India)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, 965
EC – Bed Linen (Article 21.5 – India)	Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/RW, adopted 24 April 2003, as modified by Appellate Body Report, WT/DS141/AB/RW, DSR 2003:IV, 1269
EC – Chicken Cuts	Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, DSR 2005:XIX, 9157
EC – Salmon (Norway)	Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008
Guatemala – Cement I	Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, 3767
Guatemala – Cement II	Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, DSR 2000:XI, 5295

Short Title	Full Case Title and Citation
India – Autos	Panel Report, *India – Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R and Corr.1, adopted 5 April 2002, DSR 2002:V, 1827
Indonesia – Autos	Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R and Corr.1 and 2, adopted 23 July 1998, and Corr.3 and 4, DSR 1998:VI, 2201
Japan – Film	Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, 1179
US – 1916 Act (Japan)	Panel Report, *United States – Anti-Dumping Act of 1916, Complaint by Japan*, WT/DS162/R and Add.1, adopted 26 September 2000, upheld by Appellate Body Report, WT/DS136/AB/R, WT/DS162/AB/R, DSR 2000:X, 4831
US – Anti-Dumping Measures on Oil Country Tubular Goods	Appellate Body Report, *United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, WT/DS282/AB/R, adopted 28 November 2005, DSR 2005:XX, 10127
US – Anti-Dumping Measures on Oil Country Tubular Goods	Panel Report, *United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, WT/DS282/R, adopted 28 November 2005, as modified by Appellate Body Report, WT/DS282/AB/R, DSR 2005:XXI, 10225
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, 3779
US – Carbon Steel	Panel Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/R and Corr.1, adopted 19 December 2002, as modified by Appellate Body Report, WT/DS213/AB/R, DSR 2002:IX, 3833
US – Corrosion-Resistant Steel Sunset Review	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, 3
US – Corrosion-Resistant Steel Sunset Review	Panel Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/R, adopted 9 January 2004, as modified by Appellate Body Report, WTDS244/AB/R, DSR 2004:I, 85
US – Cotton Yarn	Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, adopted 5 November 2001, DSR 2001:XII, 6027
US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)	Panel Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS212/RW, adopted 27 September 2005, DSR 2005:XVIII, 8950

Short Title	Full Case Title and Citation
US – Customs Bond Directive	Panel Report, *United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties*, WT/DS345/R, adopted 1 August 2008, as modified by Appellate Body Report, WT/DS343/AB/R, WT/DS345/AB/R
US – FSC (Article 21.5 – EC)	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, 55
US – FSC (Article 21.5 – EC II)	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Second Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW2, adopted 14 March 2006
US – Gasoline	Panel Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, adopted 20 May 1996, as modified by Appellate Body Report, WT/DS2/AB/R, DSR 1996:I, 29
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697
US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS268/AB/RW, adopted 11 May 2007
US – Section 129(c)(1) URAA	Panel Report, *United States – Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS221/R, adopted 30 August 2002, DSR 2002:VII, 2581
US – Shrimp (Article 21.5 – Malaysia)	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6481
US – Shrimp (Article 21.5 – Malaysia)	Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/RW, adopted 21 November 2001, upheld by Appellate Body Report, WT/DS58/AB/RW, DSR 2001:XIII, 6529
US – Shrimp (Thailand) / US – Customs Bond Directive	Appellate Body Report, *United States – Measures Relating to Shrimp from Thailand / United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties*, WT/DS343/R, WT/DS345/R, circulated to WTO Members 16 July 2008 [adoption pending]
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Short Title	Full Case Title and Citation
US – Softwood Lumber IV (Article 21.5 – Canada)	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 of the DSU*, WT/DS257/AB/RW, adopted 20 December 2005, DSR 2005:XXIII, 11357
US – Softwood Lumber IV (Article 21.5 – Canada)	Panel Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 [of the DSU]*, WT/DS257/RW, adopted 20 December 2005 , upheld by Appellate Body Report, WT/DS257/AB/RW, DSR 2005:XXIII, 11401
US – Softwood Lumber V	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004, DSR 2004:V, 1875
US – Stainless Steel (Mexico)	Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008
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US – Upland Cotton	Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, Corr.1, and Add.1 to Add.3, adopted 21 March 2005, as modified by Appellate Body Report, WT/DS267/AB/R, DSR 2005:II, 299
US – Upland Cotton (Article 21.5 – Brazil)	Appellate Body Report, *United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267/AB/RW, adopted 20 June 2008
US – Upland Cotton (Article 21.5 – Brazil)	Panel Report, *United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267/RW and Corr.1, adopted 20 June 2008, as modified by Appellate Body Report, WT/DS267/AB/RW
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, 323
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US – Zeroing (EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, 417
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Short Title	Full Case Title and Citation
US – Zeroing (Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted 23 January 2007
US – Zeroing (Japan)	Panel Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/R, adopted 23 January 2007, as modified by Appellate Body Report, WT/DS322/AB/R

I. INTRODUCTION

1.1 On 13 September 2007, the European Communities requested the establishment of a panel pursuant to Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") concerning the alleged failure of the United States to implement the recommendations and rulings of the Dispute Settlement Body ("DSB") in *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*.[1]

1.2 At its meeting on 25 September 2007, the Dispute Settlement Body ("DSB") decided, in accordance with Article 21.5 of the DSU, to refer this matter, if possible, to the original panel.

1.3 The Panel's terms of reference are the following:

> "To examine, in the light of the relevant provisions of the covered agreements cited by the European Communities in document WT/DS294/25, the matter referred to the DSB by the European Communities in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

1.4 On 28 November 2007, the European Communities requested the Director-General to determine the composition of the Panel.

1.5 Article 8.7 of the DSU provides:

> "If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request."

1.6 On 30 November 2007, the Director-General composed the Panel as follows:

Chairperson: Mr. Felipe Jaramillo

Members: Ms Usha Dwarka-Canabady
Mr. Scott Gallacher[2]

1.7 India, Japan, Korea, Mexico, Norway, Chinese Taipei and Thailand reserved their rights to participate in the Panel proceedings as third parties.

1.8 The Panel met with the parties to the dispute on 9-10 April 2008. The Panel met with the third parties on 10 April 2008.

1.9 The Panel submitted its interim report to the parties on 12 August 2008 and submitted its final report to the parties on 10 October 2008.

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[1] WT/DS294/25.
[2] WT/DS294/26.

II. BACKGROUND

A. INTRODUCTION

2.1 This dispute concerns the implementation by the United States of the DSB's recommendations and rulings in *US – Zeroing (EC)*, the original dispute. The report of the panel in the original dispute was circulated to Members on 31 October 2005; the report of the Appellate Body was circulated to Members on 18 April 2006. On 9 May 2006, the DSB adopted the report of the Appellate Body and the report of the original panel, as modified by the Report of the Appellate Body. Pursuant to Article 21.3(b) of the DSU, the "reasonable period of time" for the US to implement the recommendations and rulings of the DSB was set, by agreement of the parties, for a period of 11 months expiring on 9 April 2007.[3]

2.2 The dispute before the original panel concerned the use, by the United States Department of Commerce ("USDOC"), of "zeroing" when determining margins of dumping in original investigations, administrative (assessment) reviews, new shipper reviews, changed circumstances review, and sunset reviews.

B. THE US ANTI-DUMPING SYSTEM

2.3 At issue, in both the original dispute and in this compliance dispute, is the use of "zeroing" in the calculation of margins of dumping in the context of the imposition, assessment and collection, by the United States, of anti-dumping duties. The US system for the imposition, assessment and collection of anti-dumping duties can be described as follows.[4]

1. Original investigations

2.4 In order to determine whether the imposition of anti-dumping measures on known exporters of a product under consideration may be justified, the United States examines whether dumping existed during a given period of investigation. This determination is made by the United States Department of Commerce ("USDOC") and is published in a Notice of Final Determination of Sales at Less Than Fair Value. The Notice of Final Determination of Sales at Less Than Fair Value sets out the USDOC's assessment of the existence and level of dumping. The United States International Trade Commission ("USITC") then determines whether the relevant United States industry was injured by reason of the dumped imports. When the USDOC finds dumping and the USITC finds that dumping caused injury to the domestic industry, the USDOC issues a Notice of Antidumping Duty Order imposing final measures, including a cash deposit rate equivalent to the margin of dumping calculated for each known exporter. The Anti-Dumping Order provides the United States with the authority to require cash deposits at the time of importation and subsequently assess anti-dumping duties.[5]

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[3] WT/DS294/19.

[4] This description is based on the description contained in paras. 2.4-2.5 of the report of the original panel, paras. 14-33 of the European Communities' First Written Submission (hereinafter, EC First Written Submission) and paras. 6-11 of the United States' First Written Submission (hereinafter, US First Written Submission).

[5] The original dispute concerned, *inter alia*, the use of "model zeroing" by the USDOC in the calculation of margins of dumping in the context of an original investigation: The USDOC, in applying the weighted average-to-weighted average comparison method provided for under the first sentence of Article 2.4.2 of the *Anti-Dumping Agreement*, determines not only the overall product scope of the proceeding (referred to as "subject product" or subject merchandise"), but also identifies sales of sub-products which it considers "comparable", and includes such sales in an "averaging group" (an averaging group, as well as consisting of merchandise that is identical or virtually identical in all physical characteristics, also consists of merchandise

2. Administrative reviews

2.5 Once an Anti-Dumping Order is in place, the United States will assess the liability for anti-dumping duties on specific entries of the subject product by individual importers for a specified period of time on a retrospective basis. Under this system, an anti-dumping duty liability attaches at the time of entry, but duties are not actually assessed at that time. Rather, the United States collects security in the form of a cash deposit at the time of entry, and determines the amount of duties due on the entry at a later date. Once a year (during the anniversary month of the Order) interested parties may request an "administrative review" to determine the amount of duties – if any – owed on entries made during the previous year.[6] The amount of anti-dumping duties owed by each individual importer (the assessment rate) is calculated on the basis of a comparison of each individual import to a contemporaneous average normal value. The total amount of dumping associated with each importer is then aggregated and expressed as a percentage of that importer's imports into the United States. This assessment rate is then applied to all imports by that importer during the period reviewed. The amount of dumping found on all imports from a given exporter (regardless of the importer) is also used to derive a new cash deposit rate that applies on future entries from that exporter going forward. If no review is requested, the cash deposits made on the entries during the previous year are automatically assessed as the final duties. The final anti-dumping duty liability for past entries and the new cash deposit rate for future entries is calculated by the USDOC and published in a Notice of Final Results of Antidumping Duty Administrative Reviews.

2.6 When assessing an importer's final liability for paying anti-dumping duties and any future cash deposit rate, the United States applies a methodology that has been referred to as "simple zeroing": When comparing a weighted-average normal value with the price of an individual export transaction, the amount by which the normal value exceeds the export price is considered to be the "dumped" amount for that export transaction. If the export price exceeds normal value, the result of that particular comparison is considered to be zero. The total amount of dumping for each importer is calculated by aggregating the results of each comparison for which the average normal value exceeds the export price. (In other words, while the value of all export transactions is included in the denominator of the fraction used to calculate the importer's liability, the results of the comparisons for which export prices exceed the average normal value are excluded from the numerator of that fraction).

2.7 Following the publication of the results of an administrative review, the USDOC communicates the results of its determination to US Customs and Border Protection ("USCBP") by issuing what are referred to as "assessment instructions". The instructions advise the USCBP of the "assessment rate", *i.e.*, the final anti-dumping duty to be collected from a given importer. The

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that is sold at the same level of trade). The weighted average-to-weighted average comparison between normal value and export price is made within each averaging group. The amount by which the normal value exceeds the export price for a given averaging group is considered by the USDOC to be a "dumping margin" or dumped amount; the margin of dumping for the overall product is calculated by combining the averaging group results and the total of the dumped amounts is expressed as a percentage of the total export prices (including all averaging groups). At the time of the original dispute, the USDOC used "model zeroing" in calculating the margins of dumping in the context of original investigations: the USDOC treated as "zero" any amount by which the export price exceeded the normal value (in other words, in any case where the export price exceeded the normal value, the dumping margin for that averaging group was zero).

[6] The period of time covered by the duty assessment proceedings is normally twelve months; however, in the case of the first assessment proceeding (first administrative review), the period of time may extend to a period of up to 18 months in order to cover all entries that may have been subject to provisional measures.

USCBP then instructs the US ports of entries to "liquidate" the relevant entries of subject imports at the established rates.[7]

3. Sunset reviews

2.8 Five years after publication of an anti-dumping duty order, the USDOC and the USITC conduct a "sunset review" to determine respectively whether revocation of the order would be likely to lead to a continuation or recurrence of dumping, and the continuation or recurrence of material injury.

2.9 The order is revoked unless both the USDOC and the USITC make affirmative "likelihood" determinations.

C. FINDINGS BY THE PANEL AND THE APPELLATE BODY IN THE ORIGINAL DISPUTE

1. Panel

2.10 The European Communities, in the original dispute, made "as applied" claims with respect to the use of zeroing, by the USDOC, in the calculation of dumping margins in 15 original investigations and 16 administrative reviews concerning products from the European Communities. The European Communities also made "as such" claims with respect to a number of US measures concerning the use of zeroing by the USDOC in the context of original investigations, administrative reviews, new shipper reviews, changed circumstances reviews, and sunset reviews.

(a) "As applied" claims – model zeroing in original investigations

2.11 The European Communities claimed that the United States acted inconsistently with its obligations under the *Anti-Dumping Agreement* and the GATT 1994 in 15 original AD investigations[8] because the USDOC, when calculating the weighted average dumping margin for exporters, performed "model zeroing". The European Communities claimed that the US application of model zeroing in the original investigations at issue violated Articles 1, 2.4, 2.4.2, 3.1, 3.2, 3.5, 5.8, 9.3, and 18.4 of the Agreement on implementation of Article VI of the GATT 1994 (the "*Anti-Dumping Agreement*"), Articles VI:1 and VI:2 of the GATT 1994; and Article XVI:4 of the WTO Agreement. The panel concluded that the United States had acted inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement* with respect to the use of zeroing in these original investigations but declined to make additional findings under the other provisions invoked by the European Communities.[9]

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[7] When the USCBP liquidates an entry, the importer of record (or its authorised customs broker) generally receives a notice of the liquidation. For each entry made, the importer receives either: (i) only a notice, if the cash deposit amount collected at entry is exactly the same as the amount due at liquidation; (ii) a notice and a bill, if the cash deposit amount collected at entry is less than the amount due at liquidation; or (iii) a notice and a refund cheque, if the cash deposit amount collected at entry is more than the amount due at liquidation.

[8] The European Communities described the challenged measures with respect to the 15 "original investigations" (included in Exhibits EC-1 to EC-15 of the European Communities in the original proceeding) as "the 15 Notices of Final Determinations of Sales at Less Than Fair Value, including any amendments, and including all the Issues and Decision Memoranda to which they refer, and all the Final Margin Program Logs and Outputs to which they in turn refer, for all the firms investigated; each of the 15 Anti-dumping Duty Orders; each of the assessment instructions issued pursuant to any of the 15 Anti-dumping Duty Orders; and each of the USITC final injury determinations." See Panel report, *US – Zeroing (EC)*, para. 2.6.

[9] Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")* ("*US – Zeroing (EC)*"), WT/DS294/R, adopted 9 May 2006, as modified by Appellate Body Report, WT/DS294/AB/R, DSR 2006:II, 521, paras. 7.32, 7.33, 7.34, 8.1 (a) and 8.2.

(b) "As applied" claims – zeroing in administrative reviews

2.12 The European Communities also claimed, before the original panel, that the United States acted inconsistently with its obligations under Articles 2.4, 2.4.2, 9.3, 11.1, 11.2 and 18.4 of the *Anti-Dumping Agreement*, Articles VI:1 and VI:2 of the GATT 1994 and Article XVI:4 of the WTO Agreement as a consequence of comparing a weighted normal value with individual export transactions, without explanation or justification, and the use of zeroing in 16 periodic reviews ("administrative reviews")[10] proceedings in which the USDOC had used zeroing in the context of weighted average-to-transaction ("simple zeroing"). The original panel rejected all of the EC "as applied" claims with respect to the 16 administrative reviews at issue.[11]

(c) "As such" claims

2.13 The European Communities made "as such" claims against the "Standard Zeroing Procedures (or the US practice or methodology of zeroing)"[12] and various sections of the United States Tariff Act of 1930 and of the USDOC Regulations with respect to the US use of zeroing in (i) original investigations, (ii) administrative reviews, and (iii) new shippers reviews, changed circumstances reviews, and sunset reviews.

2.14 The original panel found that the US "zeroing methodology" is a norm which could be challenged in WTO dispute settlement procedures. It found that this norm, as it relates to original investigations is, as such, inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement* but found it unnecessary to make findings under the other provisions cited by the European Communities (Articles 2.4, 2.4.2, 5.8, 9.3, 1 and 18.4 of the *Anti-Dumping Agreement*; Articles VI:1 and VI:2 of the GATT 1994; and Article XVI:4 of the WTO Agreement).[13] The panel found that the sections of the

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[10] The European Communities described the challenged measures, with respect to the 16 administrative reviews subject to its "as applied" claims as "the 16 Notices of Final Results of Antidumping Duty Administrative Reviews, including any amendments, and including all the Issues and Decision Memoranda to which they refer, and all the Final Margin Program Logs and Outputs to which they in turn refer, for all the firms investigated; and each of the assessment instructions issued pursuant to any of the 16 Notices of Final Results." Panel Report, *US – Zeroing (EC)*, para. 2.6. The 16 administrative reviews were detailed in Exhibits EC-16 to EC-31.

[11] Panel Report, *US – Zeroing (EC)*, paras. 7.223, 7.284, 7.288 and 8.1 (d)-(f).

[12] The European Communities used the term "Standard Zeroing Procedures" to refer to certain specific lines of computer programming code in the computer programme used by the USDOC to calculate dumping margins, which separated sales with "positive margins" and sales with "negative margins" and subtotaled only the dumping amounts for sales with "positive margins". As the EC claim was with respect to the "'standard zeroing procedures' (or the US practice or methodology of zeroing)", the original panel sought clarification from the European Communities whether it was challenging a practice or methodology as a measure distinct from the standard zeroing procedures. In light of the EC clarifications, the original panel understood the EC claim to concern both the "Standard Zeroing Procedures" and the US practice or methodology of zeroing. Panel Report, *US – Zeroing (EC)*, paras. 7.70-7.72. The panel considered that to characterize the Standard Zeroing Procedures as an act or instrument that sets forth rules or norms intended to have general and prospective application was difficult to reconcile with the fact that they are only applicable in a particular anti-dumping proceeding as a result of their inclusion in the computer programme used in that particular proceeding. The panel found that the "'Standard Zeroing Procedures' by themselves do not create anything and are simply a reflection of something else." As a result, the panel's findings concerned the zeroing methodology "manifested in the 'Standard Zeroing Procedures'". Panel Report, *US – Zeroing (EC)*, paras. 7.97-7.109.

[13] Panel Report, *US – Zeroing (EC)*, paras. 7.106, 7.108-109, 8.1 (c) and 8.2. The European Communities had also identified as a measure that it was challenging the US Import Administration Anti-Dumping Procedures Manual, but the Panel found it unnecessary to make any finding as to the WTO-consistency of the Manual, as it considered that the Manual had been referred to by the European Communities principally as evidence to confirm the "standard" character of the "Standard Zeroing Procedures". See i*dem*, para. 7.107.

Tariff Act challenged by the European Communities (Sections 771(35)(A) and (B), 731 and 777(A)(d)) were not as such inconsistent with Articles 2.4, 2.4.2, 5.8, 9.3, 1 and 18.4 of the *Anti-Dumping Agreement*, Articles VI:1 and VI:2 of the GATT 1994 and Article XVI:4 of the WTO Agreement with respect to the calculation of dumping margins in original investigations.[14]

2.15 The original panel rejected the EC claims in respect of administrative reviews. The panel considered the EC claims in this respect to be dependent upon a finding of violation of Articles 2.4 and 2.4.2 and on an interpretation of these provisions as prohibiting zeroing and the use of an "asymmetrical comparison" of export price and normal value, which the panel had rejected in its analysis of the EC "as applied" claims with respect to administrative reviews.[15] The panel rejected the EC's "as such" claims with respect to new shipper reviews, changed circumstances reviews and sunset reviews on similar grounds.[16]

(d) Recommendation

2.16 The panel recommended that the Dispute Settlement Body request the United States to bring its measures into conformity with its obligations under the *Anti-Dumping Agreement*.[17]

(e) Dissenting opinion by one panelist

2.17 One panelist wrote a dissenting opinion. That panelist concurred in the panel's findings that model zeroing in original investigations is prohibited by Article 2.4.2 of the *Anti-Dumping Agreement*, that the Sections of the US Tariff Act challenged by the European Communities are not inconsistent with the provisions of the *Anti-Dumping Agreement*, GATT 1994 and WTO Agreement invoked by the European Communities and that the US zeroing methodology, as it relates to original investigations, is a norm which is, as such, inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*, but disagreed with all other findings of the panel.[18] In particular, the dissenting panelist would have accepted the EC claims (i) that simple and model zeroing are inconsistent with Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement* in assessment proceedings (except where there is targeted dumping); (ii) that Section 351.414 (c)(2) of the US Regulations, which foresees simple zeroing in review proceedings, is inconsistent with Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement*; and (iii) that the US zeroing methodology used in assessment and review proceedings is inconsistent with Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement*.[19]

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[14] Panel Report, *US – Zeroing (EC)*, paras. 7.69 and 8.1 (b).

[15] Panel Report, *US – Zeroing (EC)*, paras. 7.291 and 8.1(g). With respect to administrative reviews, the European Communities claimed that the Standard Zeroing Procedures "or the US or methodology of zeroing)" and Sections 771(35)(A) and (B), 731, 777A(d) and 751(a)(2)(A)(i) of the US Tariff Act of 1930 and Section 351.414(c)(2) of the USDOC Regulations were "as such" inconsistent with Articles 1, 2.4, 2.4.2, 9.3, 11.1, 11.2 and 18.4 of the *Anti-Dumping Agreement*; Articles VI:1 and VI:2 of GATT 1994; and Article XVI:4 of the WTO Agreement

[16] Panel Report, *US – Zeroing (EC)*, paras. 7.294 and 8.1(h). With respect to these reviews, the European Communities claimed that the "Standard Zeroing Procedures" "(or the United States practice or methodology of zeroing)" and Sections 771(35)(A) and (B), 731, 777A(d) and 751(a) (2)(A)(i) and (ii) of the Tariff Act and Section 351.414(c)(2) of the Regulations were "as such" inconsistent with Articles 1, 2.4, 2.4.2, 9.3, 9.5, 11.1, 11.2, 11.3 and 18.4 of the *Anti-Dumping Agreement*; Articles VI:1 and VI:2 of GATT 1994; and Article XVI:4 of the WTO Agreement.

[17] Panel Report, *US – Zeroing (EC)*, para. 8.4.

[18] Panel Report, *US – Zeroing (EC)*, para. 9.1.

[19] Panel Report, *US – Zeroing (EC)*, para. 9.62.

2. Appellate Body

(a) "As applied" claims – simple zeroing in administrative reviews

2.18 Following an appeal by the European Communities, the Appellate Body reversed the panel's finding that the United States had not acted inconsistently with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 with respect to administrative reviews. The Appellate Body found, instead, that the United States had acted inconsistently with these provisions.[20] The Appellate Body declared the panel's finding on Article VI:1 of the GATT 1994 "moot, and of no legal effect".[21] The Appellate Body did not find it necessary to rule on whether the US acted inconsistently with the first sentence of Article 2.4 of the *Anti-Dumping Agreement* ("fair comparison" requirement"), declared "moot and of no legal effect" the panel's finding in this respect[22], upheld the panel's finding that zeroing is not an impermissible allowance or adjustment (Article 2.4, third to fifth sentences),[23] declined to rule on a conditional appeal of the European Communities under Article 2.4.2 *Anti-Dumping Agreement*[24], upheld the panel's finding that the United States had not acted inconsistently with Articles 11.1 and 11.2 of the *Anti-Dumping Agreement*[25], and considered that it was not necessary to rule on whether the zeroing methodology, as applied in the administrative reviews at issue, was also inconsistent with Articles 1 and 18.4 of the *Anti-Dumping Agreement* and Article XVI:4 of the WTO Agreement.[26]

(b) Zeroing "as such" in original investigations

2.19 The Appellate Body upheld the original panel's finding (albeit for reasons different from those set out by the panel) that the zeroing methodology used by the USDOC in original investigations in which the weighted-average to weighted-average method is used could be challenged, as such, in WTO dispute settlement and that it was, as such, inconsistent with Article 2.4.2 of the Agreement.[27]

(c) Zeroing "as such" in administrative reviews

2.20 The European Communities appealed the original panel's findings that the zeroing methodology used by the United States in administrative reviews is not inconsistent, as such, with certain provisions of the *Anti-Dumping Agreement*, the GATT 1994, and the WTO Agreement. The Appellate Body declared "moot, and of no legal effect", the panel's findings in this respect. The Appellate Body considered, however, that it could not "complete the analysis", *i.e.*, could not make a finding as to whether the zeroing methodology, as it relates to administrative reviews, was inconsistent with these provisions.[28]

2.21 The Appellate Body also rejected a conditional appeal by the European Communities of the panel's conclusions or the panel's exercise of judicial economy regarding the Standard Zeroing

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[20] Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")* ("*US – Zeroing (EC)*"), WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, 417, paras. 135 and 263(a)(i).

[21] Appellate Body Report, *US – Zeroing (EC)*, paras. 135 and 263(a)(vii).

[22] Appellate Body Report, *US – Zeroing (EC)*, paras. 147 and 263(a)(vii).

[23] Appellate Body Report, *US – Zeroing (EC)*, paras. 159 and 263(a)(iii).

[24] Appellate Body Report, *US – Zeroing (EC)*, paras. 164 and 263(a)(iv).

[25] Appellate Body Report, *US – Zeroing (EC)*, paras. 169 and 263(a)(v).

[26] Appellate Body Report, *US – Zeroing (EC)*, paras. 172 and 263(a)(vi).

[27] Appellate Body Report, *US – Zeroing (EC)*, paras. 222 and 263(b). The Appellate Body also rejected an appeal from the European Communities concerning the original panel's decision to exercise judicial economy by not making findings with regard to the EC claims concerning the Anti-Dumping Manual. Appellate Body Report, *US – Zeroing (EC)*, paras. 227-228 and 263(c).

[28] Appellate Body Report, *US – Zeroing (EC)*, para. 228.

Procedures (*i.e.*, lines of computer code). The European Communities had requested the Appellate Body to find that the Procedures were inconsistent, as such, with the provisions invoked by the European Communities in its "as such" claims concerning the use of zeroing in administrative reviews, new shippers reviews, changed circumstances review, and sunset reviews. The Appellate Body found that the Procedures were not, *per se*, a measure that could be challenged and, as a consequence, that they could not be either WTO-consistent or inconsistent. It therefore declared "moot, and of no legal effect, the panel's findings that the Standard Zeroing Procedures were not inconsistent, as such, with the provisions of the *Anti-Dumping Agreement*, the GATT 1994 and the WTO Agreement invoked by the European Communities.[29]

(d) "As such" claims – USDOC Regulations

2.22 The European Communities appealed the panel's finding that Section 351.414(c)(2) of the USDOC Regulations was not inconsistent, as such, with Articles 1, 2.4, 2.4.2, 9.3, 9.5, 11.1, 11.2, 11.3 and 18.4 of the *Anti-Dumping Agreement*, Articles VI:1 and VI:2 of GATT 1994, and Article XVI:4 of the WTO Agreement. The Appellate Body declared "moot, and of no legal effect" the panel's finding that Section 351.414(c)(2) is not inconsistent with these provisions. It refrained from completing the legal analysis in this respect, *i.e.*, from deciding whether the section of the USDOC Regulations at issue was indeed inconsistent with the provisions relied upon by the European Communities.[30]

(e) Recommendation

2.23 The Appellate Body recommended that the DSB request the United States to bring its measures, which had been found in its Report, and in the report of the original panel (as modified by the Appellate Body Report), to be inconsistent with the *Anti-Dumping Agreement* and with the GATT 1994, into conformity with its obligations under those Agreements.

3. DSB recommendations and rulings

2.24 In summary, the findings of inconsistency which were adopted by the DSB are as follows:

(a) Zeroing, "as applied" in original investigations: The original panel's finding that the United States acted inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement* as a consequence of the USDOC performing "model zeroing" in the 15 original investigations at issue in the original dispute.[31]

(b) Zeroing "as such" in original investigations): The original panel's finding (upheld by the Appellate Body on a different reasoning) that the US "zeroing methodology" manifested in the "Standard Zeroing Procedures" (line of computer code) as it relates

[29] Appellate Body Report, *US – Zeroing (EC)*, paras. 231-232 and 263(d).

[30] Appellate Body Report, *US – Zeroing (EC)*, paras. 242-243 and 263(g). The Appellate Body also declined to rule on a conditional appeal of the European Communities regarding the original panel's decision to exercise judicial economy with respect to what the European Communities referred to as the US "practice" of zeroing, as such. See Appellate Body Report, *US – Zeroing (EC)*, paras. 233-234 and 263(f). It also rejected an appeal by the European Communities to the effect that the original panel had erred in exercising judicial economy with respect to the question of whether administrative review proceedings based on model zeroing are inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and with respect to whether zeroing "as applied" in the original investigations at issue was inconsistent with Article 2.4 of the *Anti-Dumping Agreement*. See Appellate Body Report, *US – Zeroing (EC)*, paras. 250 and 263((h) and (i). Finally, the Appellate Body rejected claims by the EC that the panel had acted inconsistently with Article 11 DSU. See Appellate Body Report, *US – Zeroing (EC)*, paras. 262 and 263(j).

[31] See *supra*, para. 2.11.

original investigations, is, as such, inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*.[32]

(c) Zeroing "as applied" administrative reviews: The Appellate Body's finding that the United States acted inconsistently with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 when it zeroed (simple zeroing) in the 16 administrative reviews at issue in the original dispute.[33]

2.25 The DSB recommended that the United States bring its measures, which had been found in the Appellate Body Report, and in the Panel Report as modified by the Appellate Body Report, to be inconsistent with the *Anti-Dumping Agreement* and with the GATT 1994, into conformity with its obligations under those Agreements.

2.26 Thus, the DSB adopted no findings and made no recommendation with respect to "as such" claims by the European Communities with respect to administrative reviews or other types of reviews (including sunset reviews).

III. FACTUAL ASPECTS

A. RELEVANT DEVELOPMENTS CONCERNING THE US MEASURES AT ISSUE IN THE ORIGINAL DISPUTE

3.1 The following developments with respect to the measures at issue in the original dispute are relevant to the Panel's examination of the US implementation of the DSB recommendations and rulings:

[32] The Panel further notes that the Appellate Body made it clear that the finding of inconsistency does not extend to the "Standard Zeroing Procedures" (computer line) in and of themselves since they do not constitute a measure that can be challenged under WTO dispute settlement.

[33] See *supra*, para. 2.18.

With respect to the original investigations at issue in the original dispute:[34]

(a) On 27 December 2006, the United States announced that it would abandon "model zeroing" in original AD investigations in which the weighted average-to-weighted average comparison methodology is used. The modification became effective on 22 February 2007 and concerned all pending and future original investigations as of that date.[35]

(b) On 1 March 2007, the USDOC initiated proceedings pursuant to Section 129 of the Uruguay Round Agreements Act covering twelve of the fifteen original antidumping investigations at issue in the original dispute.[36] [37] The remaining three AD orders had been previously revoked.[38] In the Section 129 determinations, the USDOC recalculated, without zeroing, the relevant margins of dumping by applying the modification of its calculation methodology announced in December 2006. The USDOC issued its determinations with respect to eleven of the Section 129 determinations on 9 April 2007. These eleven Section 129 determinations became effective on 23 April 2007.[39] The results in the last Section 129 determination were issued on 20 August 2007 and became effective on 31 August 2007.[40] As a result of these recalculations:

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[34] In this proceeding, the parties and the panel have referred to the 15 "original investigations" and 16 "administrative review" "cases" by reference to the "case numbers" assigned to them by the European Communities in its request for the establishment of a panel in the original proceeding (the same "case numbers" were listed by the European Communities in its request for the establishment of the Article 21.5 panel). Cases 1 to 15 concerned original investigations, *i.e.* case 1: Certain Hot-Rolled Carbon Steel from the Netherlands; case 2: Stainless Steel Bar from France; case 3: Stainless Steel Bar from Germany; case 4: Stainless Steel Bar from Italy; case 5: Stainless Steel Bar from the United Kingdom; case 6: Stainless Steel Wire Rod from Sweden; case 7: Stainless Steel Wire Rod from Spain; case 8: Stainless Steel Wire Rod from Italy; case 9: Certain Stainless Steel Plate in Coils from Belgium; case 10: Stainless Steel Sheet and Strip in Coils from France; case 11: Stainless Steel Sheet and Strip in Coils from Italy; case 12: Stainless Steel Sheet and Strip in Coils from the United Kingdom; case 13: Certain Cut-to-Length Carbon-Quality Steel Plate from France; case 14: Certain Cut-to-Length Carbon-Quality Steel Plate from Italy; case 15: Certain Pasta from Italy. Cases 16 to 31 concerned administrative reviews in 2004 and 2005, *i.e.* case 16: Industrial Nitrocellulose from France; case 17: Industrial Nitrocellulose from the United Kingdom; case 18: Stainless Steel Plate in Coils from Belgium; case 19: Certain Pasta from Italy; case 20: Certain Pasta from Italy; 21: Stainless Steel Sheet Strip Coils from Italy; case 22: Stainless Steel Sheet Strip Coils from Italy; case 23: Granular Polytetrafluorethylene from Italy; case 24: Granular Polytetrafluorethylene from Italy; case 25: Stainless Steel Sheet Strip Coils from France; case 26: Stainless Steel Sheet Strip Coils from France; case 27: Stainless Steel Sheet Strip Coils from Germany; case 28: Stainless Steel Sheet Strip Coils from Germany; 29: Ball Bearings from France; case 30: Ball Bearings from Italy; case 31: Ball Bearings from the United Kingdom. See EC request for the establishment of Article 21.5 panel (WT/DS/294/25, reproduced at Annex A-1).

[35] Exhibits EC-1 and EC-4; see also EC First Written Submission, para. 16; US First Written Submission, para. 17.

[36] Exhibit US-9 and US First Written Submission, para. 18.

[37] Section 129 of the Uruguay Round Agreements Act establishes the US legal framework for issuing new determinations to comply with recommendations and rulings of the DSB.

[38] Cases 10 (July 2004), 12 (July 2004) and 13 (February 2005); see EC First Written Submission, para. 40, US First Written Submission, para. 18 and note 30, Exhibit US-9.

[39] See Exhibits EC-2 (Preliminary Results of Section 129 Determination), EC-5 (Notice of Final Results of Section 129 Determination), Exhibit EC-7 (Issues and Decision Memorandum), US First Written Submission, para. 19

[40] Exhibits EC-6 (Notice of Section 129 Determination) and EC-8 (Issues and Decision Memorandum) in case 11, Stainless Steel Sheet and Strip in Coils from Italy.

(i) Two original AD orders were revoked (as a result of the recalculated margins being zero or *de minimis* for all involved producers/exporters);[41]

(ii) Ten original AD orders[42] were partially revoked (revoked with respect to certain companies for which the USDOC found zero or *de minimis* margins in the Section 129 determination) whereas for other companies, duties were either reduced or increased as a result of the recalculation. The recalculated margins of dumping established in the Section 129 determinations applied (as the new cash deposit rate) with respect to *unliquidated* entries (imports) made on or after 23 April 2007 (31 August 2007 with respect to case 11).[43]

(c) In addition, the USDOC issued in the ordinary course a number of administrative review determinations with respect to AD orders concerned in the original investigations that were at issue in the original dispute. The USDOC continued to calculate margins of dumping in these administrative reviews by using zeroing (simple zeroing).

With respect to the administrative reviews at issue in the original dispute:

(d) With respect to the sixteen administrative review determinations at issue in the original dispute, the United States considered that the cash deposit rates established as a result of each of those reviews – with the exception of one company – were no longer in effect because they had been superseded by subsequent administrative reviews: consequently, no further action was taken by the United States in order to implement the DSB recommendations and rulings in respect of these administrative review determinations.[44]

Sunset review determinations:

(e) Following negative sunset review determinations by the USITC (no likelihood of continuation or recurrence of injury), the USDOC revoked the AD orders in 4 cases, effective 7 March 2007 (cash deposits on imports made on or after that effective date were to be refunded and the concerned imports would not be subject to a final assessment of AD duties).[45] Other sunset review determinations adopted with respect to AD orders concerned in the original investigations at issue in the original dispute or in the same USDOC investigations for which administrative reviews were challenged in the original dispute resulted in the continuation of the relevant AD order.[46]

B. MEASURES AT ISSUE

3.2 The measures at issue in this dispute are, according to the European Communities, the following:

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[41] Cases 1 and 6.

[42] Cases 2, 3, 4, 5, 7, 8, 9, 11, 14 and 15.

[43] See EC First Written Submission, para. 41.

[44] See US First Written Submission, para. 21, and Exhibit US-17 for a list of the administrative review determinations superseding, in its view, the reviews challenged in the original dispute.

[45] Cases 2, 3, 4 and 5. See US First Written Submission, para. 26, and Exhibits US-10, US-11, US-12, US-13. The revocation was made on 8 February 2008, effective retroactively to 7 March 2007.

[46] See EC request for the establishment of Article 21.5 panel (WT/DS/294/25 and Annex A-1).

(a) Certain of the Section 129 determinations adopted by the United States to implement the rulings and recommendations of the DSB.[47]

(b) Subsequent administrative reviews, changed circumstances reviews and sunset reviews adopted in the "cases" at issue in some of the 15 original investigation determinations and 16 administrative review determinations challenged in the original dispute (as well as assessment instructions issued by the USDOC to the USCBP). These reviews have, in the context of this dispute, been referred to as "subsequent reviews" (as opposed to the administrative reviews that were at issue in the original dispute).[48]

(c) Liquidation of duties by the USCBP following instructions issued by the USDOC.

(d) Related omissions and deficiencies in the US compliance with the DSB's recommendations and rulings.

3.3 The United States argues, as part of its request for preliminary rulings, that certain of these measures – and in particular, each of the "subsequent reviews" and assessment instructions – do not fall within the Panel's terms of reference. The Panel addresses the US objection in this respect below, in Section VIII.D.

IV. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. EUROPEAN COMMUNITIES

4.1 The European Communities requests the Panel to make the following findings:

(a) the United States violated Articles 2.1, 2.4, 2.4.2 and 11.3 of the *Anti-Dumping Agreement* when extending the measures contained in the original dispute pursuant to sunset review proceedings relying on margin of duties calculated with zeroing;

(b) the United States has not complied with the DSB's recommendations in the original proceeding, since it continues to collect anti-dumping duties and establish new cash deposit rates based on zeroing with respect to the original investigations and administrative reviews challenged in the original dispute;

(c) the United States remains in violation of Articles 2.4.2 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, since it still collects anti-dumping duties calculated with zeroing with respect to measures challenged in the original dispute (including the measures listed in the Annex to the Panel Request and any other subsequent measures);

[47] The European Communities makes claims with respect to the Section 129 determinations adopted in case 2 (Stainless Steel Bar from France), case 3 (Stainless Steel Bar from Germany), case 4 (Stainless Steel Bar from Italy), case 5 (Stainless Steel Bar from the United Kingdom), case 11 (Stainless Steel Sheet Strip in Coils from Italy).

[48] The reviews are listed by the European Communities in the Annex to its Article 21.5 request for the establishment of a panel. For ease of reference, the parties and the Panel have referred to the "case" number of the dispute (case number of the original investigation/administrative review in accordance with the list in the EC Annexes to its panel request in the original dispute and its Article 21.5 panel request). See the Annex to the EC Article 21.5 panel request, WT/DS294/25, reproduced at Annex A-1.

(d) the United States has not complied with the DSB's recommendations in the original proceeding, since it has failed to fully revoke the original investigation orders contested in the original dispute;

(e) the United States has not complied with the DSB's recommendations in the original proceeding, since the 16 administrative review investigations covered in the original dispute have not been superseded (*i.e.*, the United States still collects duties based on the dumping margins found in those proceedings with zeroing, and the United States has also relied on those margins for the determination of likelihood of recurrence of dumping in sunset review proceedings);

(f) the United States violated Articles 21.3 and 21.3(b) of the DSU, since it did not take any measure to comply with respect to the "as applied" measures covered in the original dispute between 9 April and 23 April/31 August 2007;

(g) the United States violated Articles 2, 5.8, 6.8, 9.3, 11.1 and 11.2 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 when making an error in the calculation of the unit value and then failing to have it removed pursuant to the Section 129 Determination in case 11;

(h) the United States violated Article 6.8, Annex II and Article 9.4 of the *Anti-Dumping Agreement* when using a weighted average of exporters with zero/*de minimis* rates and adverse facts available to calculate the "all others" rates pursuant to the Section 129 determinations in cases 2, 4 and 5; and

(i) the United States violated Articles 3.1, 3.2, 3.5 and 5.8 of the *Anti-Dumping Agreement* and Article VI:1 of the GATT 1994 when failing to reassess the injury in light of the new volume of non-dumped imports pursuant to the Section 129 Determinations in cases 2, 3, 4 and 5 of the Annex to the Panel Request.[49]

4.2 The European Communities also requests the Panel to find that its composition was not consistent with Articles 21.5 and 8.3 of the DSU.

4.3 Further, the European Communities considers that, since the United States has failed to comply with its obligations, the original recommendations of the DSB remain in effect, and apply to the full extent of the findings requested above. The European Communities requests the Panel to confirm the original panel's recommendation, pursuant to Article 19 of the DSU, that the United States take the steps necessary to bring its measures into conformity with the cited WTO provisions.

4.4 The European Communities also asks the Panel to make suggestions as to how the United States should bring its measures in conformity with its obligations. The European Communities asks the Panel to suggest that, in order to comply with the DSB's recommendations, the United States cease using zeroing when calculating dumping margins in any anti-dumping proceeding with respect to the measures challenged in the original dispute and any other subsequent amendments of those.[50]

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[49] EC First Written Submission, para. 155.

[50] The European Communities asks the Panel to take into account the following comment when making a suggestion as to how the United States should implement the DSB recommendations:

> "The European Communities would like to clarify that it is not requesting retrospective application of DSB's recommendations and finding in this case. However, the European Communities asks for prospective implementation of the DSB's recommendations after the end of the reasonable period. In particular, the European Communities is of the opinion that

B. UNITED STATES

4.5 The United States requests that the Panel reject the EC claims and find that it has met its obligations to bring the measures found to be inconsistent with the *Anti-Dumping Agreement* and the GATT 1994 into conformity and has, therefore, complied with the recommendations and rulings of the DSB. The United States asks the Panel to decline to make the suggestion requested by the European Communities.

V. ARGUMENTS OF THE PARTIES

5.1 The arguments of the parties are set out in their written and oral submissions to the Panel, and in their answers to questions. The parties' arguments, based on the summaries submitted by them pursuant to paragraph 10 of the Panel's working procedures, are set forth in this section. The full non-confidential text of the submissions of the European Communities can be downloaded from the EC's web site.[51] The full non-confidential text of the United States submissions can be downloaded from the web site of the Office of the United States Trade Representative.[52]

A. US REQUEST FOR PRELIMINARY RULINGS

1. United States

5.2 The United States requests preliminary rulings concerning the EC's apparent effort to include certain determinations within the terms of reference of this proceeding, including certain administrative reviews and sunset reviews that are not measures taken to comply with the recommendations and rulings of the DSB in the original proceeding. A number of these measures also were not identified in the EC's Article 21.5 panel request.[53] The United States observes in this context that Article 21.5 of the DSU applies when there is a disagreement as to the existence or consistency with a covered agreement of a measure taken to comply with recommendations and rulings of the DSB and that the scope of an Article 21.5 compliance panel proceeding is inherently limited – it may only examine a measure that is taken to comply, and then only if that measure is specified in the request for the establishment of a panel.[54]

5.3 The only measures that were the subject of the DSB recommendations and rulings were the investigations and administrative reviews listed in the annexes to the EC's original panel request. The EC pursued a challenge against zeroing in administrative reviews "as such" but did not prevail. Upon

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the United States should stop taking any positive acts providing for the final payment of duties or retention of cash deposits based on zeroing with respect to those entries not finally liquidated before the end of the reasonable period. In other words, the United States (i) should not send new assessment instructions based on zeroing with respect to the measures covered by this dispute; (ii) should not establish new cash deposit rates based on zeroing in those cases; and (iii) should terminate all proceedings seeking to collect duties based on zeroing after the end of the reasonable period in cases where there is no final liquidation. Finally, the United States should reverse any positive acts taken after the end of the reasonable period which sought the collection of anti-dumping duties or the establishment of new cash deposit rates based on zeroing with respect to the measures successfully challenged in the original dispute."

EC First Written Submission, para. 158.

[51] See http://trade.ec.europa.eu/wtodispute/search.cfm?code=1.

[52] See http://www.ustr.gov/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Index_-_Pending.html.

[53] Executive Summary of the First Written Submission of the United States (hereinafter "US First Written Submission, Executive Summary"), para. 5.

[54] US First Written Submission, Executive Summary, para. 4.

reviewing the EC's first submission, the United States notes that the EC appears to seek to include within the terms of reference determinations that are not properly within the terms of reference for two reasons: first, because they were not identified in the EC's Article 21.5 panel request, as required by Article 6.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), and second, because those determinations were not subject to the recommendations and rulings of the DSB, nor are they measures taken to comply.[55]

5.4 Article 6.2 of the DSU provides that a panel request shall "identify the specific measures at issue." The United States submits that the key passage in the EC's Article 21.5 request is paragraph 7. This paragraph plainly states that the measures at issue are the investigations and administrative review determinations from the original proceeding. In its submission, however, the EC appears to take a different approach. The EC seeks to transform the "reviews" referenced in its panel request as separate and distinct from the "measures at issue" into "measures" within the terms of reference. Under Article 6.2, however, the EC was obliged, *in its panel request*, to "identify the specific measures at issue." The only measures identified as "measures in question" were the investigations and administrative reviews from the original proceeding. Therefore, any "measures" other than those reviews are not "measures" subject to findings in this proceeding.[56]

5.5 For the foregoing reasons, the United States requests that the Panel reject the EC's attempt to use its first submission to expand the terms of reference beyond the specific measures identified in its panel request, *i.e.*, the 16 administrative reviews in the original proceeding.[57] The EC's attempt to use its submission to expand the measures within the terms of reference of this proceeding is flawed for a second reason. The scope of an Article 21.5 proceeding is limited to the issue of the existence or consistency of measures taken to comply.[58] Pursuant to Article 6.2 of the DSU, in its request for the establishment of a panel in the original proceeding, the EC was required to "identify *the specific measures at issue*" (emphasis added). That identification in turn informs the question of what is a "measure taken to comply."[59] The United States argues that there must be an express link between the alleged measures taken to comply and the DSB's recommendations and rulings. Accordingly, in assessing whether a challenged measure is a measure taken to comply, the Panel must first look to the DSB's recommendations and rulings. Nonetheless, not every measure that has some connection with, or that could have some impact upon a measure taken to comply may be scrutinized in an Article 21.5 proceeding. Rather, such measures falling within the competence of an Article 21.5 panel are those "taken *in the direction of, or for the purpose of achieving* compliance [with the DSB's recommendations and rulings]."[60] The United States argues that here, however, the EC seeks to expand the terms of reference beyond the inquiry into the existence or consistency of measures taken to comply. Precisely what the EC seeks to include is something of a moving target.[61]

5.6 The United States recalls that the EC challenged 16 administrative reviews, and the Appellate Body concluded that those reviews were inconsistent with the Antidumping Agreement. Thus, those 16 reviews were the subject of the DSB recommendations and rulings. None of the other "measures" the EC seeks to include in these proceedings – such as subsequent reviews or assessment instructions – was the basis for a DSB recommendation or ruling.[62]

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[55] US First Written Submission, Executive Summary, para. 6.
[56] US First Written Submission, Executive Summary, para. 7.
[57] US First Written Submission, Executive Summary, para. 8.
[58] US First Written Submission, Executive Summary, para. 9.
[59] US First Written Submission, Executive Summary, para. 10.
[60] US First Written Submission, Executive Summary, para. 11.
[61] US First Written Submission, Executive Summary, para. 12.
[62] US First Written Submission, Executive Summary, para. 13.

5.7 The United States notes at the outset that proceedings under Article 21.5 address disagreements "as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings [of the DSB]."[63] A complaining Member may not use a compliance proceeding to challenge measures that it could have challenged in the original panel proceeding but did not. Nor may a complaining Member use Article 21.5 to challenge measures that are not measures taken to comply. This is because Members only agreed to the truncated, expedited procedures under Article 21.5 in the specific case involving a measure taken to comply, and did not agree to have these different dispute settlement procedures used in the case of measures not taken to comply.[64] The United States observes in this context that to identify the proper scope of any Article 21.5 proceeding, the appropriate starting point is the DSB's recommendations and rulings.[65] A panel composed under Article 21.5, therefore, begins with the recommendations and rulings of the DSB, and examines measures that a Member has taken pursuant to those recommendations and rulings to determine if that Member is in compliance.[66] In the US view, however, the EC attempts to expand the scope of these proceedings by incorporating claims regarding measures entirely distinct from those measures it originally challenged in its "as applied" claims and which were not measures taken to comply.[67]

5.8 The United States recalls that 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.[68] According to the DSB recommendations and rulings in this dispute, 15 determinations by the US Department of Commerce ("Commerce") in antidumping investigations were found inconsistent with a covered agreement. The recommendations and rulings also include "as applied" findings of a breach with respect to 16 Commerce determinations in administrative reviews. The original panel and the Appellate Body declined to make findings concerning the EC's "as such" claim against zeroing in administrative reviews.[69] In the US view, it seems clear, then, that the questions before this compliance panel pertain to US compliance with the findings concerning those specific investigations and reviews.[70] Thus, the DSB's recommendations and rulings were limited to "as applied" findings.[71] The United States maintains that it has removed the border measures in question and that it has therefore complied with the recommendations and rulings of the DSB.[72] Therefore, this Panel should reject the EC's claims of non-compliance and its effort to enlarge the obligations of the United States.[73]

5.9 The United States next notes that the EC has relied heavily on *Softwood Lumber* for the proposition that these "subsequent reviews" have a sufficient "nexus" to the 15 investigations and 16 administrative reviews found to be inconsistent "as applied" in the original proceeding. According

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[63] US First Written Submission, Executive Summary, para. 1. See also, Executive Summary of the United States, Opening Statement at the substantive meeting of the Panel (hereinafter "US Opening Statement, Executive Summary"), para. 3. "The purpose of an Article 21.5 proceeding, which is to consider the "existence or consistency with a covered agreement of measures taken to comply with the [DSB's] recommendations and rulings."

[64] US Opening Statement, Executive Summary, para. 3.

[65] US Opening Statement, Executive Summary, para. 4.

[66] US First Written Submission, Executive Summary, para. 1.

[67] US First Written Submission, Executive Summary, para. 2.

[68] Executive Summary of the United States Second Written Submission (hereinafter "US Second Written Submission, Executive Summary"), para. 1.

[69] US Opening Statement, Executive Summary, para. 4.

[70] US Second Written Submission, Executive Summary), para. 1.

[71] US Opening Statement, Executive Summary, para. 4.

[72] US Second Written Submission, Executive Summary, para. 1., See also US First Written Submission, Executive Summary para 3: "The United States has implemented the DSB's recommendations and rulings, and thus has complied with its obligations under the DSU.

[73] US First Written Submission, Executive Summary, para. 3.

to the United States, the EC's reliance is misplaced for factual and legal reasons.[74] First, the United States maintains that the assessment reviews covered distinct sales during distinct periods of time and could address different companies. As an illustration, the United States calls the Panel's attention to the cases concerning pasta from Italy. In the investigation, Commerce examined the sales of seven different Italian pasta companies. In the assessment review for the 2001-02 period, Commerce examined a total of ten companies, nine of which had not been examined in the original investigation. Similarly, in the assessment review for the 2002-03 period, Commerce reviewed eight companies, none of which was examined in the original investigation.[75]

5.10 Furthermore, the United States notes that the legal and factual distinctions between the two types of proceedings with respect to the issue of zeroing are more relevant here than was the case in *Softwood Lumber*. There, the issue was the pass-through of subsidies – and the legal basis for the panel's consideration did not differ as between the investigation and the administrative review. With respect to the issue of zeroing, however, that is not the case. Even the EC implicitly recognized this by referring to "model zeroing" in investigations and "simple zeroing" in reviews. This distinction flows through to the legal bases for the findings against zeroing – which rely significantly on the text of Article 2.4.2 and, in particular, the phrase "all comparable export transactions" in the context of investigations. In the context of reviews, however, that textual basis is absent and the Appellate Body has, instead, relied on the term "product" and the non-textual phrase "product as a whole" to find that a margin of dumping cannot be calculated in a proceeding using zeroing. Given the distinctions in the factual and legal basis for the findings on investigations as compared to reviews, it would be inappropriate to find that there is a sufficiently close nexus to address the subsequent reviews in an Article 21.5 proceeding.[76]

5.11 Moreover, as the United States noted, to conclude that one administrative review always has a nexus to the previous administrative review would run counter to the Appellate Body's admonition in *Softwood Lumber* that administrative reviews are not *per se* measures taken to comply. One administrative review routinely succeeds another. To conclude on that basis that subsequent reviews are measures taken to comply would undermine the Appellate Body's express limitation of its findings in this dispute to the measures "as applied." It would also contradict the Appellate Body's view that Article 21.5 proceedings "logically must be *narrower*" than the original proceedings.[77] Were the EC to prevail on its claims in this regard, the scope of these proceedings that the matter covered would be nearly 3 times *greater* than those covered by the original proceedings.[78]

5.12 The United States reiterates that Commerce has revoked the antidumping duty orders relating to three of the administrative reviews in their entirety. Moreover, with respect to another antidumping duty order, Commerce has now excluded two of the companies that were the subject of the EC's "as applied" challenge from that antidumping duty order.[79] Notwithstanding these revocations, and the fact that the EC accepts that relief is prospective only, the EC nevertheless contends that the United States has failed to bring its measures into compliance.[80]

5.13 The United States observes that the EC advances an argument that the United States has failed to bring its measures into compliance by challenging an additional 54 determinations, identified in the annex to its Article 21.5 panel request ("the EC's annex"), and made subsequent to the

[74] Executive Summary of the United States Closing Statement at the substantive meeting of the Panel (hereinafter "US Closing Statement, Executive Summary"), para. 6.
[75] US Closing Statement, Executive Summary, para. 7.
[76] US Closing Statement, Executive Summary, para. 8.
[77] US Closing Statement, Executive Summary, citing *US – Softwood Lumber (CVD) (21.5)*, para. 72.
[78] US Closing Statement, Executive Summary, para. 9.
[79] US Opening Statement, Executive Summary, para. 8.
[80] US Opening Statement, Executive Summary, para. 9.

31 determinations it originally challenged in its "as applied" claims, asserting that these subsequent determinations were part of the original dispute, are measures taken to comply, or somehow constitute "omissions."[81]

5.14 The United States asserts that there are several facts that expose the hollowness of the EC's argument concerning the additional 54 determinations, and, highlight the main reasons why these determinations are not within this Panel's terms of reference.[82] As an initial matter, the United States notes that in its written submissions, it has shown that the EC did not identify these "subsequent reviews" as measures in its Article 21.5 panel request. Therefore, they are not within the Panel's terms of reference.[83] Moreover, contrary to the EC's assertions, these subsequent determinations were not part of the original dispute because they were not identified in the EC's original panel request. The United States submits that neither the original panel nor the Appellate Body made any findings with respect to these determinations, noting that some of these determinations did not even exist when the EC made its original panel request.[84]

5.15 In addition, the United States argues that these determinations cannot be considered "amendments" to the 31 determinations originally challenged. In this connection, the United States clarifies that Commerce amends its determinations to correct a ministerial error, or as a result of litigation. The EC understood this, and specifically identified in its original panel request those determinations that had been amended. In this context, the term "amendments" specifically refers to those corrected Commerce determinations. The United States argues that the term "amendments" does not refer to the 54 additional determinations identified in the EC's annex, which cover distinct periods of time and, in some cases, distinct companies and which, therefore, are separate and distinct from the 31 determinations originally challenged by the EC.[85]

5.16 Turning to the issue of whether these additional determinations are "measures taken to comply," the United States observes that the EC relies on *Softwood Lumber* to support its argument. However, the United States considers that it is important to note that in that dispute, the Appellate Body cautioned that "not . . . every assessment review will necessarily fall within the jurisdiction of an Article 21.5 panel." Indeed, "[a]s a whole, Article 21 deals with events *subsequent* to the DSB's adoption of recommendations and rulings in a particular dispute." And the *Softwood Lumber* dispute indeed involved a determination that was made *after* the DSB had adopted its recommendations and rulings and that was published very close in time to the measure that both parties agreed was a measure taken to comply. In that dispute, the Appellate Body first cautioned that there was no finding that an administrative review is *per se* a "measure taken to comply," but rather the analysis was more nuanced. Furthermore, in concluding that an aspect of an administrative review *did* come within the terms of reference of an Article 21.5 proceeding, the Appellate Body found significant both this fact of timing as well as the fact that the responding Member acknowledged that the determination at issue was made "'in view of' the recommendations and rulings of the DSB."[86]

5.17 The United States argues that even if it accepts the principle that determinations made "in view of" recommendations and rulings can be brought within the terms of reference of an Article 21.5 proceeding, it cannot be said in *this* dispute that the 54 additional determinations were made "in view of" the DSB's recommendations and rulings. Of the 54 additional determinations, 16 are determinations in sunset reviews. On this point, the United States contends that the EC's original "as applied" claims did not include any challenges to determinations in sunset reviews. Consequently,

[81] US Opening Statement, Executive Summary, para. 9.
[82] US Opening Statement, Executive Summary, para. 10.
[83] US Opening Statement, Executive Summary, para. 11.
[84] US Opening Statement, Executive Summary, para. 12.
[85] US Opening Statement, Executive Summary, para. 13.
[86] US Opening Statement, Executive Summary, para. 14.

neither the original panel, nor the Appellate Body, made any findings in this dispute, whether "as such" or "as applied," with respect to sunset reviews. These sunset reviews are, therefore, not part of the terms of reference.[87]

5.18 Moreover, the United States submits that in 11 of the sunset reviews, Commerce issued its determination regarding the likelihood of a continuation or recurrence of dumping *before* the DSB had even adopted its recommendations and rulings in this dispute. The United States notes that four resulted in the revocation of the antidumping orders. In the one remaining sunset review determination, the interested parties did not raise, and Commerce made no mention of, the issue of non-dumped sales. Thus, this determination could not have been made "in view of" the DSB's recommendations and rulings.[88] Two of the additional determinations identified by the EC were made in changed circumstances reviews. The United States submits that Commerce made both of these determinations before the adoption of the DSB's recommendations and rulings. Moreover, both determinations addressed whether one company was the successor in interest of a second company, and was therefore entitled to the cash deposit rate already established for that second company. Commerce did not recalculate any margins of dumping in these two changed circumstances reviews. Neither of these determinations, therefore, can be said to have been made "in view of" the DSB's recommendations and rulings, which concerned Commerce's treatment of non-dumped sales.[89] The United States further notes that the remaining 36 determinations were made in administrative reviews and that Commerce made determinations in 26 of these reviews before the DSB adopted its recommendations and rulings.[90] Of the remaining 10 determinations, 4 gave no indication that Commerce's treatment of non-dumped sales was an issue in the review. Another 4 were made before the end of the reasonable period of time. The United States clarifies that in those determinations, Commerce made clear that the determinations were *not* being issued in view of the recommendations and rulings. Thus, the factual predicate in *Softwood Lumber* – the Appellate Body's conclusion that the United States acknowledged that the administrative review was conducted "in view of" the recommendations and rulings – does not exist here.[91]

5.19 The United States explains that in one of the two remaining determinations, the 2005-2006 administrative review of Stainless Steel Bar from the United Kingdom, no party specifically raised the issue of non-dumped sales. However, one party raised the issue of the recalculation of the "all others" rate from the Section 129 determination. In response, Commerce stated that the recalculation of the all others rate from the Section 129 determination was not challengeable in the 2005-2006 administrative review. Commerce further noted that because the new all others rate did not take effect until 23 April 2007, any imports covered by this review that were subject to an all others rate were subject to the all others rate in existence *before* the recalculation. Thus, again, this determination was not made "in view of" the DSB's recommendations and rulings.[92]

5.20 In respect of the only one outstanding the determination in the 2004-2005 administrative review of Hot-Rolled Steel from the Netherlands, the United States observes as an initial matter, that the EC's original "as applied" challenge covered only Commerce's determination in the investigation of Hot-Rolled Steel from the Netherlands, and not any determinations from subsequent administrative reviews of the order. Commerce complied with the DSB's recommendations and rulings in the Section 129 determination covering this investigation when it granted offsets for non-dumped sales in the recalculation of the margin of dumping. Indeed, that Section 129 determination resulted in the revocation of the antidumping order on Hot-Rolled Steel from the Netherlands with respect to all

[87] US Opening Statement, Executive Summary, para. 15.
[88] US Opening Statement, Executive Summary, para. 16.
[89] US Opening Statement, Executive Summary, para. 17.
[90] US Opening Statement, Executive Summary, para. 18.
[91] US Opening Statement, Executive Summary, para. 19.
[92] US Opening Statement, Executive Summary, para. 20.

imports on or after the date of revocation. The United States argues, therefore, that it had no further obligation with respect to the Appellate Body's specific "as applied" finding, which was made only with respect to that investigation determination.[93] Moreover, in the US view, Commerce's determination in the 2004-2005 review cannot be said to have been made "in view of" the DSB's recommendations and rulings. In addressing the issue of non-dumped sales, Commerce stated, "With respect to the specific administrative reviews at issue in [the *US – Zeroing (EC)*] dispute, the United States has determined that each of those reviews has been superseded by a subsequent administrative review and the challenged reviews are no longer in effect." Thus, Commerce clearly stated its position that the DSB's recommendations and rulings did not require Commerce to take any action with respect to the treatment of non-dumped sales in this particular review.[94] In summary, the United States maintains that the EC has failed to show that any of these 54 subsequent determinations have the required timing and connection with the DSB's recommendations and rulings to qualify as "measures taken to comply." All of these additional determinations are outside of the terms of reference of this Panel.[95]

5.21 Finally, the United States asserts that the EC's argument that these additional determinations constitute "omissions" which can be reviewed by this Panel is contradictory, because the EC is arguing simultaneously that the measures taken to comply both exist and do not exist at the same time.[96]

5.22 The United States has raised serious concerns about the EC's Article 21.5 panel request. Noting that the EC dismisses its due process concerns as merely "formal," the United States finds that a disturbing position to take. The provisions in the DSU were specifically negotiated and agreed upon, and they cannot be casually dismissed whenever adherence to those provisions proves inconvenient.[97] In addition, the EC's view on the mutable nature of "words" goes far to explain what the United States has found to be an ever-shifting scope of challenged measures, both in the original proceeding and here. For example, the United States understood from the EC's panel request that it was not challenging the subsequent reviews themselves, but rather was presenting them as evidence of the undermining of US measures taken to comply (that is, the EC was attempting to assert that these subsequent reviews resulted in the "non-existence" of measures taken to comply in the language of Article 21.5) in respect of the 15 investigations and 16 administrative reviews that were the subject of the DSB recommendations and rulings in the original proceeding. The United States did not consider that the subsequent reviews themselves would be transformed into "measures taken to comply," or measures that were part of the DSB recommendations and rulings, which is how the EC began to describe them in its first written submission. In the original panel request, the EC identified certain reviews "as amended." In its submissions in the original proceeding, the EC then referred to "any amendments," a term not found in the panel request *except* to refer to determinations amended under US law. The EC now seeks to construe the phrase "any amendments" to mean any subsequent acts relating to the original challenged measures. That is a far cry from the limited and specific use of the term "amended" in the original panel request.[98]

5.23 Similarly, the United States notes that in its panel request in this proceeding, the EC specifically referred to the "measures in question" as the 15 investigations and 16 administrative reviews found to be inconsistent "as applied" in the original proceeding. Now the EC considers that the scope of the measures in this proceeding is not limited to the measures it identified *as* measures in its panel request, but rather extends to any of the reviews listed in the Annexes to its panel request.

[93] US Opening Statement, Executive Summary, para. 21.
[94] US Opening Statement, Executive Summary, para. 22.
[95] US Opening Statement, Executive Summary, para. 23.
[96] US Opening Statement, Executive Summary, para. 24.
[97] US Closing Statement, Executive Summary, para. 10.
[98] US Closing Statement, Executive Summary, para. 11.

To be sure, a Member is not necessarily obliged to refer to the measures in question as "measures"; but when a Member expressly uses the term "measure" – a term of art referenced in Article 6.2 – to describe certain determinations, it can be reasonably inferred that *not* describing other determinations as "measures" has meaning, and that those determinations are in fact not measures subject to challenge in the proceeding. Under Article 6.2 of the DSU, the complaining party bears a clear obligation to identify, in its panel request, "the *specific* measures at issue."[99] In that way, the responding Member and potential third parties are provided clear notification of the measures at issue. It is not for the responding Member to have to guess which measures are at issue, nor should the responding Member or potential third parties bear the adverse consequences of what the complaining party may later decide was an ill-advised word choice.[100] The United States argues that it is evident that the EC wishes to undo the limited "as applied" findings of the Appellate Body – while accusing the United States of declining to accept those same findings unconditionally. However, these results cannot be obtained at the expense of the procedural requirements set out in the DSU, both in Article 6.2 and in Article 21. These concerns are not "merely formal" but flow from the results of the particular negotiation and agreement by WTO Members.[101]

5.24 The United States also observes that the EC has stated repeatedly in this proceeding that the "words" don't really matter. The United States finds that this is a somewhat astonishing position to take in a dispute involving matters of treaty interpretation. The United States is reminded of similar views taken by Humpty Dumpty in *Through the Looking Glass.* "When I use a word, it means just what I choose it to mean." Alice replies, "The question is whether you can make words mean so many different things." And Humpty Dumpty responds: "The question is, which is to be master – that's all."[102] The United States emphasizes that words do in fact matter – Members negotiated and agreed on specific words in the covered agreements. Complaining parties may not "choose to be master" by giving words different meanings over the course of a proceeding depending on what will net the best result. That is precisely why due process matters.[103]

5.25 In summary, the United States argues that, by attempting to include these additional 54 determinations within the scope of this Article 21.5 proceeding, the EC seeks to gain the benefit of an "as such" finding where the Appellate Body expressly declined to make such a finding.[104]

5.26 The United States notes that in the EC's original panel request, the EC identified determinations made by Commerce in sixteen administrative reviews, but specifically challenged *particular margins* in those determinations. The EC also challenged *multiple reviews* of the same product. Thus, in the original proceeding, the EC treated each review as a separate measure and in fact challenged specific margins within each such measure. Moreover, while the Appellate Body found that Commerce's determination of margins of dumping "as applied" in the sixteen administrative reviews was inconsistent with certain WTO obligations, the Appellate Body denied the EC's request that it find Commerce's methodology for calculating margins of dumping in administrative reviews to be "as such" inconsistent with any WTO obligations.[105] This, according to the United States, is consistent with the fact that in each administrative review, Commerce examines different facts, a different time period, and a different set of transactions. Thus, in its initial panel

[99] Emphasis added by the United States
[100] US Closing Statement, Executive Summary, para. 12.
[101] US Closing Statement, Executive Summary, para. 13.
[102] US Closing Statement, Executive Summary, para. 14.
[103] US Closing Statement, Executive Summary, para. 15.
[104] US Opening Statement, Executive Summary, para. 25.
[105] US First Written Submission, Executive Summary, para. 14.

request, the EC recognized that a determination from one administrative review is separate and distinct from a determination made in a subsequent administrative review.[106]

5.27 The United States argues that the EC cannot ignore the consequences of this and cannot bring entirely new and distinct determinations concerning different periods of time into this compliance proceeding simply because those determinations involved the same subject merchandise. Rather, the scope of the DSB's "as applied" recommendations and rulings are limited to those specific determinations that the EC indicated that it was challenging in its original panel request. Anything else would, in view of the United States, be directly contrary to the fact that the DSB's recommendations and rulings were limited to these 16 administrative reviews "as applied" and explicitly did not include an "as such" recommendation or ruling.[107] The United States considers that the EC apparently understood this, as it filed a second challenge to Commerce's calculation methodology in an entirely separate DSB proceeding. In the *US – Zeroing (EC) II* panel request, for example, the EC identifies the determination in the administrative review of Certain Pasta from Italy covering sales made by PAM from 1 July 2002 through 30 June 2003 as an "as applied" measure. This very same determination is also identified by the EC as a review in the annex to its panel request that is "related to" the "measures in question." The EC recognized that these subsequent determinations are distinct measures and not measures taken to comply with the DSB's recommendations and rulings in this dispute.[108] The United States argues that further undermining the EC's contention that subsequent reviews are measures taken to comply is the EC's argument that it is, in fact, challenging the US *"omissions"* to take the necessary measures to comply. The EC cannot have it both ways: if the United States failed to comply by "omission," then any corresponding finding against the United States should be that a measure was *not* taken to comply, not that subsequent determinations are not consistent with US obligations.[109]

5.28 The United States maintains that many of the distinct administrative review determinations identified by the EC in its 21.5 panel request cannot be considered measures taken to comply because they pre-date the adoption of the DSB's recommendations and rulings. "As a whole, Article 21 deals with events *subsequent* to the DSB's adoption of recommendations and rulings in a particular dispute." Determinations made by a Member prior to the adoption of a dispute settlement report are not taken for the purpose of achieving compliance and cannot be within the scope of an Article 21.5 proceeding.[110]

5.29 The United States understands the EC to argue that the US implementation obligations with respect to the "as applied" claims extend to distinct determinations which supercede the measures described in its original panel request. To this end, the EC is attempting to use these Article 21.5 proceedings to obtain the effect of an "as such" finding that the Appellate Body expressly declined to make.[111] The US recalls that the EC made an "as such" claim against Commerce's methodology for calculating margins of dumping in administrative reviews in its initial panel request. The original panel rejected this claim. The Appellate Body also declined to find that Commerce's calculation methodology in administrative reviews was inconsistent with US WTO obligations "as such." Rather, the Appellate Body limited itself to "as applied" findings concerning the sixteen Commerce determinations originally challenged by the EC.[112] The United States contends, however, that the EC would have the United States recalculate the margins of dumping in any subsequent determination which happened to involve the same products that were the subject of the measures challenged in the

[106] US First Written Submission, Executive Summary, para. 15.
[107] US First Written Submission, Executive Summary, para. 16.
[108] US First Written Submission, Executive Summary, para. 17.
[109] US First Written Submission, Executive Summary, para. 18.
[110] US First Written Submission, Executive Summary, para. 19.
[111] US First Written Submission, Executive Summary, para. 20.
[112] US First Written Submission, Executive Summary, para. 21.

initial panel request. That is, the EC seeks the benefit of an "as such" finding, when neither the original panel nor the Appellate Body made one in this dispute. In light of the above, the United States maintains that the panel should reject the EC's efforts.[113]

5.30 In its Second Written Submission, the United States notes that the EC's response to its request for a preliminary ruling only reinforces the deficiencies in the panel request. The United States considers 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.[114]

5.31 The United States notes the EC's contention 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, in view of the United States.[115] 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 favour, the United States regrets that – by the rebuttal submission – the complaining party in this matter has been unable to simplify matters for the Panel.[116]

5.32 The United States also regrets that the EC would resort to characterizing the US 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.[117] The crux of the matter, according to the United States, 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.[118]

5.33 The United States is not ignoring or deliberately misconstruing the express terms of paragraph 7 of the panel request. According to the United States, the EC acknowledges that the panel request refers to "reviews *related to* the measures in question" but 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. The United States contends, however, that nowhere does the panel request state that those reviews are in fact the measures in question.[119] Noting that the EC continues to argue that its reference to "omissions" brings the reviews in the Annex within the terms of reference, the United States maintains that an omission is a failure to act, not an action; the reviews

[113] US First Written Submission, Executive Summary, para. 22.
[114] US Second Written Submission, Executive Summary, para. 5.
[115] US Second Written Submission, Executive Summary, para. 6.
[116] US Second Written Submission, Executive Summary, para. 7.
[117] US Second Written Submission, Executive Summary, para. 8.
[118] US Second Written Submission, Executive Summary, para. 9.
[119] US Second Written Submission, Executive Summary, para. 10.

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."[120]

5.34 Finally, the United States notes that the EC has used a variety of terms to characterize its views on the measures at issue, *i.e.*, the EC uses "subsequent reviews," "assessment instructions," and "amendments." The United States considers that that fact that the EC appears to use them somewhat interchangeably adds to the confusion.[121] The United States understands the EC to argue that, 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.[122]

5.35 The United States points out that the EC, in its original panel request, directly referenced amended determinations in the context of US antidumping law. US 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.[123]

5.36 Similarly, the United States argues that sunset reviews are not amendments "to the original measures" either, despite the EC's assertion to the contrary. The United States maintains that 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.[124] Thus, according to the United States, 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.[125]

5.37 The United States asserts that 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." *Anti-Dumping 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.[126]

5.38 The United States argues that 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

[120] US Second Written Submission, Executive Summary, para. 11.
[121] US Second Written Submission, Executive Summary, para. 12.
[122] US Second Written Submission, Executive Summary, para. 13.
[123] US Second Written Submission, Executive Summary, para. 14.
[124] US Second Written Submission, Executive Summary, para. 15.
[125] US Second Written Submission, Executive Summary, para. 16.
[126] US Second Written Submission, Executive Summary, para. 17.

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.[127] The United States further notes that some 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.[128]

5.39 The United States also notes the EC's argument 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.[129] 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. The United States recalls that 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.[130]

5.40 In light of the above arguments by the EC, the United States concludes 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.[131]

5.41 The United States further observes that the EC's argument that it is not only challenging these subsequent determinations as measures taken to comply, but that it is, rather, challenging the "*omissions or deficiencies*" of the United States as reflected in these subsequent determinations, only further demonstrates, that the EC is attempting to gain the benefits of an "as such" finding, when the Appellate Body declined to make one.[132] 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.[133] 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 US 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.[134]

5.42 The United States lastly reiterates that by complaining about 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", the EC effectively

[127] US Second Written Submission, Executive Summary, para. 18.
[128] US Second Written Submission, Executive Summary, para. 19.
[129] US Second Written Submission, Executive Summary, para. 20.
[130] US Second Written Submission, Executive Summary, para. 21.
[131] US Second Written Submission, Executive Summary, para. 22.
[132] US Second Written Submission, Executive Summary, para. 23.
[133] US Second Written Submission, Executive Summary, para. 24.
[134] US Second Written Submission, Executive Summary, para. 25.

complains of the general and prospective application of the so-called "zeroing" methodology and that, 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.[135]

2. European Communities

5.43 The European Communities submits that the request for a preliminary ruling by the United States is unfounded.[136] The EC notes in this regard that the United States[137] requests the Panel to find that the only measures within the terms of reference of this proceeding are the 15 original investigations and 16 administrative reviews referenced in paragraph 7 of the EC's Panel Request. In particular, the United States argues that certain administrative and sunset review proceedings listed in the EC's Panel Request are not properly before this Panel because (1) they were not identified in the EC's Panel Request, and (2) they were not subject to the DSB's recommendations and findings in the original dispute and, thus, they are not measures taken to comply.[138]

5.44 The European Communities observes that proceedings under Article 21.5 of the DSU relate to "measures taken to comply with the recommendations and rulings" of the DSB. Thus, the phrase "measures taken to comply" refers to measures which have been, or which should be, adopted by a Member to bring about compliance with the recommendations and rulings of the DSB. In other words, a complaining Member can challenge either a Member's implementing actions (*i.e.*, measures which have been adopted) or their omissions (*i.e.*, measures which should have been adopted). The European Communities recalls that an Article 21.5 proceeding is not only about the consistency of a measure taken to comply with the covered agreements, but also about the existence of such a measure and that this was explicitly confirmed by the Appellate Body in *US – Softwood Lumber IV (21.5)*. Thus, if the recommendations and rulings of the DSB have not been complied with, a measure taken to comply does not "exist".[139] In this context, the European Communities argues that the United States has failed to adopt measures necessary to comply with the DSB's recommendations.[140]

5.45 The European Communities asserts that the "measures taken to comply with the recommendations and rulings" for the purposes of Article 21.5 of the DSU necessarily flow from the particular "recommendations and rulings" in question: in the present case, those adopted by the DSB in May 2006.[141]

5.46 The European Communities recalls in this connection that the original dispute concerned the application by the United States of the so-called "zeroing methodology" when determining dumping margins in anti-dumping proceedings, including proceedings resulting in the initial imposition of anti-dumping measures and proceedings relating to the collection of anti-dumping duties.[142] The EC observes that the "as applied" measures it challenged in the original dispute were (i) 15 original investigations, including "any amendments" and "each of the assessment instructions issued pursuant to any of the 15 Anti-dumping Duty Orders"; and (ii) 16 administrative reviews, also including "any amendments" and "each of the assessment instructions issued pursuant to any of the 16 Notices of

[135] US Second Written Submission, Executive Summary, para. 26.
[136] Executive Summary of the European Communities Second Written Submission (hereinafter "EC Second Written Submission, Executive Summary"), para. 7.
[137] US First Written Submission, paras. 30-54.
[138] EC Second Written Submission, Executive Summary, para. 7.
[139] Executive Summary of the European Communities First Written Submission (hereinafter "EC First Written Submission, Executive Summary"), para 15.
[140] EC First Written Submission, Executive Summary, para. 14.
[141] EC First Written Submission, Executive Summary, para. 17.
[142] EC First Written Submission, Executive Summary, para. 6.

Final Results".[143] In this respect, the European Communities argues that all the measures it challenges are clearly connected to the original Panel and Appellate Body reports, as explained in *US – Upland Cotton (21.5)*. The Annex to the Panel Request describes the subsequent measures adopted by the United States from the original investigations and administrative review investigations identified in the original dispute. These include (i) administrative reviews which, in essence, collect the anti-dumping duties due with respect to a particular period of review and establish new cash deposit rates amending the ones calculated in the original investigations (or administrative reviews); and (ii) sunset reviews, which prolong the original anti-dumping order and, thus, the duties.[144]

5.47 The European Communities argues that it has shown in detail in its Rebuttal Submission that those subsequent reviews were covered by the description of the measures challenged in the original dispute. In this context the European Communities specifically notes that the EC's First Written Submission in the original dispute described the measures at issue as 15 original investigations, including *any amendments* and assessment instructions, and 16 administrative reviews, also including *any amendments* and assessment instructions.[145] The European Communities notes that the Panel in the original dispute correctly captured the description of the measures at issue not only in paragraph 2.6 of its Report, but also in other sections, including its findings[146], and that the adopted DSB reports found the 15 original investigations and 16 administrative reviews inconsistent with Articles 2.4.2 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the *GATT 1994*, and recommended the United States to bring its measures into conformity with its obligations.[147] The European Communities also observes that its Notice of Appeal contained the same description of the measures. Accordingly, the Appellate Body ruled on the basis of such a description. In light of the above, the European Communities maintains that the DBS's recommendations and rulings in the original dispute comprised the 15 original investigations and the 16 administrative reviews, including *any amendments* and any assessment instructions.[148] Therefore, according to the EC, the United States was required to bring those measures, including any amendments and assessment instructions, into conformity with the mentioned agreements.[149]

5.48 The European Communities argues that according to WTO jurisprudence, a measure that essentially replaces an earlier measure remains within the terms of reference of an original panel. Thus, a 21.5 panel must be in a position to assess whether an annual administrative review determination (or sunset review) that confirms and supersedes the original determination relating to the same anti-dumping duty and the same methodology (*i.e.*, zeroing) constitutes a "continuing violation".[150] Therefore, the European Communities considers that all matters referred to in its submission fall within the scope of this proceeding. In particular, the measures mentioned in the Annex to the Panel Request, in addition to the Section 129 Determinations explicitly mentioned by the United States as "measure taken to comply", fall within the scope of this proceeding.[151]

5.49 The European Communities observes that the United States has hardly raised any substantive arguments in its First Written Submission; rather, it has relied on purely formal ones. In this respect, the European Communities notes its view that the United States misinterprets the EC's claims with respect to the scope of this proceeding. Any amendments and assessment instructions connected to the 15 original administrations and 16 administrative reviews were covered by the description of the

[143] EC First Written Submission, Executive Summary, para. 16.
[144] EC First Written Submission, Executive Summary, para. 17.
[145] Executive Summary of the European Communities Opening Statement at the substantive meeting of the Panel (hereinafter "EC Opening Statement, Executive Summary"), para. 2.
[146] EC Opening Statement, Executive Summary, para. 2.
[147] EC First Written Submission, Executive Summary, para. 18.
[148] EC Opening Statement, Executive Summary, para. 2.
[149] EC First Written Submission, Executive Summary, para. 18.
[150] EC First Written Submission, Executive Summary, para. 20.
[151] EC First Written Submission, Executive Summary, para. 14.

measures at issue in the original dispute. Therefore, the subsequent review proceedings listed in the Annex to the Panel Request, as well as the US omissions and deficiencies in its compliance with the DSB's recommendations and findings, fall within the scope of this proceeding. Likewise, the European Communities claims that those subsequent reviews are measures taken to comply with the DSB's recommendations and findings and, thus, are subject to this proceeding.[152]

5.50 The European Communities considers that in its Rebuttal Submission, the United States is trying to change what the Panel in the original dispute and the Appellate Body found to be the "measures at issue" in the original dispute. The United States cannot reopen now an issue that was already settled by the Panel (and the Appellate Body) in the original dispute. Moreover, the description of the measures in the original dispute referred to "*any* amendments", which indicates the broad coverage of the measures at issue.[153] The European Communities therefore maintains that, as subsequent reviews were covered by the DSB's recommendations and rulings, the United States should have stopped using zeroing with respect to those measures, at least, after the end of the reasonable period of time (*i.e.*, 9 April 2007). Since the United States has failed to do so, the European Communities challenges in this proceeding the US *omissions and deficiencies* when complying with the DSB's recommendations and rulings.[154]

5.51 The European Communities argues in the alternative that, should the Panel consider that the subsequent reviews were not included in the description of the measures in the original dispute (although the European Communities finds it impossible to envisage any basis on which the Panel could reach such a conclusion), the European Communities also argues that they equally fall within the terms of reference of this Panel because they are "measures taken to comply". Even if the subsequent review proceedings were to be considered as separate determinations or different measures from those covered by the DSB's recommendations and rulings in the original dispute, the European Communities is of the view that they can be regarded as "measures taken to comply" because of their *close nexus* with the 15 original investigations and the 16 administrative reviews in the original dispute. The particular facts of this case show that the *nature* of the subsequent reviews is, *in essence*, the same as the measures in the original dispute. Moreover, the *violation* originally challenged (*i.e.*, the use of zeroing when calculating dumping margins) *still remains* in the subsequent review proceedings, either by applying simple zeroing when calculating the duties to be collected or establishing new deposit rates, or by relying on dumping margins previously calculated with zeroing. Furthermore, the subsequent review proceedings relate to the *same products*, the *same countries* and the *same exporting companies*. In other words, according to the EC, they are a *continuation* of the 15 original investigations and the 16 administrative reviews in the original dispute, whose *effects* based on zeroing still remain in place after the end of the reasonable period of time. Finally, as the Appellate Body observed in *US – Softwood Lumber IV (21.5)*, the European Communities considers that measures *predating* the adoption of the DSB's recommendations and rulings may also be covered by Article 21.5 DSU proceedings. Otherwise, Members could adopt new measures diametrically against compliance in a particular case just the day before the adoption of the DSB report.[155] In light of this *close nexus*, the European Communities submits that the subsequent review proceedings listed in the Annex to the Panel Request can also be considered as "measures taken to comply" falling within the scope of this proceeding.[156]

5.52 The EC maintains that, despite the US efforts to argue otherwise, the measures at issue in the original dispute were the 15 original investigations and the 16 administrative reviews, including *any* amendments and their assessment instructions. Since the subsequent reviews proceedings listed in the

[152] EC Second Written Submission, Executive Summary, para. 1.
[153] EC Opening Statement, Executive Summary, para. 3.
[154] EC Opening Statement, Executive Summary, para. 4.
[155] EC Opening Statement, Executive Summary, para. 5.
[156] EC Opening Statement, Executive Summary, para. 6.

Annex to the Panel Request are amendments to the original measures, they fall within the scope of this proceeding. Furthermore, an examination of those subsequent review proceedings and the acts (and omissions) taken by the United States after the end of the reasonable period of time, shows that the United States (i) has continued collecting duties and establishing cash deposits based on zeroing, and (ii) has relied on dumping margins equally based on zeroing to extend the original measures pursuant to sunset review proceedings. Therefore, the US omissions and deficiencies in this case fully confirm the jurisdiction of this Panel to examine this matter.[157] Alternatively, the European Communities argues that it has shown that the subsequent reviews listed in the Annex to the Panel Request are "measures taken to comply", since they have a *close nexus* with the DSB's recommendations and rulings in the original dispute. Indeed, the subsequent reviews relate to the *same products*, the *same countries* and the *same exporters* and, thus, are a *continuation* of the 15 original investigations and 16 administrative reviews in the original dispute. No matter which legal theory the Panel chooses to follow, it is evident that the United States cannot escape from a ruling on the substance of this case: once again, the meaning *of immediate compliance* with the DSB's recommendations and rulings.[158]

5.53 The European Communities emphasises that through this compliance proceeding it is merely seeking to have the "as applied" findings adopted by the DSB in the original dispute fully implemented by the United States, concluding that regardless of the characterisation of the findings made by the Panel and the Appellate Body in the original dispute, the DSB's recommendations and rulings clearly stated that the zeroing methodology applied by the United States in the 15 original investigations and the 16 administrative reviews was inconsistent with Article 2.4.2 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the *GATT 1994*. Consequently, in the EC view, when applying the same zeroing methodology in the subsequent reviews listed in the Annex to the Panel Request, the United States failed to comply with the DSB's recommendation to bring the measures into conformity with its obligations.[159]

5.54 The European Communities argues that all matters referred to this Panel fall within the scope of this proceeding.[160] The European Communities asserts that the Panel Request clearly identifies the measures at issue. It disputes the US argument that the European Communities has not complied with Article 6.2 of the *DSU* since it has failed to identify the specific measures at issue in its Panel Request. The European Communities argues that the US submission is entirely without merit. According to the European Communities, the United States simply ignores or deliberately misconstrues the express terms of paragraph 7 of the Panel Request, which refers to "the reviews related to the measures in question", and which expressly cross-refers to the Annex to the Panel Request, which lists the measures that the European Communities does place before this compliance Panel.[161]

5.55 Moreover, the European Communities submits that it has adequately identified the measures at issue in this dispute in its Panel Request. As the Appellate Body observed in *US – FSC (21.5 II)*, in order to identify the "specific measures at issue" in an Article 21.5 proceeding, the complaining party must (i) cite the recommendations and rulings that the DSB made in the original dispute which, according to the complaining party, have not yet been complied with; and (ii) identify, with sufficient detail, the measures allegedly taken to comply with those recommendations and rulings, as well as

[157] Executive Summary of the European Communities, Closing Statement at the substantive meeting of the Panel (hereinafter "EC Closing Statement, Executive Summary") para. 3.
[158] EC Closing Statement, Executive Summary, para. 4.
[159] EC Opening Statement, Executive Summary, para. 7.
[160] EC Second Written Submission, Executive Summary, para. 7.
[161] EC Second Written Submission, Executive Summary, para. 8.

any omissions or deficiencies therein, or state that no such measures have been taken by the implementing Member. The EC's Panel Request fully meets these requirements.[162]

5.56 The European Communities contends that the measures listed in the Annex to the Panel Request fall within the scope of this proceeding. It rejects the US argument that the "subsequent reviews" listed in the Annex to the Panel Request (including administrative review and sunset review proceedings) were not covered by the original dispute and, thus, are not "measures taken to comply" subject to this proceeding. In this respect, the European Communities submits that the United States tries to narrow the scope of the Article 21.5 proceedings and seeks to exclude measures that were subject to the DSB's recommendations and findings in the original dispute and/or are measures taken to comply within the jurisdiction of this compliance Panel.[163] The European Communities submits that the omissions by the United States are also covered by the Article 21.5 proceeding, and the Panel is called upon to examine the "existence" (or inexistence) of measures taken to comply by the United States, in particular, by examining the subsequent review proceedings listed in the Annex to the Panel Request.[164]

5.57 The European Communities argues that the "subsequent reviews" listed in the Annex to the Panel Request are measures which were covered by the DSB's recommendations and findings in the original dispute and/or are measures taken to comply. In this regard it notes that the United States argues that the subsequent reviews and their assessment instructions that the European Communities contests in this proceeding were not the basis for the DSB's recommendations and ruling in the original dispute. According to the United States, the European Communities merely obtained DSB's recommendations and rulings with respect to the USDOC's determinations in the 15 original investigations and the 16 administrative reviews. The United States also maintains that the European Communities cannot bring new dumping determinations concerning different periods of time into this proceeding simply because those determinations involved the same product. Finally, the United States argues that many of the subsequent review proceedings listed in the Annex to the Panel Request pre-date the adoption of the DSB reports and, thus, cannot be within the scope of an Article 21.5 proceeding.[165]

5.58 The European Communities considers that the United States misunderstands the EC's claim on this point. The European Communities is not only arguing that subsequent reviews and assessment instructions are "measures taken to comply" and, thus, that they fall within the scope of this proceeding. Nor is the European Communities simply arguing that it can challenge new dumping determinations because they relate to the same product. Rather, the European Communities also argues that subsequent reviews and assessment instructions with respect to the 15 original investigations and 16 administrative reviews challenged in the original dispute were covered by the DSB's recommendations and findings, and thus that US omissions or deficiencies in that respect – as reflected in the said reviews – also clearly fall within the jurisdiction of this compliance Panel.[166]

5.59 The European Communities observes that its First Written Submission, the Panel Report, the EC's Notice of Appeal and the Appellate Body Report refer to "any amendments" and "assessment instructions" when describing the original investigations and administrative reviews at issue in the original dispute. Thus, the European Communities submits that the "subsequent reviews" listed in the Annex to the Panel Request (as well as any assessment instruction therein) are covered by the DSB's recommendations and finding and, thus, fall within the scope of this proceeding.[167] In particular, the

[162] EC Second Written Submission, Executive Summary, para. 9.
[163] EC Second Written Submission, Executive Summary, para. 10.
[164] EC Second Written Submission, Executive Summary, para. 11.
[165] EC Second Written Submission, Executive Summary, para. 12.
[166] EC Second Written Submission, Executive Summary, para. 13.
[167] EC Second Written Submission, Executive Summary, para. 13.

European Communities considers that the United States has failed to take the necessary measures to eliminate zeroing in those subsequent reviews. In other words, the United States has continued using the same methodology which was found inconsistent with the *Anti-Dumping Agreement* and the GATT 1994 by the reports adopted by the DSB in May 2006 when carrying out dumping determinations in the subsequent review proceedings referring to the 15 original investigations and 16 administrative reviews in the original dispute. Thus, the US omissions and deficiencies in its compliance with the DSB's recommendations and findings fall within the scope of this compliance proceeding.[168]

5.60 The European Communities also argues that the subsequent review proceedings listed in the Annex to the Panel Request are "measures taken to comply" since they are closely connected to the original investigations and administrative reviews identified in the original dispute and the DSB's recommendations and rulings. The European Communities observes that the nature of the subsequent reviews is, in essence, the same as the measures in the original dispute (*i.e.*, collect anti-dumping duties and establish cash deposits based on zeroing). The violation originally challenged (*i.e.*, the use of zeroing when calculating dumping margins) still remains in the subsequent review proceedings. Further, the subsequent review proceedings relate to the same products, the same countries and the same exporting companies. In other words, they are a continuation of the 15 original investigations and 16 administrative reviews in the original dispute, whose effects based on zeroing still remain in place after the end of the reasonable period of time.[169]

5.61 The European Communities submits that the sunset reviews mentioned in the Annex to the Panel Request also fall within the scope of this proceeding. In response to the argument made by the United States that, since the European Communities did not challenge any sunset reviews in the original proceeding and, thus, there are no DSB's recommendations or findings relating to these, the sunset review proceedings listed in the Annex to the Panel Request do not fall within the scope of this proceeding[170], the European Communities recalls that the adopted DSB's recommendation also covered any amendments to the 15 original investigations and 16 administrative reviews. Article 11.3 of the *Anti-Dumping Agreement* provides for the termination of anti-dumping duties after five years in the absence of a positive determination in a sunset review, which restarts a new five-year period of application. Determinations in sunset review proceedings, which are based on previous dumping margins, may lead to the continuation of the measures based on the level of duties found in the original LTFV investigation or the most recent administrative review which reflects the most representative degree of dumping. Therefore, in view of the European Communities, by their nature, sunset review proceedings are amendments to the original measures because they restart the application of the duty for another five years (*i.e.*, in their absence the duty would not longer be in force) and, thus, they were covered by the DSB's recommendations and findings in the original dispute. The European Communities argues that the US omissions or deficiencies in that respect – as also reflected in the said reviews – clearly fall within the jurisdiction of this compliance Panel. Likewise, as mentioned before, the sunset reviews listed in the Annex to the Panel Request are "measures taken to comply" since they are closely connected to the original investigations and administrative reviews in the original dispute.[171]

5.62 Noting the argument of the United States that the European Communities is attempting to use this Article 21.5 proceeding to obtain the effect of an "as such" finding that the Appellate Body declined to make with respect to the use of simple zeroing in administrative reviews[172], the

[168] EC Second Written Submission, Executive Summary, para. 14.
[169] EC Second Written Submission, Executive Summary, para. 15.
[170] EC Second Written Submission, Executive Summary, para. 16.
[171] EC Second Written Submission, Executive Summary, para. 17.
[172] EC Second Written Submission, Executive Summary, para. 18.

European Communities argues that the United States misinterprets the EC's claim in this regard.[173] The European Communities argues that it is merely seeking the implementation of the "as applied" finding of the panel report in the original dispute. Therefore, the European Communities is not arguing *in general*, as the United States believes, that the US implementation obligations with respect to the "as applied" claims extend to distinct determinations – for example related to other products or other sub-regions of the European Communities, or entirely new original investigations – or indeed to measures that may or may not "supersede" the measures described in the original Panel Request. In contrast, the European Communities argues that, *in this particular case*, since the subsequent reviews and assessment instructions were part of the measures challenged in the original dispute, the US implementation obligations with respect to the "as applied" claims extend to any subsequent determination and assessment instruction in connection with the measures as described by the Panel and the Appellate Body in the original dispute, as well as the related US omissions or deficiencies. In other words, the scope of the "as applied" finding covered every instance of application (and omission or deficiency) of the zeroing methodology by the United States with respect to any amendments, including assessment instructions, of the 15 original investigations and 16 administrative reviews, since those were part of the measures challenged "as applied".[174] In light of the foregoing, the European Communities requests this Panel to fully reject the request for preliminary ruling made by the United States. The European Communities invites this Panel to make a preliminary finding on the US request at an earlier stage of this proceeding, provided that this does not delay the conclusion of the proceeding in due time.[175]

B. PANEL COMPOSITION

1. European Communities

5.63 The European Communities raises the issue of the Panel composition as a procedural matter which must be examined in this case, also in view of the obvious and important systemic interest of a finding on this point.[176]

5.64 The European Communities recalls that in the context of an exchange of views between the Parties when discussing the composition of this Article 21.5 Panel, the WTO Secretariat indicated that the Chair of the Panel and one Member of the Panel were not available. It was therefore clearly necessary, in the EC's view, to appoint at least two new panelists and to appoint one of the three panelists as Chair. The remaining Panelist is from the European Communities. On 1 October 2007, the European Communities sent a letter to the WTO Secretariat opposing the exclusion of this panelist, since he was available to serve as a panelist. However, the EC states that in a meeting held with the parties on 5 October 2007, the WTO Secretariat expressed the view that, without prejudice to the correct interpretation of the DSU on this point, three new panelists should be appointed.[177]

5.65 The European Communities calls upon this Panel to interpret the relevant provisions of the DSU, in the exercise of its inherent jurisdiction to consider and make findings with respect to such matters. More specifically, the European Communities submits that a correct interpretation of the relevant provisions of the DSU necessarily leads to the conclusion that, when panelists of the original dispute are available to serve in Article 21.5 proceedings, they cannot be unilaterally removed from the panel by one of the Parties. This is equally the case even if the remaining panelists are of the nationality of one of the parties, since the original agreement pursuant to Article 8.3 of the DSU

[173] EC Second Written Submission, Executive Summary, para. 19.
[174] EC Second Written Submission, Executive Summary, para. 19.
[175] EC Second Written Submission, Executive Summary, para. 20.
[176] EC Second Written Submission, Executive Summary, para. 3.
[177] EC Second Written Submission, Executive Summary, para. 4.

cannot be revoked at any stage of the dispute proceeding, including subsequent compliance proceedings.[178]

5.66 Finally, the European Communities is of the view that a panel may be requested to rule on the propriety of its own composition, resulting in findings subject to appellate review. Even if the parties do not address this issue directly in their submissions, the Panel has a duty to address it, as it is of fundamental importance for the correct interpretation of the DSU and for the smooth and equitable operation of the WTO dispute settlement system. Therefore, the European Communities requests the Panel to find that the composition of the Panel was not consistent with Articles 21.5 and 8.3 of the DSU.[179]

2. United States

5.67 The United States notes that 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 for the first time in its rebuttal submission. 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.[180] The United States submits that 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. It argues that these claims are not about a measure identified in that panel request and that, 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.[181]

5.68 At the same time, the United States notes 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.[182]

C. VIOLATIONS WITH RESPECT TO ALL MEASURES COVERED IN THIS PROCEEDING

1. Whether the United States extended the measures challenged in the original dispute pursuant to sunset review proceedings which relied on dumping margins calculated with zeroing

(a) European Communities

5.69 The European Communities argues that the United States has extended the duration of the original measures challenged in the original dispute pursuant to sunset review proceedings concluded before and after 9 April 2007[183], *i.e.*, beyond the end of the reasonable period of time, notably as a result of sunset review investigations.[184] The European Communities observes that although the future duty rate has generally been set based on the non-zeroed "Section 129" re-determinations, the fact remains that, in the sunset reviews, the United States expressly relied on the results of previous

[178] EC Second Written Submission, Executive Summary, para. 5.
[179] EC Second Written Submission, Executive Summary, para. 6.
[180] US Second Written Submission, Executive Summary, para. 2.
[181] US Second Written Submission, Executive Summary, para. 3.
[182] US Second Written Submission, Executive Summary, para. 4.
[183] EC First Written Submission, Executive Summary, para. 21.
[184] EC First Written Submission, Executive Summary, para. 7.

administrative review investigations, based on zeroing.[185] In particular, it asserts that the USDOC decided to extend the measures challenged in the original dispute because, based on the previous levels of dumping found with zeroing in prior proceedings, it considered that it was likely that dumping would recur. In this respect, the European Communities submits that the United States violated Articles 2.1, 2.4, 2.4.2 and 11.3 of the *Anti-Dumping Agreement*.[186] The European Communities argues that the *Anti-Dumping Agreement* and the established case-law are clear on this point. If a sunset review relies on a zeroed dumping margin, the sunset review is necessarily inconsistent with the *Anti-Dumping Agreement*.[187]

5.70 The European Communities maintains that the United States has relied on the dumping margins calculated with zeroing when finding the likelihood of recurrence of dumping in sunset review proceedings. In this sense, the European Communities challenges the *omissions* by the United States to take the necessary measures to comply in this case, *i.e.*, (i) that the United States should, on 9 April 2007, have stopped collecting anti-dumping duties based on zeroing in connection with any of the measures described in the original dispute and, thus, with respect to the measures contained in the Annex to the Panel Request; and (ii) that the United States should have recalculated, without zeroing, the previous dumping margins based on zeroing, in order to rely on them for the assessment of likelihood of recurrence of dumping in sunset review proceedings with respect to the measures mentioned above.[188]

5.71 The European Communities recalls that, as highlighted by the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*, if a likelihood determination under Article 11.3 of the *Anti-Dumping Agreement* is based on a dumping margin calculated using a methodology inconsistent with Article 2.4 of the *Anti-Dumping Agreement*, then this defect taints the likelihood determination too and, thus, the USDOC's likelihood determination could not constitute a proper foundation for the continuation of anti-dumping duties under Article 11.3 of the *Anti-Dumping Agreement*. Moreover, the Appellate Body had the occasion to rule on the inconsistency of the use of zeroing in sunset review proceedings in measures adopted by the United States in *US – Zeroing (Japan)*, where it also noted that the USDOC relied on past margins that were calculated during administrative reviews on the basis of "simple zeroing". Having previously concluded that zeroing in administrative review investigations is inconsistent with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement*, the Appellate Body found that the determinations in the sunset reviews at issue were inconsistent with Article 11.3 of the *Anti-Dumping Agreement*.[189] In light of the foregoing, the European Communities submits that, by relying in the sunset review proceedings mentioned in the Annex to the Panel Request on margins calculated in prior proceedings using model or simple zeroing, the United States did not comply with its obligations pursuant to Articles 2.1, 2.4 and 2.4.2 because these margins were not based on a fair comparison and not calculated for the product as a whole. As a result, the United States acted in breach of Article 11.3 of the *Anti-Dumping Agreement*.[190]

5.72 The European Communities notes that the United States has not contested this claim in substance[191], and that it has not produced any substantive evidence to rebut the EC's claims.[192] The

[185] EC First Written Submission, Executive Summary, para. 2.
[186] EC First Written Submission, Executive Summary, para. 21.
[187] EC First Written Submission, Executive Summary, para. 2.
[188] EC First Written Submission, Executive Summary, para. 19.
[189] EC First Written Submission, Executive Summary, para. 22.
[190] EC First Written Submission, Executive Summary, para. 23.
[191] EC Second Written Submission, Executive Summary, para 21. See also, European Communities, Opening Statement at the substantive meeting of the Panel (hereinafter "EC Opening Statement"), para. 8. "As regards the sunset review proceedings listed in the Annex to the Panel Request, the European Communities has shown that the United States has extended the life of the 15 original investigations and the 16 administrative reviews in the original dispute in a manner contrary to Article 11.3 of the Anti-Dumping Agreement. The United States has not contested this claim in substance".

European Communities observes that on this point, the United States only argues that, since the European Communities did not challenge any sunset reviews in the original proceeding, there are no DSB's recommendations or findings relating to these and, therefore, the sunset reviews listed in the Annex to the Panel Request do not fall within the scope of this proceeding. In this respect, the European Communities recalls its arguments that the adopted DSB's recommendation also covered any amendments to the 15 original investigations and 16 administrative reviews, including sunset review proceedings, and related US omissions or deficiencies therein. Thus, the sunset reviews proceedings listed in the Annex to the Panel Request fall under the scope of this proceeding.[193] Therefore, the European Communities requests the Panel to find that United States did not comply with the DSB's recommendations and rulings and violated Articles 2.1, 2.4, 2.4.2 and 11.3 of the *Anti-Dumping Agreement* when extending the measures contained in the original dispute pursuant to sunset review proceedings relying on margin of duties calculated with zeroing.[194]

(b) United States

5.73 In response to the EC's attempts to challenge certain sunset reviews, the United States recalls that the EC did not challenge any sunset reviews in the original proceeding and, thus, there are no DSB recommendations or rulings relating to sunset reviews. Consequently, the sunset reviews identified in the EC's 21.5 panel request cannot be within the terms of reference of this panel.[195] The EC relies on *US – Zeroing (Japan)* for support. However, in view of the United States, that dispute only confirms the fundamental flaw in the EC's posture. In *US – Zeroing (Japan)*, Japan in its panel request in the original proceeding expressly challenged sunset reviews and included a claim that the United States had acted inconsistently with Article 11.3. By contrast, in its panel request in the original proceeding, the EC did not challenge sunset reviews nor set out a claim concerning Article 11.3. (Indeed, the EC appears to have recognized that claims against sunset reviews must be made in the original panel request, because it has expressly done so in its other zeroing dispute against the United States.) The United States argues that the EC cannot cure its failure to pursue a claim in the original proceeding by seeking to include it in a compliance proceeding.[196] In addition, the United States argues that the EC's Article 21.5 panel request did not identify the sunset reviews as measures within the terms of reference of this proceeding. Rather, the sunset reviews are simply identified as "reviews" related to *the measures in question.* Therefore, with respect to those reviews, the EC did not "specify the measures at issue" as required by Article 6.2.[197] Thus, the United States respectfully requests the Panel to find that the only measures within the terms of reference of this proceeding are the 15 original investigations and 16 administrative reviews referenced in paragraph 7 of the EC's Article 21.5 panel request.[198]

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[192] EC Closing Statement, Executive Summary, para. 5.
[193] EC Second Written Submission, Executive Summary, para. 21.
[194] EC Second Written Submission, Executive Summary, para. 22.
[195] US First Written Submission, Executive Summary, para. 23.
[196] US First Written Submission, Executive Summary, para. 24.
[197] US First Written Submission, Executive Summary, para. 25.
[198] US First Written Submission, Executive Summary, para. 26.

2. Whether the United States continues to collect anti-dumping duties and impose cash deposits inflated by zeroing after 9 April 2007, has failed to revoke the original orders entirely, and whether the 16 administrative reviews challenged in the original dispute have been "superseded"

(a) European Communities

5.74 The European Communities argues that after the end of the reasonable period of time, the United States continues to take positive acts, including new administrative review investigations, assessment instructions and final liquidations, based on zeroing.

5.75 The European Communities clarifies that it had challenged certain US legal instruments, procedures, methodologies and practice, "as such" and "as applied". In the 15 "as applied" cases referred to by the European Communities as "original investigations" the challenged measures were: the 15 Notices of Final Determinations of Sales at Less Than Fair Value, including any amendments, and including all the Issues and Decision Memoranda to which they refer, and all the Final Margin Program Logs and Outputs to which they in turn refer, for all the firms investigated; each of the 15 Anti-dumping Duty Orders; each of the assessment instructions issued pursuant to any of the 15 Anti-dumping Duty Orders; and each of the USITC final injury determinations. In the 16 "as applied" cases referred to by the European Communities as "administrative reviews" the challenged measures were: the 16 Notices of Final Results of Antidumping Duty Administrative Reviews, including any amendments, and including all the Issues and Decision Memoranda to which they refer, and all the Final Margin Program Logs and Outputs to which they in turn refer, for all the firms investigated; and each of the assessment instructions issued pursuant to any of the 16 Notices of Final Results.[199]

5.76 The European Communities notes that on 31 October 2005, the Panel in the original proceedings circulated its report, finding that the United States had acted inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement* when, in the original anti-dumping investigations concerned, the USDOC used "model zeroing". The Panel in the original proceedings also found that the same methodology was inconsistent, "as such", with Article 2.4.2 of the *Anti-Dumping Agreement*. However, the Panel concluded that the United States did not act inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement* when using "simple zeroing" in the administrative reviews at issue. On 18 April 2006, the Appellate Body, following an appeal by the European Communities, issued its report, finding that the United States had acted inconsistently with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the *GATT 1994* in the administrative review investigations at issue due to its use of a "simple zeroing" methodology, and reversing Panel's finding to the contrary. Moreover, the Appellate Body upheld the Panel's conclusion that "model zeroing" was inconsistent, "as such", with Article 2.4.2 of the *Anti-Dumping Agreement*. However, the Appellate Body was unable to complete the analysis to determine whether "simple zeroing" in administrative reviews was inconsistent, "as such", with the provisions of the *Anti-Dumping Agreement*.[200]

5.77 The European Communities recalls that the Appellate Body recommended that the DSB request the United States to bring its measures, which had been found to be inconsistent with the *Anti-Dumping Agreement* and with the *GATT 1994*, into conformity with its obligations under those Agreements. On 9 May 2006, the DSB adopted the Appellate Body Report contained in WT/DS294/AB/R and the Panel Report contained in WT/DS294/R, as modified by the Appellate Body Report.[201]

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[199] EC First Written Submission, Executive Summary, para. 7.
[200] EC First Written Submission, Executive Summary, para. 8.
[201] EC First Written Submission, Executive Summary, para. 9.

5.78 The European Communities observes that on 28 July 2006, the European Communities and the United States agreed, pursuant to Article 21.3(b) of the DSU, that the reasonable period of time for the United States to implement the recommendations and rulings of the DSB in the original dispute "shall be 11 months", expiring on 9 April 2007.[202] The European Communities points out that on 27 December 2006, the United States published a notice whereby it announced that it was abandoning "zeroing" in average-to-average comparisons in anti dumping original investigations. The final modification became effective on 22 February 2007. The European Communities explains that with this, the United States committed to abandon the use of "model zeroing" in all current and future anti-dumping original investigations as of the effective date. Subsequently, the United States began a recalculation of the margins of dumping in 12 of the 15 original investigations challenged in the original dispute. In three of the 15 original investigation measures, the United States considered that it did not have to take any action since the anti-dumping orders had been previously revoked for reasons other than zeroing. The United States, having issued provisional findings on 26 February 2007, issued its final findings in 11 of the revised original investigations on 9 April 2007, which entered into effect on 23 April 2007, and on 20 August 2007 issued its final findings in Certain Stainless Steel Sheet and Strip from Italy (which entered into force on 31 August 2007) (the "Section 129 Determinations").[203]

5.79 Despite the fact that the subsequent measures amended the 15 original orders and 16 administrative reviews challenged in the original dispute, the European Communities asserts that the United States continued after the end of the reasonable period of implementation and still now continues collecting duties calculated using zeroing as a result of those measures.[204] In other words, the EC argues that despite the fact that the use of zeroing has been found repeatedly inconsistent with WTO rules in previous cases, the United States is reluctant to comply with its obligations and, thus, has failed to fully implement the recommendations of the DSB in the original dispute.[205]

5.80 The European Communities asserts that the United States cannot change reality: after the end of the reasonable period of time, it has taken positive acts providing for final payment of the duties due or retention of the cash deposits made based on zeroing with respect to those entries not finally liquidated before the end of the reasonable period.[206]

5.81 In the EC's view, in order to comply immediately with the DSB's recommendations and rulings in the original dispute, (i) the United States should have stopped taking any positive acts providing for the final payment of duties or retention of cash deposits based on zeroing with respect to those entries not finally liquidated before the end of the reasonable period in connection with any of the measures described in the original dispute and, thus, with respect to the measures contained in the Annex to the Panel Request; and (ii) the United States should have recalculated, without zeroing, the previous dumping margins based on zeroing, in order to rely on them for the assessment of likelihood of recurrence of dumping in sunset review proceedings with respect to the measures mentioned above. In addition, the United States, once it recalculated the dumping margins without zeroing pursuant to the Section 129 Determinations and revoked the measures, should have stopped collecting any duties at all, since the measures were thereby, in effect, void. All these acts are, in the EC's view, prospective in nature.[207] The European Communities observes that it cannot understand why the United States, would not, in a simple accounting exercise, adjust its calculations so as to properly reflect the degree of dumping, if any, (i.e. without zeroing) that occurred, having a full opportunity to do so (in subsequent reviews of the measures concerned or in the appeals and protests filed by

[202] EC First Written Submission, Executive Summary, para. 10.
[203] EC First Written Submission, Executive Summary, para. 11.
[204] EC First Written Submission, Executive Summary, para. 19.
[205] EC First Written Submission, Executive Summary, para. 1.
[206] EC Closing Statement, Executive Summary, para. 5.
[207] EC Closing Statement, Executive Summary, para. 6.

importers against them) and *at least* with effect from the end of the reasonable period of time, noting that the United States has failed to provide any explanation on this point.[208]

5.82 In the particular circumstances of this case, in which such positive acts were expressly found to be part of the original measures at issue, the European Communities is of the view that it is impossible to characterise the actions (and omissions) of the United States as constituting immediate compliance.[209] The European Communities recalls that the matter addressed by the Panel in the original proceedings was the use of zeroing when calculating dumping margins in original investigations as well as in administrative reviews and that the European Communities referred to 15 original investigations and 16 administrative reviews in order to demonstrate how the US zeroing methodology was inconsistent, *inter alia*, with Articles 2.4.2 and 9.3 of the *Anti-Dumping Agreement*. The Appellate Body agreed with the European Communities position. Despite the DSB's findings and recommendation to bring its measures into conformity, the United States has manifestly failed to do so.[210]

5.83 In support of its position, the European Communities asserts that, first, with respect to the *original investigations* covered in the original dispute, the United States has issued assessment instructions to collect anti-dumping duties in subsequent administrative reviews where simple zeroing was used and whose results were obtained after 9 April 2007. Second, even in cases where administrative review proceedings were not requested by the companies concerned, after 9 April 2007 the United States still seeks to collect duties at the rate established in the original investigations covered by the original dispute, where "model zeroing" was used. Third, in addition to issuing assessment instructions to collect anti-dumping duties, the United States has also established new cash deposits as a result of subsequent administrative reviews proceedings in connection with the original investigations challenged in the original dispute using simple zeroing after the end of the reasonable period. Fourth, with respect to *administrative review proceedings* covered in the original dispute, the United States has also issued assessment instructions to collect anti-dumping duties and has established new cash deposits in subsequent administrative reviews where simple zeroing was used and whose results were obtained after 9 April 2007. Fifth, with respect to both the *original investigations* and *administrative reviews* covered in the original dispute, after 9 April 2007 the United States still actively seeks to collect anti-dumping duties as a result of modifications of the original measures pursuant to subsequent administrative review proceedings for which assessment instructions were sent before 9 April 2007 and where "simple zeroing" was used and that after 9 April 2007, the United States still takes positive acts providing for final payment of the duties due or retention of the cash deposits made based on zeroing with respect to those entries not finally liquidated before the end of the reasonable period to implement the DSB's recommendations.[211]

5.84 The European Communities submits that the measures adopted by the United States described above cannot be considered as "compliance with the DSB's recommendations". The European Communities observes that the DSB recommended that the United States bring the measures found inconsistent with the *Anti-Dumping Agreement* and the *GATT 1994* into conformity and maintains that those measures included in the original dispute "any amendments" as well as "each assessment instructions issued pursuant to" the original order and/or administrative review.[212]

5.85 The European Communities argues that the modifications made by the United States have not changed the "essence" of the contested measure in the original dispute (*i.e.*, use of zeroing in original

[208] EC First Written Submission, Executive Summary, para. 3. See also, EC Closing Statement, Executive Summary, para. 7, See also EC Second Written Submission, Executive Summary, para. 27

[209] EC First Written Submission, Executive Summary, para. 3.

[210] EC First Written Submission, Executive Summary, para. 24.

[211] EC First Written Submission, Executive Summary, para. 25.

[212] EC First Written Submission, Executive Summary, para. 26.

investigations and administrative reviews) because the products from the countries concerned in the original dispute still are subject to anti-dumping duties unfairly imposed pursuant to the use of a methodology which has been found inconsistent by the adopted DSB reports and by the Appellate Body in other occasions.[213] Therefore, the European Communities considers that, since the United States still collects anti-dumping duties calculated with zeroing with respect to the cases identified in the original dispute after 9 April 2007, the United States continues to violate Articles 2.4.2 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the *GATT 1994*.[214]

5.86 Since it is not possible to relitigate the same issue twice in Article 21.5 proceedings, the European Communities submits that this Panel should not enter again into the conformity of the zeroing methodology with the mentioned agreements. This has already been confirmed by the adopted DSB reports in the original dispute, and is *res judicata*.[215] Accordingly, since it is established that the United States still collects anti-dumping duties calculated with zeroing with respect to measures challenged in the original dispute, the European Communities requests the Panel to find that the measures listed in the Annex to the Panel Request are inconsistent with Articles 2.4.2 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the *GATT 1994*, and that the United States remains in violation of these provisions.[216]

5.87 The European Communities notes that the United States has not contested the facts provided by the European Communities that it has continued collecting duties and imposing cash deposits based on zeroing with respect to the measures challenged in the original dispute.[217] The European Communities observes that, instead the United States argues that it has complied with the DSB's recommendations and rulings in the original dispute since no duties, as resulting from the determinations made in the 15 original investigations and 16 administrative reviews identified in the original dispute, are collected with respect to imports made on or after the end of the reasonable period. Moreover, the United States considers that the cash deposits resulting from the 16 administrative review proceedings challenged in the original dispute (the only element which may have remained after the end of the reasonable period), are no longer in place since they have been superseded and replaced by new determinations in subsequent administrative review proceedings.[218]

5.88 As a preliminary remark, the European Communities notes that the US arguments purporting to demonstrate compliance with the DSB's recommendations and rulings in the original dispute are incorrect. But even following the US theory that compliance in this case means that no imports relating to the 15 original investigations and the 16 administrative reviews made after the end of the reasonable period of time are subject to duties based on zeroing, the European Communities argues that the facts of the case show something different. The European Communities notes in this context that the United States has recognised that imports of stainless steel wire rod from Sweden (Case 6 in the Annex of the Panel Request) after 9 April 2007 are subject to the original anti-dumping duties based on model zeroing. Likewise, the United States has admitted that it continues collecting anti-dumping duties and imposing cash deposits on imports of ball bearings from the United Kingdom (Case 31 in the Annex to the Panel Request) made by one company (NSK) at the rate based on simple zeroing in the administrative review challenged in the original dispute. Therefore, according to the EC, even under the US own theory, it is evident that the United States has not complied with the

[213] EC First Written Submission, Executive Summary, para. 27.
[214] EC First Written Submission, Executive Summary, para. 28.
[215] EC First Written Submission, Executive Summary, para. 29.
[216] EC First Written Submission, Executive Summary, para. 30.
[217] EC Second Written Submission, Executive Summary, para. 2.
[218] EC Second Written Submission, Executive Summary, para. 23.

DSB's recommendations and rulings in the original dispute[219], and that the US lack of compliance with the DSB's recommendations and rulings in the original dispute is obvious and manifest.[220]

5.89 The European Communities explains that the liability to pay anti-dumping duties in the US system is determined at a later stage than the time of importation. The United States argues that the anti-dumping liability is created at the time of importation and, thus, imports made before or during the reasonable period of time to comply with the DSB's recommendations and rulings can be subject to WTO-inconsistent measures. In contrast, the European Communities considers that, in light of the particularities of the US system of duty assessment, the final amount to be collected and, thus, the obligation to pay any anti-dumping duties, is determined at a later stage than the time of importation. According to the US system of duty assessment, the final and true liabilities are established by the USDOC based on a subsequent retrospective accounting exercise. This exercise may lead to the conclusion that the importer is not responsible for the payment of duties. Moreover, importers can appeal the amounts established by the USDOC in accordance with US municipal law. These proceedings may result in a finding of no liability at all and, thus, no obligation to pay duties (or, alternatively, a modification of the amounts to be collected due to, for example, arithmetical errors made by the USDOC when calculating the duties).[221] In these circumstances, the European Communities cannot understand why the United States would not adjust its calculations so as to properly reflect the degree of dumping (*i.e.*, without zeroing) that occurred (if any), having a full opportunity to do so (in subsequent reviews of the measures concerned or in the appeals and protests filed by importers against them), and at least with effect from the end of the reasonable period of time.[222]

5.90 According to the EC, what the United States argues in this case is that it can collect duties based on zeroing after the end of the reasonable period of time even if the original anti-dumping order has been revoked because, absent zeroing, no dumping was found (or because of any other reason). Therefore, the United States acknowledges that its measure should never have been taken in the first place, while still claiming the right to collect anti-dumping duties (on a non-existent measure) long after its revocation.[223] In other words, in the view of the EC, the United States is seeking to squeeze the juices out of the WTO-inconsistent measures until their last drop, even after the end of the reasonable period to comply agreed by the Parties to the dispute. Once more, this cannot be the meaning of "prompt compliance" in Article 21 of the *DSU*. Nor can it imply that the measures have been withdrawn, as required by Article 3.7 of the *DSU*.[224] Moreover, the US interpretation of compliance will render the US system of duty assessment untouchable, as a moving target that

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[219] EC Second Written Submission, Executive Summary, para. 24. See also, EC, Opening Statement, para. 9:

> "In addition, the European Communities has already shown in its submissions how the United States, even after the end of the reasonable period of time, has continued taking positive acts providing for the final payment of duties or retention of cash deposits based on zeroing with respect to those entries not finally liquidated before the end of such a period. In a nutshell, with respect to the 15 original investigations and the 16 administrative reviews in the original dispute, including their amendments as contained in the Annex to the Panel Request, the United States has carried out final duty assessments, has sent assessment instructions, has liquidated duties and has continued proceedings seeking final liquidation of duties all based on zeroing after 9 April 2007. Further, the United States has continued collecting duties even if the original anti-dumping orders were revoked because the non-zeroed recalculation of the dumping margin from the original investigation resulted in a negative final determination of dumping."

[220] EC Opening Statement, Executive Summary, para. 10.
[221] EC Second Written Submission, Executive Summary, para. 26.
[222] EC Second Written Submission, Executive Summary, para. 27.
[223] EC Second Written Submission, Executive Summary, para. 31.
[224] EC Second Written Submission, Executive Summary, para. 32.

escapes from anti-dumping duty disciplines. Each administrative review proceeding would have to be subject to a new panel request, and by the time the panel, Appellate Body and implementation procedure was completed, another administrative review proceeding would have superseded the results of any previous review. A new panel would have to be started against this review. The European Communities considers that this would run diametrically contrary to the purpose and objective of Article 21 of the *DSU*.[225]

5.91 The European Communities maintains that the US theory to assess compliance in this case is inappropriate[226], as well as *inaccurate* and *insufficient*.[227] The European Communities considers that the application of the US theory as regards implementation would lead to absurd results in light of the circumstances of this case[228], because it would imply that a Member whose measure has been found to be inconsistent with the WTO Agreements could still effectively apply that measure even after the end of the reasonable period of time to comply with the DSB's recommendations and findings.[229] Thus, the European Communities submits that the Panel should reject it.[230]

5.92 The European Communities sets out why it considers the US's compliance theory is *inaccurate*. As the United States has acknowledged and not contested, it has continued levying anti-dumping duties at the rates originally established pursuant to model zeroing on imports of stainless steel wire rod from Sweden (Case 6 in the Annex of the Panel Request) after 9 April 2007; and has equally continued collecting anti-dumping duties and imposing cash deposits at the rates based on simple zeroing on imports of ball bearings from the United Kingdom (Case 31 in the Annex to the Panel Request), *i.e.*, the same rates of the administrative review challenged in the original dispute. Therefore, it is evident that the United States has not complied with the DSB's recommendations and rulings in the original dispute.[231] Next, the European Communities explains why it considers the US's compliance theory is *insufficient* - because, in the EC view, it allows the United States to keep its so-declared WTO inconsistent measures *effectively in place even after the end of the reasonable period of time*. In simple terms, what the United States argues in this case is that it can collect duties based on zeroing after the end of the reasonable period of time even if the original anti-dumping order has been *revoked* because, absent zeroing, no dumping was found. Likewise, the United States also claims that it can, after the end of the reasonable period to comply, liquidate duties at rates that were significantly higher than those which should have been collected absent zeroing. In this respect, the measures challenged in the original dispute are still in place since, until the United States stops taking positive acts to enforce them, their *effects* persist even after the end of the reasonable period. Once more, this cannot be the meaning of "prompt compliance" in Article 21 of the *DSU*. Nor can it imply that the measures have been withdrawn, as required by Article 3.7 of the *DSU*.[232] In addition, the European Communities notes that the United States also seeks to make the "date of entry" the backbone principle as regards compliance in anti-dumping disputes. In this respect, the US theory on compliance disregards its own system, where the "date of entry" is not determinative of final liability.[233]

5.93 Therefore, the European Communities considers that, in light of the characteristics of the US system, the anti-dumping liability – whether or not it is "created" at the time of importation – is not finally determined at that time, but only at a later stage. In these circumstances, the European

[225] EC Second Written Submission, Executive Summary, para. 33.
[226] EC Second Written Submission, Executive Summary, para. 25.
[227] EC Opening Statement, Executive Summary, para. 10.
[228] EC Second Written Submission, Executive Summary, para. 25.
[229] EC Second Written Submission, Executive Summary, para. 33.
[230] EC Second Written Submission, Executive Summary, para. 25.
[231] EC Opening Statement, Executive Summary, para. 11.
[232] EC Opening Statement, Executive Summary, para. 12.
[233] EC Opening Statement, Executive Summary, para. 13.

Communities cannot understand why the United States would not, in that *simple accounting exercise*, adjust its calculations so as to properly reflect the degree of dumping (*i.e.*, without zeroing) that occurred (if any), having a full opportunity to do so (in subsequent reviews of the measures concerned or in the appeals and protests filed by importers against them), and *at least* with effect from the end of the reasonable period of time. Simply put, in the EC's view, the US efforts to find arguments to keep its measures in place even after the end of the reasonable period should be confronted by a clear ruling from this Panel.[234]

5.94 The European Communities considers that, in order for the United States to comply with the DSB's recommendations and rulings, *immediately* after the end of the reasonable period of time the United States should have refrained from taking positive acts providing for the final payment of duties or retention of cash deposits based on zeroing with respect to those entries not finally liquidated before the end of the reasonable period, regardless of when those imports where made. The European Communities asserts that this approach does not imply a retrospective relief, as the United States argues[235] and that it does not argue that the WTO dispute settlement system provides for retrospective relief. The European Communities considers that it has clarified in its First Written Submission that it asks for prospective implementation of the DSB's recommendations after the end of the reasonable period.[236] In addition, the European Communities notes that it is possible for the United States to take positive steps after the end of the reasonable period to comply with the DSB's recommendations and rulings in respect of entries which were made before then, without this involving any retrospective relief. In fact, the European Communities observes that, according to the United States, Section 129(c)(1) permits the USDOC to apply new, WTO-consistent methodologies to entries made *before* the date of implementation of a Section 129 Determination.[237] Therefore, the European Communities considers that the United States would comply with the DSB's recommendations and findings in a prospective manner in this case if it stops taking any positive acts providing for the final payment of duties or retention of cash deposits based on zeroing with respect to those entries not finally liquidated before the end of the reasonable period. However, the European Communities contends that this has not yet been the case.[238]

5.95 The European Communities notes that the United States has also argued that the "date of entry" should be the reference for assessing compliance in the case of anti-dumping measures. In particular, it has emphasised that prospective and retrospective anti-dumping systems should lead to the same results when bringing WTO-inconsistent measures into conformity with the *Anti-Dumping Agreement*. The European Communities agrees. Under both systems, WTO Members are prevented from taking positive acts that are contrary to the adopted DSB reports after the end of the reasonable period of time.[239]

5.96 Further, as a result of the 12 Section 129 Determinations, (i) two original orders were revoked because of the new calculation of dumping margins without zeroing; and (ii) ten original orders were partially revoked with respect to certain companies, whereas with respect to others, duties were reduced or increased as a result of specific calculations of dumping margins without zeroing or the general application of new "all others" duty levels.[240] The European Communities considers that any

[234] EC Opening Statement, Executive Summary, para. 14.

[235] EC Second Written Submission, Executive Summary, para. 25. See also, EC Second Written Submission, para. 28 "In the European Communities' view, in order to comply with the DSB's recommendations and rulings, the United States should stop taking any positive acts providing for the final payment of duties or retention of cash deposits based on zeroing with respect to those entries not finally liquidated before the end of the reasonable period."

[236] EC Second Written Submission, Executive Summary, para. 28.

[237] EC Second Written Submission, Executive Summary, para. 29.

[238] EC Second Written Submission, Executive Summary, para. 30.

[239] EC Closing Statement, Executive Summary, para. 8.

[240] EC First Written Submission, Executive Summary, para. 12.

future liquidation of entries subject to a revoked order (including those revoked because of reasons other than zeroing) or with respect to an exporter excluded from the scope of the relevant order would be illegal since, again, as mentioned in the previous section, this would amount to taking a positive act, already found to be WTO inconsistent, after the expiry of the implementation period.[241] The European Communities argues that the United States seems to ignore the fact that, under its duty assessment system, the final liability of importers is determined at a later stage than the time of importation. Thus, any time after the end of the reasonable period of time the United States could carry out a simply accounting exercise to establish without zeroing the true and final liabilities to which entries are subject (if any). Finally, even if the legal basis for collecting duties has been revoked, the United States has not stayed proceedings to obtain final payment of those duties.[242]

5.97 Finally, the European Communities submits, with respect to the 16 administrative reviews at issue in the original dispute, that the United States considered that in each case the results were superseded by subsequent reviews and, thus, no further action was necessary for the United States to bring the challenged measures into compliance with the recommendations and rulings of the DSB.[243]

5.98 The European Communities argues that in order for the 16 administrative reviews challenged in the original dispute to be "superseded", the United States should have stopped them (by not collecting duties calculated with "simple zeroing") and replaced them (by collecting the duties and establishing new cash deposits based on a methodology without zeroing). The United States has failed in both respects.[244] Firstly, the European Communities notes that the United States still collects duties established in the administrative reviews contested in the original dispute. Second, the European Communities argues that the United States has failed to recalculate the dumping margins without zeroing in all the administrative reviews covered in the original dispute. Finally, the fact that the United States has not recalculated the dumping margins in the administrative reviews concerned also affects the extension of the original orders pursuant to sunset review investigations.[245]

(b) United States

5.99 The United States considers that it has implemented the DSB's recommendations and rulings and thus, has complied with the its obligations under the DSU. The Panel should reject the EC's claims non-compliance and its efforts to enlarge the obligations of the United States.[246] Turning to the 15 antidumping investigations, the United States notes that by the time the DSB adopted its recommendations and rulings, Commerce had already revoked 3 of the antidumping orders resulting from those investigations. With respect to the other 12 investigations where antidumping orders remained in place, Commerce conducted proceedings under US domestic law, called Section 129 proceedings, to recalculate the margins of dumping. The Section 129 determinations resulted in the revocation of two additional orders. Later, Commerce revoked 4 more orders as a result of sunset reviews. Thus, with respect to the 15 determinations made in investigations, 9 concern antidumping orders that are now revoked. Thus, the United States submits that for all nine of the revoked antidumping duty orders, no antidumping duties will be assessed on entries of the goods made after the effective date of the revocation.[247]

5.100 Turning to the 16 administrative reviews, the United States notes that the purpose of such reviews is to determine the final assessment rate on imports that occurred before the review

[241] EC First Written Submission, Executive Summary, para. 31.
[242] EC Second Written Submission, Executive Summary, para. 2.
[243] EC First Written Submission, Executive Summary, para. 13.
[244] EC First Written Submission, Executive Summary, para. 32.
[245] EC First Written Submission, Executive Summary, para. 33.
[246] US First Written Submission, Executive Summary, para. 3.
[247] US Opening Statement, Executive Summary, para. 5.

commenced, and to calculate a new cash deposit rate that will be applicable to subject imports occurring after the determination is made.[248] What the United States considers is noteworthy for purposes of this proceeding is that the 16 administrative reviews in question all involved entries that occurred *prior to* the adoption of the DSB recommendations and rulings. Noting that the EC concedes, that implementation of WTO obligations is prospective, the United States observes that nevertheless, according to the EC, the United States was obligated to refund duties in respect of entries that were made prior to the adoption of the recommendations and rulings. In other words, in the US view, the EC attempts to argue that the United States was effectively required to provide retroactive relief – *i.e.*, refunds of duties collected on prior entries solely as a result of the WTO dispute. However, in view of the principle of prospective relief to which even the EC subscribes, the United States submits that it was under no obligation to do so.[249]

5.101 The United States observes that in the underlying dispute, the EC obtained DSB recommendations and rulings with respect to Commerce determinations in sixteen administrative reviews. The United States has taken measures to comply with respect to each of those determinations, and as a result of those measures, the United States has complied with those recommendations and rulings.[250]

5.102 The United States clarifies that in some instances, the United States has revoked the antidumping duty order giving rise to the determinations challenged by the EC. Under US law, the United States no longer has the authority to collect cash deposits, or assess antidumping duties, on products subject to a revoked antidumping order which are imported on or after the date of revocation. This is the situation with respect to the four of the sixteen determinations challenged by the EC. With respect to the remaining reviews that the EC challenged, the cash deposit rate established in the challenged determination (the only aspect of the administrative review that could – absent the US compliance – have continued beyond the expiration of the RPT), is no longer in effect. To the extent that a cash deposit rate is currently in effect with respect to these same products from the same Member States of the EC, that is the result of a separate determination of dumping made in a separate administrative review examining distinct facts during a subsequent period of time.[251]

5.103 Turning first to the antidumping duty orders revoked, the United States notes that these orders form the basis under US law for the authority to impose antidumping duties. That is, without an antidumping duty order in place, the United States cannot collect cash deposits and assess antidumping duties on imports made on or after the date of revocation.[252] The United States observes that, in its annex to its panel request, the EC acknowledges that the following antidumping orders have been revoked in whole or with respect to certain companies identified in the EC's original panel request:

(1) Industrial Nitrocellulose from France (revocation effective 1 August 2003)
(2) Industrial Nitrocellulose from the United Kingdom (revocation effective 1 July 2003)
(3) Certain Pasta from Italy (revoked for Ferrara effective 9 February 2005, and for Pallante on 29 November 2005); and
(4) Stainless Steel Sheet and Strip in Coils from France (revocation effective 27 July 2004).[253]

[248] US Opening Statement, Executive Summary, para. 6.
[249] US Opening Statement, Executive Summary, para. 7.
[250] US First Written Submission, Executive Summary, para. 45.
[251] US First Written Submission, Executive Summary, para. 46.
[252] US First Written Submission, Executive Summary, para. 47.
[253] US First Written Submission, Executive Summary, para. 48.

5.104 The United States observes, by way of example, with regard to Industrial Nitrocellulose from France, that it revoked the antidumping duty order effective 1 August 2003. This means that the United States ceased collecting cash deposits on imports occurring on or after that date, and such imports incur no antidumping duty liability. Therefore, as of the date of the EC's panel request in this Article 21.5 proceeding (and, in fact, as of the expiry of the reasonable period of time established in this dispute), no imports are affected by that antidumping duty order, and the measure challenged by the EC in the underlying proceeding has been terminated. The same is true with respect to the other antidumping duty orders that the United States has revoked. The United States submits that the elimination of these orders has thus brought the United States into compliance with the recommendations and rulings related to those orders.[254]

5.105 The United States maintains that it has implemented the recommendations and rulings because each of the reviews has been superseded by Commerce determinations in subsequent administrative reviews. The chart attached as Exhibit US-17 specifies the subsequent Commerce determinations that have superseded each of the administrative reviews subject to the DSB's recommendations and rulings. The determinations in these subsequent reviews cover the same merchandise and the same exporters or producers identified by the EC. However, the subsequent reviews examined a wholly different set of sales transactions occurring during a different period of time. Given that in these subsequent determinations, Commerce calculated new margins of dumping, and put in place new cash deposits for the companies examined, as a result, the cash deposit rates that had been established in the determinations that the EC originally challenged have been superceded, because cash deposit rates from a determination in one administrative remain in effect only until a determination in a subsequent administrative review establishes a new cash deposit rate – once Commerce issues a determination in a subsequent administrative review involving the same merchandise and the same exporter or producer, the former cash deposit rate is terminated.[255] Consequently, as of the date of the EC's panel request in this Article 21.5 proceeding (and in fact, as of the expiry of the reasonable period of time established in this dispute), no further entries are subject to antidumping rates established in the administrative reviews that the EC challenged in the underlying proceeding. Accordingly, because the challenged determinations, and in particular their cash deposit rates, have been superceded, the United States maintains that it has brought the challenged measures into compliance with the DSB's recommendations and rulings.[256]

5.106 In this connection, the United States notes that it is puzzled by the occasional references in the EC's first submission to "definitive assessment of duties" and "collect[ion] of duties pursuant to liquidation instructions" after April 9, 2007 (the end of the reasonable period of time established in this dispute). While the point of these references is not at all clear, the United States assumes that the EC remains faithful to its long-held and oft-repeated position that, for purposes of assessing compliance with the rulings and recommendations of the DSB relating to duties, one examines the treatment accorded to goods entered on or after the expiration of the reasonable period of time. The EC took a similar view when it implemented the recommendations and rulings of the DSB in the dispute *EC – Customs Classification of Frozen Boneless Chicken Cuts*.[257]

5.107 The United States notes that this EC position follows logically from the fact that the WTO dispute settlement provides prospective relief, not retrospective relief. For example, Article 19.1 of the DSU provides, "Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement" (footnotes omitted). The ordinary meaning of the term "bring" is to "[p]roduce as a consequence," or "cause to become." These definitions give an indication of future

[254] US First Written Submission, Executive Summary, para. 49.
[255] US First Written Submission, Executive Summary, para. 50.
[256] US First Written Submission, Executive Summary, para. 51.
[257] US First Written Submission, Executive Summary, para. 52.

action. Furthermore, under DSU Article 3.7, "the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements." The withdrawal of the inconsistent measure is meant to provide a prospective solution to the nullification or impairment of the benefits accruing under the covered agreements, and not to provide compensation for any past harm.[258]

5.108 Furthermore, the United States observes that in a WTO dispute challenging an antidumping or countervailing duty measure, the measure in question is a border measure. Accordingly, eliminating a WTO-inconsistent antidumping or countervailing duty measure prospectively at the border will constitute "withdrawal" of the measure within the meaning of DSU Article 3.7. And in this case, by superceding the administrative reviews at issue in the underlying proceeding, the United States has withdrawn the challenged measures.[259]

5.109 The United States notes that in its First Written Submission, the EC raised two arguments concerning the determination in the investigation of Certain Hot-Rolled Carbon Steel Products from the Netherlands. First, the EC argued that the United States has assessed antidumping duties pursuant to determinations made in subsequent administrative reviews, where Commerce continued to deny offsets for non-dumped sales. Second, the EC contends that as a result of a rescission of an administrative review, the United States assessed antidumping duties at the cash deposit rate established in the original investigation.[260] The United States clarifies in this connection that these final assessments are the result of determinations distinct from the determination made in the investigation. With respect to the EC's first argument, those assessment instructions were issued pursuant to the determination made in the 2004-05 administrative review. With respect to the EC's second argument, those assessment instructions were issued pursuant to the determination (in that case to terminate) the 2005-06 administrative review.[261] The United States argues that neither of these two subsequent determinations are within the scope of this Article 21.5 proceeding. The EC's original panel request identified only Commerce's determination in the investigation of Certain Hot-Rolled Carbon Steel Products from the Netherlands. Similarly, the original panel's "as applied" findings covered only Commerce's determination from the investigation. Thus, the United States maintains that the Panel should reject the EC's claims as beyond the scope of this Article 21.5 dispute.[262]

5.110 Turning to Commerce's Section 129 determination concerning the investigation of Stainless Steel Wire Rod from Sweden, the United States points out that Commerce complied with the recommendations and rulings of the DSB by providing offsets for non-dumped sales in the recalculation of the margin of dumping. As a result of the Section 129 determination, Commerce revoked the antidumping duty order on Stainless Steel Wire Rod from Sweden effective 23 April 2007.[263] The United States argues that the EC contention that that the United States has established new cash deposit rates in Stainless Steel Wire Rod from Sweden based on an administrative review that Commerce published after concluding the Section 129 determination, however, is in error.[264] Commerce did publish the amended final results of the 2004-05 administrative review of Stainless Steel Wire Rod from Sweden on 9 May 2007. According to the United States, in those amended final results, Commerce did state that it would notify CBP of the revised cash deposit resulting from the review, that the cash deposit rate would be effective as of the date of publication, and that "the cash deposit requirement shall remain in effect until further notice." However, on 10 May 2007, Commerce provided "further notice" by issuing instructions to CBP

[258] US First Written Submission, Executive Summary, para. 53.
[259] US First Written Submission, Executive Summary, para. 54.
[260] US First Written Submission, Executive Summary, para. 35.
[261] US First Written Submission, Executive Summary, para. 36.
[262] US First Written Submission, Executive Summary, para. 37.
[263] US First Written Submission, Executive Summary, para. 38.
[264] US First Written Submission, Executive Summary, para. 39.

informing it of the revocation resulting from the Section 129 determination. These instructions informed CBP that any cash deposits paid on imports of wire rod from Sweden made on or after 23 April 2007, were to be refunded. All imports made on or after 23 April 2007, would not be subject to the final assessment of antidumping duties.[265] The United States submits that as a result of the revocation of the antidumping duty order on stainless steel wire rod from Sweden, Commerce did not issue new cash deposit instructions to CBP based on the determination made in the 2004-05 administrative review. Accordingly, the United States requests that this Panel reject the EC's claim regarding the Section 129 determination in Stainless Steel Wire Rod from Sweden because Commerce provided offsets for non-dumped sales in the recalculation of the margin of dumping and that measure is no longer in effect. [266]

5.111 The United States observes that 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.[267] The United States notes that the text of GATT 1994 and the *Anti-Dumping 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.[268]

5.112 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 US 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.[269] Several provisions of the *Anti-Dumping 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.[270]

5.113 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 *Anti-Dumping 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 [sic]. 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

[265] US First Written Submission, Executive Summary, para. 40.
[266] US First Written Submission, Executive Summary, para. 41.
[267] US Second Written Submission, Executive Summary, para. 27.
[268] US Second Written Submission, Executive Summary, para. 28.
[269] US Second Written Submission, Executive Summary, para. 29.
[270] US Second Written Submission, Executive Summary, para. 30.

no obligation to refund any antidumping duties assessed on importations occurring prior to the end of the reasonable period of time.[271]

5.114 The EC argues that prospective implementation of the DSB's recommendations and rulings with respect to US administrative reviews would make the US system of duty collection "*untouchable*" and a "moving target." In this regard, the US 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. Moreover, 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.[272]

5.115 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 *Anti-Dumping 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.[273]

5.116 The United States notes that the EC agreed in its written submissions that WTO relief is prospective. In its submissions, the EC took pains to describe the US duty assessment system and the fact that "final" liability attaches at a point later in time than entry. Thus, it is the EC that emphasized the relevance of a retrospective system to the issues in this dispute. The United States argues that it responded by pointing out that "final" liability is not germane to the question of when a Member's duty to provide relief is triggered. The United States pointed out that the date of entry of the good is the only date upon which to evaluate whether relief is due. To conclude otherwise would be to discriminate against Members like the United States for having a retrospective duty assessment system, one expressly provided for under Article 9.3.1 of the Antidumping Agreement. As the United States explained, and as the original panel found, in a retrospective system, liability attaches at the time of entry, but final liability attaches at a later date. By contrast, in a prospective system, final liability is determined at the time of entry. This is precisely the distinction the EC emphasized when, as recently as its rebuttal submission, it referred to the "particularities of the US system of duty assessment."[274] If final liability is the relevant point for assessing whether relief must be provided, then Members with prospective systems will have no implementation obligations in respect of entries made prior to the expiry of the reasonable period of time, but Members with retrospective systems will have such obligations in the event that final liability is calculated *after* the expiry of the RPT.[275]

5.117 Notably, the EC seems to be abandoning its theory that the determination of final liability *after* importation is "particular" to retrospective systems, implying that it is equally applicable to prospective systems. Perhaps this new theory reflects acknowledgment of the fact that, otherwise,

[271] US Second Written Submission, Executive Summary, para. 31.
[272] US Second Written Submission, Executive Summary, para. 32.
[273] US Second Written Submission, Executive Summary, para. 33.
[274] *See* EC Second Written Submission, para. 69.
[275] US Closing Statement, Executive Summary, para. 2.

using final liability as the basis for establishing implementation obligations would put retrospective systems at a disadvantage. However, the EC's sudden change of position is not supported by the text of Articles 9.3.1 and 9.3.2, its written submissions[276], or the panel report[277], all of which make clear that calculation of "final liability" *after* importation is a facet "particular" (to borrow the EC's term) to the US retrospective system.[278]

5.118 In addition, the EC argued that the *Ikea* case is an example of how the EC provides retrospective relief. *Ikea* does not stand for the proposition that the EC provides retrospective relief *in connection with its implementation of recommendations and rulings.* In the *Ikea* case, the European Court of Justice expressly *rejected* the notion of refunding the duties on that basis.[279] Instead, the Court found that zeroing was inconsistent with paragraph 2(11) of the EC's basic regulation and was "a manifest error of assessment with regard to Community law."[280] On *that* basis – that zeroing was inconsistent with the EC's own regulations, rather than the Antidumping Agreement – the Court ordered repayment of duties.[281] Thus, the EC may in some circumstances provide refunds under its municipal law; but that does not mean that there is any WTO obligation to do so.[282]

5.119 The United States observes that it has great trouble reconciling the EC's current litigation position – that entries made before the end of the reasonable period of time are subject to refunds – with: (1) EC statements to the contrary, as cited in the US first submission at paragraph 100, in which the EC makes clear that it will not provide reimbursements for prior entries; (2) the very nature of "prospective relief"; and (3) the EC's emphasis on the fact that "final liability" attaches at a later point in time in a retrospective system.[283] If the United States accepts the theory proffered by the EC at the panel meeting – that refunds must be given on imports dating back to some undetermined date preceding the expiry of the RPT – the question of "final" liability particular to a retrospective assessment system would be irrelevant.[284]

5.120 Turning to the EC's claims regarding the determination in the investigation of Certain Hot-Rolled Carbon Steel Products from the Netherlands, the United States asserts that it has complied with the recommendations and rulings of the DSB by providing offsets for non-dumped sales when it recalculated the margin of dumping in the Section 129 determination. As a result of the Section 129 determination, the antidumping duty order was revoked effective 23 April 2007. Moreover, as a result of a subsequent Commerce determination in a sunset review, the revocation of the antidumping duty order became effective as of November 29, 2006. All cash deposits made on imports occurring on or after 29 November 2006 have been or will be refunded. Additionally, imports made on or after 29 November 2006 are not subject to any final assessment of antidumping duties. Thus, the United States submits that the EC's claims concern a measure that is no longer in effect.[285]

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[276] *See* EC Second Written Submission, paras. 69-76.
[277] Panel Report, *US – Zeroing (EC)*, para. 2.4.
[278] US Closing Statement, Executive Summary, para. 3.
[279] *See* Paragraphs 35, 67, and 69 (Exhibit US-34).
[280] Paragraph 56 (Exhibit US-34).
[281] Paragraph 69 (Exhibit US-34).
[282] US Closing Statement, Executive Summary, para. 4.
[283] *See, e.g.*, EC Second Written Submission, paras. 69-76.
[284] US Closing Statement, Executive Summary, para. 5.
[285] US First Written Submission, Executive Summary, para. 34.

3. Whether the United States failed to put into effect new measures between 9 April and 23 April/31 August 2007

(a) European Communities

5.121 The EC submits that it is not contested that the United States was late in its implementation. The European Communities seeks findings from the Panel also on this point. The EC notes that the Appellate Body has made clear that it is for the complaining Member to judge whether or not dispute settlement may be fruitful. In this case, the European Communities observes that it remains of the view that the findings it seeks may have autonomous consequences in US municipal law.[286]

5.122 The European Communities notes that the measures adopted by the United States to comply with the DSB's recommendations and rulings concerning the "as applied" violations, *i.e.*, the Section 129 Determinations, entered into force on 23 April and 31 August 2007. However, the parties had agreed on a reasonable period of time which ended on 9 April 2007. This allows the United States to still collect duties which refer to a period of time where compliance should have been achieved.[287]

5.123 Article 21 of the DSU requires WTO Members to comply immediately with the recommendations of an adopted DSB report. In particular, Article 21.1 of the DSU states that "*[p]rompt compliance* with the recommendations and rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members" (*emphasis added*). Article 21.3 of the DSU also highlights that "[i]f it is impracticable to comply *immediately* with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so" (*emphasis added*). In this respect, WTO Members must bring their measures found inconsistent with their obligations *immediately* after the date of adoption of the DSB report or, should a reasonable period be agreed between the parties to the dispute, at the end of such a period *at the latest*.[288]

5.124 Since the United States manifestly failed to do so with respect to the "as applied" violations found in the original dispute, the European Communities considers that the United States violated Articles 21.3 and 21.3(b) of the DSU when failing to adopt new measures between 9 April and 23 April/31August 2007.[289]

5.125 The European Communities requests this Panel to make an explicit finding that no measure taken to comply existed at all during the mentioned period of time. This is different from a finding on the existence or consistency with a covered agreement of measures taken to comply "at the end of the reasonable period of time" in addition to a finding on the existence of a measure taken to comply "as of the date of the establishment of a panel". In other words, the European Communities is not asking the Panel to rule on the existence of measures taken to comply "at the end of the reasonable period of time", *i.e.*, on 9 April 2007. In contrast, the European Communities wants the Panel to declare that no measure taken to comply existed between 9 April 2007 and 23 April/31 August 2007. A similar finding of non-compliance in past periods was made by the panel in *Australia – Salmon (21.5)*.[290]

5.126 The European Communities notes that the United States opposes the request for a specific finding by the European Communities that, since the United States did not take new measures between 9 April 2007 (*i.e.*, the end of the reasonable period) and 23 April/31 August 2007 (when all the Section 129 Determinations were completed and entered into force), it failed to comply with the

[286] EC First Written Submission, Executive Summary, para. 4.
[287] EC First Written Submission, Executive Summary, para. 34.
[288] EC First Written Submission, Executive Summary, para. 35.
[289] EC First Written Submission, Executive Summary, para. 36.
[290] EC First Written Submission, Executive Summary, para. 37.

DSB's recommendations and ruling in a timely manner and, thus, violated Articles 21.3 and 21.3(b) of the *DSU*. In particular, it argues that Articles 21.3 and 21.3(b) of the *DSU* do not impose obligations on Members.[291] The European Communities argues that a careful reading of Article 21 of the *DSU* implies that WTO Members must bring their measures found inconsistent with their obligations immediately after the date of adoption of the DSB report or, should a reasonable period be agreed between the parties to the dispute, at the end of such a period *at the latest*.[292] The European Communities considers that unlike in *US – Upland Cotton (21.5)*, in this case the European Communities is not asking the Panel to rule on the existence of measures taken to comply "at the end of the reasonable period of time", *i.e.*, on 9 April 2007. In contrast, the European Communities wants the Panel to declare that no measure taken to comply existed between 9 April 2007 and 23 April/31 August 2007. The EC's request is similar to the one made by Canada in *Australia – Salmon (21.5)*, which was granted by the panel.[293]

5.127 Finally, the European Communities argues that the United States seems to agree with its observation that the Panel should refrain from entering into the analysis of the effects of its report in the US municipal law jurisdiction. The European Communities considers that the Panel is called upon to interpret Article 21.3 of the *DSU* and infer the necessary consequences from the facts of this case.[294]

5.128 The European Communities argues that it has shown that the United States failed to take new measures to comply with the DSB's recommendations and rulings in the original dispute before the end of the reasonable period of time (*i.e.*, 9 April 2007) and the United States has not contested that imports subject to anti-dumping duties in the original proceeding made between 9 April 2007 and 23 April/31 August 2007 must pay duties based on zeroing. The European Communities asks a specific finding from this Panel on this issue, again, showing that this cannot be *immediate compliance*.[295] The European Communities considers that, by failing to put into effect the measures taken to comply between 9 April and 23 April/31 August 2007, the United States violated Articles 21.3 and 21.3(b) of the *DSU*, and failed to comply with the DSB's recommendations and rulings.[296] In light of the foregoing, the European Communities submits that the United States has not complied with the DSB's recommendations in the original proceeding and, thus, remains in violation of Articles 2.4.2 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, since it continues collecting anti-dumping duties and establishing new cash deposit rates based on zeroing with respect to the original investigations and administrative reviews as described in the original dispute.[297]

5.129 In conclusion, the European Communities requests the Panel to make an explicit finding on this matter since there are entries which have not yet been liquidated by the United States. Such a finding may lead the relevant authorities to stop proceedings for collection of duties and, thus, is of relevance to the effective resolution of the present dispute.[298] In light of the foregoing, the European Communities considers that the United States has failed to show that it has complied with the DSB's recommendations and ruling in the original dispute.[299]

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[291] EC Second Written Submission, Executive Summary, para. 35.
[292] EC Second Written Submission, Executive Summary, para. 36.
[293] EC Second Written Submission, Executive Summary, para. 37.
[294] EC Second Written Submission, Executive Summary, para. 38.
[295] EC Closing Statement, Executive Summary, para. 9.
[296] EC Opening Statement, Executive Summary, para. 15.
[297] EC Second Written Submission, Executive Summary, para. 34.
[298] EC Second Written Submission, Executive Summary, para. 39.
[299] EC Second Written Submission, Executive Summary, para. 40.

(b) United States

5.130 The United States understands the EC to claim that the United States breached Article 21.3 and Article 21.3(a) by implementing its measures taken to comply on April 23, 2007, two weeks after the conclusion of the reasonable period of time. However the United States argues, the EC fails to explain how US implementation of the recommendations and rulings of the DSB constituted a breach of Article 21.3 or Article 21.3(a).[300] The United States argues that contrary to the EC's assertion, the report in *Australia – Salmon* does not support the EC's position. That panel simply concluded that the measures taken to comply did not exist at the end of the reasonable period of time. The panel made no finding that Australia had breached Article 21.3, or any of its subparagraphs, as a result. By contrast, the United States does find support for the futility of such a finding in the report in *US – Upland Cotton (21.5)*. There, the panel explained that a finding of a breach of Article 21.3 would "be of little relevance to the effective resolution of disputes."[301]

5.131 In light of the above, the United States submits that this Panel should decline to make the suggestion requested by the EC. It observes in this context that a Member retains the right to determine the manner of implementing DSB recommendations and rulings. The question in this proceeding is the existence or consistency of the measure taken to comply, not what future actions the United States should take to ensure compliance.[302]

5.132 The United States reiterates 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.[303] The United States observes that 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.[304]

D. VIOLATIONS WITH RESPECT TO SPECIFIC MEASURES (SECTION 129 DETERMINATIONS)

1. Whether there has been a violation in respect of case 11 – Stainless Steel Sheet and Strip in Coils from Italy

(a) European Communities

5.133 The European Communities considers that the "measures taken to comply" by the United States in this case (*i.e.*, the Section 129 Determinations relating to the original investigations challenged in the previous Panel proceedings) are inconsistent with its WTO obligations.[305] The European Communities submits that the Section 129 Determinations adopted by the United States to bring its measures into conformity violated certain provisions of the *Anti-Dumping Agreement* and the *GATT 1994*. In this respect, the European Communities notes that the scope of Article 21.5 proceedings allows for new legal claims against "measures taken to comply". The Appellate Body has already clarified that panels are to review the "totality" of claims relating to the consistency of

[300] US First Written Submission, Executive Summary, para. 55.
[301] US First Written Submission, Executive Summary, para. 56.
[302] US First Written Submission, Executive Summary, para. 57.
[303] US Second Written Submission, Executive Summary, para. 54.
[304] US Second Written Submission, Executive Summary, para. 55.
[305] EC First Written Submission, Executive Summary, para. 5.

"measures taken to comply" with the covered agreements (continuing violations, new violations and consequential violations of the covered agreements). Thus, a compliance panel is not limited to examining the consistency of the "measures taken to comply" with the original DSB's rulings and recommendations. The task of a compliance panel is rather to examine the consistency of the measures with "the covered agreements".[306]

5.134 The European Communities submits that the United States committed, and then failed to remove, an obvious calculation error when adopting a Section 129 Determination in *Stainless Steel Sheet and Strip in Coils from Italy*, listed in the Annex to the Panel Request as Case 11.[307]

5.135 The Section 129 Determination covered one manufacturer/exporter of stainless steel sheet and strips in coil from Italy, ThyssenKrupp Acciai Speciali Terni S.p.A and ThyssenKrupp AST USA (collectively "TKAST"). Errors were made in the dumping margin calculation by the USDOC in the original less-than-fair value (LTFV) investigation. In particular, the USDOC incorrectly calculated the average unit value of 84 TKAST US sales. The USDOC applied a "facts available" rate to these 84 unreported US sales. The USDOC, in its calculation, erroneously inverted the fraction: instead of dividing total value by total volume, it divided total volume by total value. This error artificially inflated the unit value and, therefore, the amount of dumping found. Despite realising this obvious error, the United States failed to correct it.[308]

5.136 The European Communities notes that if, in addition to eliminating zeroing, the United States had corrected this obvious calculation error, the dumping margin would have been negative and, thus, the measure would have been revoked. Thus, as regards this obvious calculation error, the European Communities submits that the United States violated Articles 2, 5.8, 6.8, 9.3, 11.1 and 11.2 of the *Anti-Dumping Agreement* and Article VI:2 of the *GATT 1994*.[309]

5.137 The European Communities notes the argument made by the United States that the EC's claim that the USDOC made an error in the calculation of the unit value and then failed to have it removed pursuant to the Section 129 Determination at hand is beyond the scope of this proceeding, since that clerical error is not part of the measure taken to comply with the DSB's recommendations and rulings in the original dispute. It also notes that the United States also maintains that the European Communities has not made a *prima facie* case since the EC's claims are based on unsupported assertions. Finally, the EC observes that the United States notes that the failure by the USDOC to disregard the allegations of error made by the respondents in that Section 129 Determination is consistent with an investigating authority's right to the orderly conduct of its proceedings. The European Communities submits that these arguments should be rejected.[310]

5.138 The European Communities is of the view that the Section 129 Determinations are "measures taken to comply". The United States agrees with this. The European Communities also notes that the scope of Article 21.5 proceedings allows for new legal claims against "measures taken to comply" and, thus, panels are to review the "totality" of claims relating to the consistency of "measures taken to comply" with the covered agreements (continuing violations, new violations and consequential violations of the covered agreements). Consequently, since the existence of the calculation error has not been contested by the United States, and remains in the "measure taken to comply" (*i.e.*, the Section 129 Determination concerning stainless steel sheet and strip in coils from Italy), it is part of that measure and, thus, may be subject to claims within this Article 21.5 proceeding. Indeed, when the USDOC recalculated the non-zeroed anti-dumping duty for TKAST in the Section 129

[306] EC First Written Submission, Executive Summary, para. 38.
[307] EC First Written Submission, Executive Summary, para. 39.
[308] EC First Written Submission, Executive Summary, para. 40.
[309] EC First Written Submission, Executive Summary, para. 41.
[310] EC Second Written Submission, Executive Summary, para. 41.

proceeding, it repeated exactly the same calculation error (the inversion of the fraction) that it had made in the original investigation. Without this error, the dumping margin for TKAST would have been negative. Therefore, the calculation error in question was actually committed in the Section 129 proceeding, while makes it even clearer that it is part of the "measure taken to comply".[311]

5.139 The European Communities argues that even assuming *arguendo* the US argument that the calculation error is not part of the "measure take to comply", the European Communities considers that it would still fall under the scope of this proceeding. Indeed, measures having a *close nexus* with the "measure taken to comply" can also fall within the scope of Article 21.5 proceedings. The European Communities observes that the arithmetical error in question artificially inflated the unit value and, therefore, affected the amount of dumping found by the USDOC. In this respect, the error it is part of the calculation exercise carried out by the USDOC when determining the new amount of dumping in the Section 129 Determination. The United States could not recalculate the correct dumping margin without zeroing and bring the measure into compliance if there are basic errors in the data used for this purpose.[312] Consequently, the European Communities maintains that EC's claim that the USDOC made an error in the calculation of the unit value and then failed to have it removed pursuant to the Section 129 Determination at hand falls within the scope of this proceeding. The calculation error is part of the new dumping determination, *i.e.*, the measure taken to comply by the United States in this case.[313] On the basis of the above, the European Communities considers that it has sufficiently made a *prima facie* case that the failure by the United States to correct the arithmetical error pursuant to the Section 129 Determination at hand violates the *Anti-Dumping Agreement*.[314]

5.140 In addition, the European Communities rejects the argument of the United States that, in the Section 129 Determination at hand, the USDOC rejected all claims of errors by all interested parties on the basis of the need for finality of proceedings and for equitable treatment of all parties. The European Communities submits that the USDOC, in this particular case, should have taken into account all claims of errors and, in fact, had enough time to do so.[315] It notes that, as the United States confirmed, the Section 129 Determination concerning this case was delayed for *four months* precisely because the USDOC was examining the claims brought by interested parties. The European Communities explains that the USDOC decided to do so even if the scope of the Section 129 Determination was, allegedly, "limited to recalculate the margins of dumping by applying a methodology without zeroing". However, at the end of the proceeding, the USDOC decided to reject all claims. Thus, contrary to what the United States asserts, the examination of the claims concerning errors made by the USDOC in the calculation of the new margin of dumping was part of the Section 129 proceeding. Moreover, the European Communities notes that the USDOC has taken into account (and corrected) other errors in Section 129 proceedings. Finally, the European Communities submits that the USDOC could not have remained passive and refuse to correct its own mistake. Otherwise, this would imply that clerical errors made by the investigating authorities remain *untouchable* for interested parties.[316] In light of the above, the European Communities submits that the Panel should reject the arguments raised by the United States with respect to Case 11 relating to the arithmetical error.[317]

5.141 The European Communities notes that the United States has made several arguments to try to justify the fact that, thanks to an arithmetical error, anti-dumping duties have remained in place as a result of its Section 129 Determination in *Stainless Steel Sheet and Strip in Coils from Italy*.

[311] EC Second Written Submission, Executive Summary, para. 42.
[312] EC Second Written Submission, Executive Summary, para. 43.
[313] EC Second Written Submission, Executive Summary, para. 44.
[314] EC Second Written Submission, Executive Summary, para. 45.
[315] EC Second Written Submission, Executive Summary, para. 46.
[316] EC Second Written Submission, Executive Summary, para. 47.
[317] EC Second Written Submission, Executive Summary, para. 48.

However, in the EC's view, this Panel should reject those unfounded arguments in order to avoid the abusive application of the *Anti-Dumping Agreement* by the United States and provide compliance proceedings with effectiveness.[318]

5.142 In particular, the European Communities notes that the calculation error is part of the measure taken to comply and, thus, may be subject to claims within this Article 21.5 proceeding. The fact that the USDOC decided, at the last moment, to disregard the claim on the clerical error and *stated so in its decision*, shows that the error (and particularly the decision to fail to correct it) was part of the measure taken to comply. Further, the European Communities observes that there is an important difference between *EC – Bed Linen (21.5)* and the case at hand. In the present case, the clerical error affecting the calculation of the normal value is one of the elements included in the set of data necessary to recalculate the correct amount of dumping. In other words, both the error and the zeroing methodology affect the calculation of the dumping margin, which the United States had to "bring into conformity with its obligations". Therefore, it is not possible to separate in the re-determination made by the USDOC pursuant to the Section 129 proceeding one of the elements (*i.e.*, the normal value) from the rest of the calculation of the dumping margin.[319] Moreover, the European Communities has sufficiently made a *prima facie* case that the failure by the United States to correct the arithmetical error pursuant to the Section 129 Determination at hand violates the *Anti-Dumping Agreement*.[320]

5.143 Finally, the European Communities considers that the United States cannot maintain its anti-dumping duties in force, once it has been alerted repeatedly by the interested parties in the context of the Section 129 Determination, since it is evident that, without the arithmetical error, there is no dumping. Therefore, the United States is ignoring the basic principle that anti-dumping duties can only be levied in order to *offset dumping*.[321] In sum, the European Communities maintains that the Panel should reject the arguments raised by the United States with respect to Case 11 relating to the arithmetical error.[322]

(b) United States

5.144 In respect of the EC's claims that in the *original* investigation of stainless steel sheet and strip in coils ("SSSS") from Italy, Commerce made a calculation error, the United States contends that these claims are made for the first time in this compliance proceeding. Although the EC could have made these claims in the original dispute, it did not. Therefore, the United States submits that the EC's claims are beyond the terms of reference of this proceeding.[323] In addition, the United States argues that the EC has failed to make a *prima facie* case with respect to the claims asserted.[324] Moreover, according to the United States, Commerce's decision not to consider the respondent's argument, when raised for the first time in the section 129 proceeding, is fully consistent with an investigating authority's right to the orderly conduct of its proceedings.[325]

5.145 The United States observes that, 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

[318] EC Opening Statement, Executive Summary, para. 16.
[319] EC Opening Statement, Executive Summary, para. 17.
[320] EC Opening Statement, Executive Summary, para. 18.
[321] EC Opening Statement, Executive Summary, para. 19.
[322] EC Opening Statement, Executive Summary, para. 20.
[323] US First Written Submission, Executive Summary, para. 42.
[324] US First Written Submission, Executive Summary, para. 43.
[325] US First Written Submission, Executive Summary, para. 44.

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.[326]

5.146 The EC's arguments are without merit. As the United States discusses 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.[327]

5.147 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.[328]

5.148 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.[329]

5.149 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.[330]

5.150 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.[331]

5.151 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.[332]

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[326] US Second Written Submission, Executive Summary, para. 38.
[327] US Second Written Submission, Executive Summary, para. 39.
[328] US Second Written Submission, Executive Summary, para. 40.
[329] US Second Written Submission, Executive Summary, para. 41.
[330] US Second Written Submission, Executive Summary, para. 42.
[331] US Second Written Submission, Executive Summary, para. 43.
[332] US Second Written Submission, Executive Summary, para. 44.

5.152 The United States notes that in its first submission, the EC asserted that the United States' failure to address the alleged errors is inconsistent with various Articles of the *Anti-Dumping 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."[333] 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.[334]

5.153 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 *Anti-Dumping 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?[335] 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. The United States maintains that 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.[336]

2. Whether there has been a violation in respect of cases 2, 4 and 5 – Stainless Steel Bar from France, Italy and the United Kingdom ("all others" rate)

(a) European Communities

5.154 The European Communities submits that in the Section 129 Determinations adopted by the United States in the Cases listed in the Annex to the Panel Request as 2, 4 and 5, the United States established new duty levels based on an unjustified increase in the "all others" rates.[337] In two of the cases, *Stainless Steel Bar from France* and *Stainless Steel Bar from the United Kingdom*, the Section 129 Determination led to the revocation of the order for Ugitech and Corus respectively and created a situation where all the company-specific dumping margins were either zero/*de minimis* or based on adverse facts available. In both cases, the USDOC changed the "all others" rate (previously equivalent to the "zeroed" rate of Ugitech and Corus) to a simple weighted average of the zero/*de minimis* and adverse facts available rates. This resulted in an astronomic increase in the "all others" rate, from 3.9 per cent to 35.92 per cent in France and 4.48 per cent to 83.85 per cent in the United Kingdom.[338]

[333] US Second Written Submission, Executive Summary, para. 45.
[334] US Second Written Submission, Executive Summary, para. 46.
[335] US Second Written Submission, Executive Summary, para. 47.
[336] US Second Written Submission, Executive Summary, para. 48.
[337] EC First Written Submission, Executive Summary, para. 42.
[338] EC First Written Submission, Executive Summary, para. 43.

5.155 In the case of *Stainless Steel Bar from Italy*, the exclusion of Valbruna and Foroni led to an increase of the "all others" rate from 3.81 per cent to 6.6 per cent, following a similar averaging exercise which included an adverse facts available rate.[339]

5.156 The European Communities observes that the above situations have come about because the USDOC, following the provisions of Article 9.4 of the *Anti-Dumping Agreement*, had originally based the "all others" rate on the highest dumping margin for a co-operating exporter, thus excluding zero/*de minimis* margins and margins based on facts available from the calculation. Once the impact of zeroing was removed in the Section 129 proceeding, all co-operating exporters had zero or *de minimis* margins. Thus, USDOC had to find another basis for setting the "all others" rate. The method it chose led to the steep increases described above. The European Communities submits that such increases in the "all others rate" are unreasonable and inconsistent with Articles 9.4 and 6.8 of the *Anti-Dumping Agreement*.[340]

5.157 According to the European Communities, in the three cases concerned, the United States had originally used a methodology consistent with Article 9.4 of the *Anti-Dumping Agreement*. In contrast, when carrying out the Section 129 Determinations, in the absence of any remaining co-operating exporters with a dumping margin above *de minimis*, not only did the United States use margins based on facts available, but also zero/*de minimis* margins (*i.e.*, the new ones calculated without zeroing). In fact, the United States made a weighted average between the two types of margins to calculate the final "all others" rates. The European Communities considers that this is directly contrary to the text of Article 9.4 of the *Anti-Dumping Agreement*, as interpreted by the Appellate Body.[341]

5.158 In addition, the European Communities argues that, basing the "all others" rate on adverse facts available rates also violates Article 6.8 and Annex II of the *Anti-Dumping Agreement*. Indeed, the method applied by the USDOC to calculate the "all others" rate in practice moves from a situation where the "all others" rate is based on "facts available" (*i.e.*, the highest rate for a co-operating exporter) to one where it is largely based on "adverse inferences" (*i.e.*, a rate for an exporter which has failed to "act to the best of its ability to comply with a request for information"). By basing the rate on adverse facts available, the USDOC effectively determined that exporters subject to the "all others" rate were guilty of behaviour that would warrant the application of adverse inferences and has put them in the same basket as firms which are alleged to have actively impeded the investigation, without demonstrating that such treatment is appropriate.[342]

5.159 The European Communities notes that the United States asks the Panel to reject the EC's claim concerning the Section 129 Determinations on Stainless Steel Bar from France, Italy and the United Kingdom because the original anti-dumping orders were revoked and, thus, the measures are no longer in place. Moreover, the United States maintains that the European Communities has failed to demonstrate that the calculation of the "all others" rates from the Section 129 Determinations was inconsistent with the Anti-Dumping Agreement. The European Communities submits that the US arguments should be rejected in light of the following reasons.[343] First, as the United States points out, pursuant to sunset reviews of the anti-dumping duty orders on Stainless Steel Bar from, *inter alia*, France, Italy and the United Kingdom, the USITC found that the revocation of the orders would not be likely to lead to the continuation or recurrence of material injury to the domestic industry. Thus, on 7 February 2008 the USDOC revoked the original order. However, this revocation is not final and conclusive because, under US law, interested parties may challenge the USITC's determination within

[339] EC First Written Submission, Executive Summary, para. 44.
[340] EC First Written Submission, Executive Summary, para. 45.
[341] EC First Written Submission, Executive Summary, para. 46.
[342] EC First Written Submission, Executive Summary, para. 47.
[343] EC Second Written Submission, Executive Summary, para. 49.

30 days after the publication of the notice in the Federal Register. Should the appeal be successful, the measure would be reintroduced. Therefore, the European Communities considers that the Panel should examine the conformity of this measure with the *Anti-Dumping Agreement* and the GATT 1994.[344] Second, the European Communities observes that the fact that a challenged measure is no longer in effect, of itself, does not necessarily prevent the Panel from assessing that measure, even though it may affect the Panel's rulings in connection with implementation. The European Communities recalls that several panels have indicated their willingness to examine and make findings regarding measures that have already expired or allegedly expired. The European Communities argues that this approach is necessary in order to provide a positive solution to the dispute, and to prevent the purpose of the dispute settlement system from being defeated.[345] Third, the European Communities contends that it has demonstrated that the calculation of the "all others" rates from the Section 129 Determinations is inconsistent with the Anti-Dumping Agreement, having sufficiently addressed this issue in its First Written Submission.[346] In light of the above, the European Communities submits that the Panel should reject the arguments raised by the United States with respect to Cases 2, 4 and 5 relating to the unjustified increased of "all others" rates.[347]

5.160 The European Communities observes that it has explained in its submissions how the significant increase of "all others" rates (sometimes even almost *twenty times* higher that the original "all others" rates") as a result of the Section 129 Determinations in the cases concerning *Stainless Steel Bar from France, Italy and the United Kingdom* violates Articles 9.4 and 6.8 of the *Anti-Dumping Agreement*. The United States has not contested these claims.[348]

5.161 As for the revocation of the original orders, the European Communities requests this Panel to continue with its analysis of consistency of *all* the measures challenged in this proceeding with the *Anti-Dumping Agreement* and the *GATT 1994*, regardless of whether the original anti-dumping orders have been revoked or not. Otherwise, it would need to come back to a new panel to discuss the same issue and, thus, a positive solution to the dispute on this point would have to wait. This cannot be the purpose of the dispute settlement system which, according to Article 3.2 of the *DSU*, must provide "security and predictability" and serves to "clarify the existing provisions" of the covered agreements.[349]

5.162 As regards the observation made by the United States that the EC's arguments are result-oriented, the European Communities adds that the situation is rather the contrary. It is the United States which is seeking to artificially increase the "all others" rates, in disregard of its obligations contained in Articles 9.4 and 6.8 of the *Anti-Dumping Agreement*. If the United States finds it difficult to justify its duties on the basis of the *Anti-Dumping Agreement*, it might well be, as the European Communities has suggested, that the only WTO-consistent solution available for the United States is that the level of "all others" rate should be zero. Yet it should not be forgotten that this situation arose because the anti-dumping duties for the major exporters, as selected by the United States in the original investigation, were *revoked* after zeroing was eliminated from the calculation. Should the United States have disregarded those companies at the very beginning of the original investigation (because dumping would not have been found without zeroing), the United States could have selected other sources of information in order to calculate the "all others" rates.[350] Consequently, the European Communities submits that it has demonstrated that the calculations of the "all others" rates in the Section 129 Determinations in question are inconsistent

[344] EC Second Written Submission, Executive Summary, para. 50.
[345] EC Second Written Submission, Executive Summary, para. 51.
[346] EC Second Written Submission, Executive Summary, para. 52.
[347] EC Second Written Submission, Executive Summary, para. 53.
[348] EC Opening Statement, Executive Summary, para. 21.
[349] EC Opening Statement, Executive Summary, para. 22.
[350] EC Opening Statement, Executive Summary, para. 23.

with Articles 9.4 and 6.8 of the *Anti-Dumping Agreement*, and that the United States has not rebutted this claim.[351]

(b) United States

5.163 The United States first submits that the EC's claims regarding the Section 129 determinations on Stainless Steel Bar from France, Germany, Italy and the United Kingdom should be rejected because these claims concern measures that are no longer in effect. Commerce revoked the orders covering Stainless Steel Bar from France, Germany, Italy and the United Kingdom effective as of 7 March 2007.[352]

5.164 The United States observes in this context that the Section 129 determinations, which resulted in a change to the all others rates, became effective on April 23, 2007. Thus, imports made on or after 23 April 2007, from exporters or producers who did not have their own cash deposit rate were subject to the posting of a cash deposit at the new all others rate. However, the revocation of the antidumping duty orders on Stainless Steel Bar from France, Italy and the United Kingdom became effective as of 7 March 2007. Pursuant to this revocation, the United States will refund any cash deposits posted on imports of stainless steel bar from these countries made on or after 7 March 2007 and those imports will not be subject to any final assessment of antidumping duties. Alternatively, the EC also has failed to demonstrate that the calculation of the all others rates from the Section 129 determinations was inconsistent with the *Anti-Dumping Agreement*.[353]

5.165 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 United States argues that the EC's claim continues to be unfounded.[354]

5.166 The United States explains that consistent with Article 6.10, in the original investigations Commerce limited its examination to the largest percentage of the volume of the exports from the country in question which could reasonably be investigated. Commerce then calculated an all others rate to apply to imports from those exporters or producers who did not have their own margin of dumping, consistent with Article 9.4. In the Section 129 Determinations, Commerce recalculated the rates for the selected respondents as well as the all others rate. For the three stainless steel bar determinations challenged by the EC, each of the margins of dumping Commerce calculated were either zero or *de minimis*, or based on facts available. Article 9.4 does not address this situation, and Commerce determined the simple average of the margins of dumping calculated in each of the Section 129 Determinations to establish the all others rate for that determination.[355] The United States notes in this regard that the EC's contention here is not with the reasonableness of the methodology Commerce employed. Rather, the EC's arguments are results-oriented, pointing to the fact that the resulting all others rates were higher than those calculated in the original investigations. Should the Panel reach this claim, which it need not, the United States argues that the EC has failed to demonstrate that Commerce acted inconsistently with Articles 6.8, 6.10 or 9.4 of the *Anti-Dumping Agreement*, and the Panel should so find.[356]

5.167 According to the United States, the EC contends that under Article 9.4 of the *Anti-Dumping Agreement*, the United States could not use zero or *de minimis* margins or margins based on facts

[351] EC Opening Statement, Executive Summary, para. 24.
[352] US First Written Submission, Executive Summary, para. 27.
[353] US First Written Submission, Executive Summary, para. 28.
[354] US Second Written Submission, Executive Summary, para. 34.
[355] US First Written Submission, Executive Summary, para. 29.
[356] US First Written Submission, Executive Summary, para. 30.

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.[357] 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.[358]

5.168 The United States observes indeed that, 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 *Anti-Dumping Agreement*.[359]

3. Whether there has been a violation in respect of cases 2, 3, 4 and 5 – Stainless Steel Bar from France, Germany, Italy and the United Kingdom ("injury")

(a) European Communities

5.169 The European Communities observes that pursuant to the Section 129 Determinations concerning Cases 2 to 5 listed in the Annex to the Panel Request, the United States recalculated the dumping margins without zeroing and found that some exporters were not dumping or had *de minimis* dumping margins. However, in those cases the United States maintained the anti-dumping duties without establishing (i) whether the remaining amount of dumped imports was causing injury to the domestic industry, and (ii) whether this volume of dumped imports was not negligible. In particular, the United States disregarded the fact that, after the recalculation of duties without zeroing, on average around 75 per cent of the volume of imports which had been considered as dumped, could no longer be considered as dumped. The European Communities submits that this is inconsistent with Articles 3.1, 3.2, 3.5, 5.8 of the *Anti-Dumping Agreement* and Article VI:1 of the *GATT 1994*.[360]

5.170 The European Communities notes that the United States argues that the EC's claim concerning the Section 129 Determinations on Stainless Steel Bar from France, Germany, Italy and the United Kingdom should be rejected because the original anti-dumping orders were revoked and, thus, the measure is no longer in place. In this respect, the European Communities refers the Panel to the arguments made in Section IV.2(a) of its Rebuttal Submission, arguing that the Panel must continue with its analysis of consistency of all the measures challenged in this proceeding with the *Anti-Dumping Agreement* and the GATT 1994, regardless of whether the original anti-dumping orders have been revoked or not.[361]

5.171 The European Communities further notes that the United States is of the view that the European Communities made the same claim in the original proceeding, but the Panel in the original dispute declined to consider it. Thus, the United States argues that such claims are not within the

[357] US Second Written Submission, Executive Summary, para. 35.
[358] US Second Written Submission, Executive Summary, para. 36.
[359] US Second Written Submission, Executive Summary, para. 37.
[360] EC First Written Submission, Executive Summary, para. 48.
[361] EC Second Written Submission, Executive Summary, para. 54.

terms of reference of this proceeding. The European Communities observes in this respect that the United States has not based this argument on any legal claims or provisions of the *DSU*. Nor have the United States referred to the specific documents where the European Communities made such claims in the original proceeding. Thus, the Panel should reject it as unfounded.[362]

5.172 In any event the European Communities maintains, that, should the Panel examine the argument raised by the United States on this point, the claim concerning the failure to reassess the injury in the Section 129 Determinations concerned refers to new measures (*i.e.*, measures taken to comply) and, thus, new claims can be made against them.[363] In light of the foregoing, the European Communities submits that the Panel should reject the arguments made by the United States against the violations identified by the European Communities with respect to the Section 129 Determinations covered in this proceeding.[364]

5.173 The European Communities observes that it has extensively argued that the US failure to reassess injury when, after the recalculation of duties without zeroing, on average around 75 per cent of the volume of imports which had been considered as dumped could no longer be considered as dumped, is inconsistent with Articles 3.1, 3.2, 3.5, 5.8 of the *Anti-Dumping Agreement* and Article VI:1 of the *GATT 1994*.[365]

5.174 The European Communities argues that the claims made by the European Communities with respect to the Section 129 Determinations at issue are not "dependent claims" as the United States has characterised them. They relate to new measures (*i.e.*, the Section 129 Determinations), against which new claims can be made, and with respect to which the European Communities is asking for a finding from this Panel.[366]

5.175 In addition, the European Communities notes that the Panel in the original dispute did not reject the EC's claims, as the US pretends to argue; rather, the Panel exercised *judicial economy* since the EC's claims were *consequential* of the violation when calculating the dumping margin. In this respect, it is worth remembering that, in *US – OCTG (Sunset Reviews) (21.5)*, the Appellate Body held that a claim relating to an aspect of a measure on which the panel in the original proceeding had exercised judicial economy was *properly* within the scope of Article 21.5 of the DSU. Therefore, the EC's claim in the present case is equally properly before this Panel.[367]

5.176 Thus, the European Communities requests a finding that the United States violated Articles 3.1, 3.2, 3.5 and 5.8 of the *Anti-Dumping Agreement* and Article VI:1 of the *GATT* 1994 when failing to reassess the injury in light of the new volume of non-dumped imports in the Section 129 Determinations concerned.[368]

5.177 As regards the Section 129 Determinations specifically challenged in this proceeding, the European Communities requests this Panel to find that the calculation error, the unjustified increase in "all others" rates and the failure to reassess injury amount to violations of the *Anti-Dumping Agreement* and the *GATT 1994*. Even if the United States has revoked some of these measures, it is vital for a proper solution to this dispute, including the correct interpretation of the relevant provisions of the *Anti-Dumping Agreement* and the *GATT 1994*, that this Panel provides a clarification of the relevant rules. Otherwise, nothing would prevent the United States from infringing the rules again in

[362] EC Second Written Submission, Executive Summary, para. 55.
[363] EC Second Written Submission, Executive Summary, para. 56.
[364] EC Second Written Submission, Executive Summary, para. 57.
[365] EC Opening Statement, Executive Summary, para. 25.
[366] EC Opening Statement, Executive Summary, para. 26.
[367] EC Opening Statement, Executive Summary, para. 27.
[368] EC Closing Statement, Executive Summary, para. 10.

new anti-dumping measures. In fact, a lack of a ruling on this issue would allow the United States to introduce WTO inconsistent measures at one point, wait for a challenge brought by a WTO Member, wait for the panel proceedings to be initiated and then modify the measure at the last minute, in order to prevent a negative finding. Again, this would set a bad example not only applicable to compliance cases, but to the dispute settlement system in general.[369]

(b) United States

5.178 The United States asserts that the Panel should reject the EC's contention that the United States acted inconsistently with the *Anti-Dumping Agreement* and GATT 1994 by maintaining the orders with respect to Stainless Steel Bar from France, Germany, Italy and the United Kingdom without reconsidering the issue of injury after the Section 129 Determinations found that some of the exporters originally investigated were not dumping because it concerns measures that are no longer in effect.[370] The United States clarifies that pursuant to the sunset reviews, it revoked the orders on Stainless Steel Bar from France, Germany, Italy and the United Kingdom effective March 7, 2007. Thus, contrary to the EC's contention, the United States no longer maintains antidumping duties on products subject to these orders. Indeed, the revocation is effective more than one month prior to the end of the reasonable period of time. The United States observes that it will refund the cash deposits on any imports occurring on or after March 7, 2007. Additionally, these imports will not be subject to any final assessment of antidumping duties in the future.[371]

5.179 As a procedural matter, the United States notes that the EC asserted these claims in the original proceeding, and the original panel declined to consider them. Should the EC pursue these claims even though the order has been revoked, the United States reserves its right to request a ruling from the Panel that such claims are not within its terms of reference.[372]

5.180 The United States notes, with respect to the EC's claims involving injury, that the EC has failed to demonstrate that these claims are within the terms of reference of this proceeding. The United States considers that the EC, by including 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", instead trying to resuscitate failed claims from the original dispute. The United States recalls that 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.

5.181 The EC raised these claims in the original proceeding, and the original panel affirmatively declined to make findings on them.[373] The United States, referring to the EC's First Written Submission, notes that the EC does not dispute this fact. The United States understands that the EC asks the United States to identify where in the original proceeding the EC made these claims. The United States responds by noting that that these claims appear in the corrected version of the EC's original Panel request under Section 3.2, "as applied claims,"[374] and that the EC is precluded from pursuing these claims here for two reasons. First, in view of the United States, 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. The United States recalls that the Appellate Body noted and did not disturb the original panel's treatment of the injury claims. Thus, the recommendations and rulings of the DSB did not pertain to

[369] EC Closing Statement, Executive Summary, para. 11.
[370] US First Written Submission, Executive Summary, para. 31.
[371] US First Written Submission, Executive Summary, para. 32.
[372] US First Written Submission, Executive Summary, para. 33.
[373] US Opening Statement, Executive Summary, para. 26.
[374] US Second Written Submission, Executive Summary, para. 49.

any findings on these claims, and the United States was under no obligation to take a measure to comply with respect to such claims[375] -- the United States cannot be faulted for a failure to comply since there was nothing to comply with.[376] Observing that the EC now argues, however, that the United States was in fact obliged to take steps with respect to the injury claims, the United States submits that that argument contradicts the express finding of the original panel that no such steps would need to be taken.[377] 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 *Anti-Dumping Agreement*. 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 United States maintains that the EC is precluded from renewing those claims here.[378]

5.182 The United States argues that the reasons given by the original Panel for dismissing the claims similarly apply to compel rejection of the EC's reiterated argument here. Now, according to the United States, 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.*"[379]

5.183 The United States also recalls that the orders in question have been revoked. Petitioners appealed the determination that resulted in revocation, but that appeal has been dismissed. Thus, the antidumping duty orders in question no longer exist.[380]

4. Requests for findings

(a) European Communities

5.184 The European Communities requests the Panel to make the following findings:[381]

- the United States violated Articles 2.1, 2.4, 2.4.2 and 11.3 of the *Anti-Dumping Agreement* when extending the measures contained in the original dispute pursuant to sunset review proceedings relying on margin of duties calculated with zeroing;
- the United States has not complied with the DSB's recommendations in the original proceeding, since it continues to collect anti-dumping duties and establish new cash deposit rates based on zeroing with respect to the original investigations and administrative reviews challenged in the original dispute;
- the United States remains in violation of Articles 2.4.2 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the *GATT 1994*, since it still collects anti-dumping duties calculated with zeroing with respect to measures challenged in the original dispute (including the measures listed in the Annex to the Panel Request and any other subsequent measures);

[375] US Second Written Submission, Executive Summary, para. 50.
[376] US Opening Statement, Executive Summary, para. 26.
[377] US Second Written Submission, Executive Summary, para. 52. See also, US Opening Statement, Executive Summary, para. 26.
[378] US Second Written Submission, Executive Summary, para. 53.
[379] US Second Written Submission, Executive Summary, para. 51.
[380] US Opening Statement, Executive Summary, para. 27.
[381] See also, EC Second Written Submission, Executive Summary, para. 58 and EC Opening Statement, Executive Summary, para. 29

- the United States has not complied with the DSB's recommendations in the original proceeding, since it has failed to fully revoke the original investigation orders contested in the original dispute;
- the United States has not complied with the DSB's recommendations in the original proceeding, since the 16 administrative review investigations covered in the original dispute have not been superseded (*i.e.*, the United States still collects duties based on the dumping margins found in those proceedings with zeroing, and the United States has also relied on those margins for the determination of likelihood of recurrence of dumping in sunset review proceedings);
- the United States violated Articles 21.3 and 21.3(b) of the DSU, since it did not take any measure to comply with respect to the "as applied" measures covered in the original dispute between 9 April and 23 April/31 August 2007;
- the United States violated Articles 2, 5.8, 6.8, 9.3, 11.1 and 11.2 of the *Anti-Dumping Agreement* and Article VI:2 of the *GATT 1994* when making the error in the calculation of the unit value and then failing to have it removed pursuant to the Section 129 Determination in Case 11 of the Annex to the Panel Request;
- the United States violated Article 6.8, Annex II and Article 9.4 of the *Anti-Dumping Agreement* when using a weighted average of exporters with zero/*de minimis* rates and adverse facts available to calculate the "all others" rates pursuant to the Section 129 Determinations in Cases 2, 4 and 5 of the Annex to the Panel Request; and
- the United States violated Articles 3.1, 3.2, 3.5 and 5.8 of the *Anti-Dumping Agreement* and Article VI:1 of the *GATT 1994* when failing to reassess the injury in light of the new volume of non-dumped imports pursuant to the Section 129 Determinations in Cases 2, 3, 4 and 5 of the Annex to the Panel Request.[382]

5.185 The European Communities also requests the Panel to find that its composition was not consistent with Articles 21.5 and 8.3 of the DSU.

5.186 The European Communities considers that, since the United States has failed to comply with its obligations, the original recommendations of the DSB remain in effect, and apply to the full extent of the findings requested above. Thus, the European Communities requests this Panel to confirm its previous recommendation, pursuant to Article 19 of the DSU, that the United States takes the steps necessary to bring its measures into conformity with the cited WTO provisions.[383]

5.187 In the European Communities' view, the Panel should suggest that, in order to comply with the DSB's recommendations, the United States cease using zeroing when calculating dumping margins in any anti-dumping proceeding with respect to the measures challenged in the original dispute and any other subsequent amendments of those. This suggestion will be appropriate to help promote the resolution of the dispute.[384]

5.188 The European Communities clarifies that it is not requesting retrospective application of DSB's recommendations and finding in this case. However, the European Communities asks for prospective implementation of the DSB's recommendations after the end of the reasonable period. In particular, the European Communities is of the opinion that the United States should stop taking any positive acts providing for the final payment of duties or retention of cash deposits based on zeroing with respect to those entries not finally liquidated before the end of the reasonable period. In other words, the United States (i) should not send new assessment instructions based on zeroing with respect to the measures covered by this dispute; (ii) should not establish new cash deposit rates based on zeroing in those cases; and (iii) should terminate all proceedings seeking to collect duties based on

[382] EC First Written Submission, Executive Summary, para. 49.
[383] EC First Written Submission, Executive Summary, para. 50.
[384] EC First Written Submission, Executive Summary, para. 51.

zeroing after the end of the reasonable period in cases where there is no final liquidation. Finally, the United States should reverse any positive acts taken after the end of the reasonable period which sought the collection of anti-dumping duties or the establishment of new cash deposit rates based on zeroing with respect to the measures successfully challenged in the original dispute.[385]

(b) United States

5.189 The United States considers that it has implemented the DSB's recommendations and rulings, and thus has complied with its obligations under the DSU. Thus, the Panel should reject the EC's claims of non compliance and its effort to enlarge the obligations of the United States. The United States also considers that the Panel should decline to make the suggestion requested by the EC. A Member retains the right to determine the manner of implementing DSB recommendations and rulings. The question in this proceeding is the existence or consistency of the measure taken to comply, not what future actions the United States should take to ensure compliance.[386]

VI. ARGUMENTS OF THE THIRD PARTIES

6.1 The arguments of the third parties are set out in their written and oral submissions to the Panel, and in their answers to questions. The third parties' arguments, based on the summaries submitted by them pursuant to paragraph 10 of the Panel's working procedures, are set forth in this section. Certain of the third parties made only an oral submission, while others did not make either an oral or written submission, but attended the Panel's meeting with the parties and third parties.[387]

1. India

6.2 At the Panel meeting with third parties, India stated that it has strong systemic interests in the interpretation and application of various provisions of the *Anti-Dumping Agreement*, which individually and collectively, prohibit the utilization of zeroing practice in all proceedings regulated by the *Anti-Dumping Agreement*.[388]

6.3 India considers that the issue of zeroing is of extreme systemic importance to the multilateral trading system. India strongly opposes the practice of zeroing in dumping margin calculations in every comparison methodology under Article 2.4.2 in the original investigations as well as in all kinds of reviews – administrative, interim, sunset. India considers that it is regrettable that the United States continues to apply the zeroing methodology for determining the anti-dumping margins, except in the comparison of weighted-average normal value with weighted average export price during original investigations, despite the fact that the panel and the Appellate Body unequivocally held that the US DOC's application of zeroing in both the original investigations and subsequent reviews constitute violation of relevant provisions of the *Anti-Dumping Agreement*.[389]

6.4 India has strong concerns on the manner in which the US claims to have complied with panel/ Appellate Body rulings in this dispute. The US states in paragraph 50 of the Executive Summary of its First Written Submissions of February 8, 2008 that it has implemented the recommendations and

[385] EC First Written Submission, Executive Summary, para. 52.

[386] US First Written Submission, Executive Summary, paras. 3, 57.

[387] The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; India; Mexico and Thailand informed the Panel that they would not be providing written submissions in this dispute. Furthermore, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, Mexico; Norway and Thailand informed the Panel that they would not be making oral statements at the Panel meeting with the parties and third parties.

[388] Opening Statement of India at the meeting of the Panel with third parties (hereinafter "India's Opening Statement"), para. 1.

[389] India's Opening Statement, para. 2.

rulings because each of those reviews has been superseded by determinations in subsequent administrative reviews. The US further states that the subsequent reviews examined a wholly different set of sales transactions occurring during a different period of time. Further in these subsequent determinations, Commerce calculated new margins of dumping, and put in place new cash deposits for the companies examined. India disagrees with this argument of the US. Even if the original measures may have been reviewed on different occasions, these are continuation of original measures, the results of the previous review still affect interested parties and subsequent equally critical procedures. The Appellate Body in its report, found that the United States had acted inconsistently with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the *GATT 1994* in the administrative review investigations at issue due to its use of a "simple zeroing" methodology, and reversed Panel's finding to the contrary.[390]

6.5 India notes that from the US claim of its stated compliance with the rulings in this dispute it seems that there is no discipline for calculating dumping margin in administrative reviews. Whereas, as per Article 9.3, the margin of dumping has to be established as per Article 2 even in the administrative reviews. Therefore, the principle of 'fair comparison' as enshrined in Article 2.4 must apply. Further, the margins are to be established as per the comparison methodology provided in Article 2.4.2. As seems to be the US practice, during the administrative reviews, the US compares the weighted average normal value with individual export transactions (para. 24 of EC's First Written Submissions). In this process of comparison, the US takes into account only those transactions where the margin is positive. Those transactions having negative margins are not taken into account, and thereby assigned 'zero' value. [391]

6.6 Article 2.4.2 of *Anti-Dumping Agreement* lays down the rules for comparison of normal value with export price. The margins of dumping are normally to be established on the basis of a comparison of weighted average normal value with weighted average export price. The third option of W to T comparison of weighted average normal value with individual export transactions can only be used in special circumstances where the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences can not be taken into account appropriately by the use of the other two methodologies of comparison. It seems the third methodology of W to T (weighted average to weighted transaction) comparison becomes the default option by the US during the administrative reviews and by use of this methodology the US tries to justify use of 'zeroing' in the dumping margin calculations in administrative reviews. India would like to request the US delegation to kindly clarify:

- Under which provisions of the Anti dumping agreement, does the US determine the dumping margin in administrative reviews?
- While determining the dumping margin in administrative reviews by using the W to T comparison, does the US follow the principles set out in the provisions of the Article 2.4.2, and if so, does the US provide an explanation in each of its determinations as regards the use of the W to T methodology and why the other two methodologies can not be used? [392]

6.7 India has strong systemic concerns on this continuous practice of zeroing, despite the settled jurisprudence by the panel and the Appellate Body that the practice of zeroing is WTO inconsistent. India believes that reliance on previous case law actually flows from the necessity to ensure in any

[390] India's Opening Statement, para. 3.
[391] India's Opening Statement, para. 4.
[392] India's Opening Statement, para. 5.

legal system security, consistency and predictability, and therefore, the use of "zeroing", at every stage, either in the original investigations or in reviews of all kinds is impermissible.[393]

6.8 To conclude, India believes that the periodic reviews challenged by the EC are closely connected to the original measures that are the subject of the DSB's recommendations and rulings and therefore with in the jurisdiction of this panel. [394]

2. Japan

6.9 Japan's reading of the EC's panel request is that the review measures were explicitly "identified" by the EC because they were among the "measures at issue" in these proceedings. Moreover, the EC devoted paragraph 7 of its request to explaining that the reviews specifically identified in the annex were related to the original measures, and involved the continued use of the disputed zeroing methodology. In fact, in that paragraph of its request, the EC described the reviews as being "*in question*", the very words that the United States says were not used by the EC in connection with these measures.[395] Thus, Japan believes that the EC's panel request specifically identified the periodic and sunset reviews that are related to the original measures.[396]

6.10 In the original proceedings, the EC successfully challenged a group of 31 anti-dumping measures resulting from 15 original investigations and 16 periodic reviews on the grounds that zeroing had been used in the dumping determinations. In these proceedings, the EC contests, among others, the United States' omission or failure to take steps to eliminate zeroing from certain of these, and other closely related, measures; additionally, the EC challenges the United States' adoption of measures very closely related to the original measures, including periodic reviews, sunset reviews, and measures that impose and collect definitive anti-dumping duties based on inflated dumping margins calculated with zeroing.[397]

6.11 The United States argues that these connected measures cannot be subject to Article 21.5 proceedings because they are not "measures taken to comply" with the DSB's recommendations and rulings. Japan's arguments focus on the periodic review measures challenged by the EC.[398]

6.12 It is well-established that, Article 21.5 proceedings may concern measures in the form of both acts and omissions. In *US – Softwood Lumber IV (Article 21.5)*, the Appellate Body observed that "[t]he word 'existence' [in Article 21.5] suggests that measures falling within the scope of Article 21.5 encompass not only positive acts, but also *omissions*."[399] Indeed, an Article 21.5 dispute may involve "a *combination* of both [acts and omissions] in situations where the measures taken to comply, through omissions or other deficiencies, may achieve only partial compliance."[400] Thus, the EC is entitled to challenge *omissions* by the United States to take action to eliminate zeroing from its measures, as well as *acts* by the United States in adopting measures that involve the further application of zeroing, or measures involving a *combination* of both.[401]

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[393] India's Opening Statement, para. 6.

[394] India's Opening Statement, para. 7.

[395] Executive Summary of the Third Party Submission of Japan (hereinafter "Japan's Third Party Submission, Executive Summary"), para. 2.

[396] Japan's Third Party Submission, Executive Summary, para. 3.

[397] Japan's Third Party Submission, Executive Summary, para. 4.

[398] Japan's Third Party Submission, Executive Summary, para. 5.

[399] Japan's Third Party Submission, Executive Summary, para. 6, citing Appellate Body Report, *US – Softwood Lumber IV (Article 21.5)*, para. 67 (original italics).

[400] Japan's Third Party Submission, Executive Summary, para. 6, citing Appellate Body Report, *US – FSC (Article 21.5 – II)*, para. 93 (emphasis added).

[401] Japan's Third Party Submission, Executive Summary, para. 7.

6.13 In one of the very first Article 21.5 proceedings, the Appellate Body observed that "Article 21.5 proceedings involve, in principle, *not* the original measure, but rather *a new and different measure which was not before the original panel*."[402] In other words, compliance proceedings normally involve a measure that is separate and distinct from the original measure, and that was not the subject of the DSB's recommendations and rulings.[403] The panel report of *Australia – Salmon (Article 21.5)*[404] and the rulings of the panel and Appellate Body in *US – Softwood Lumber IV (Article 21.5)* [405] also contradicts the United States' arguments. As will become clear below, the two measures in *US – Softwood Lumber IV (Article 21.5)* stood in virtually the same relationship to each other as do the original and subsequent reviews challenged by the EC in these proceedings.[406]

6.14 In *US – Softwood Lumber IV (Article 21.5)*, the Appellate Body emphasized that Article 21.5 establishes an "express link" between the measures covered by Article 21.5 and the DSB's recommendations and rulings.[407] Accordingly, in determining whether particular measures are covered by Article 21.5, a compliance panel is to examine whether a close relationship exists between those measures, and the measures subject to the DSB's recommendations and rulings. In conducting this analysis, the Appellate Body held that a panel must examine the "connection" between the measures challenged under Article 21.5 and the original measures using what was described as a "nexus-based test".[408] As part of that test, an Article 21.5 panel is to examine the "nature" or "subject matter"[409] of the measures to establish whether the measure(s) challenged in Article 21.5 proceedings and the original measure(s) have a connection in terms of their *substance*. With respect to the "nature" and "subject matter" of the measures, *US – Softwood Lumber IV (Article 21.5)* is highly instructive for these proceedings.[410]

6.15 In terms of the "nature" and "subject matter", Japan argues that the links between the original and subsequent measures are virtually the same as those that led the Appellate Body, in *US – Softwood Lumber IV (Article 21.5)*, to conclude that a subsequent periodic review was subject to the Article 21.5 proceedings. In particular:

- the original measures and the subsequent periodic reviews *all resulted from anti-dumping proceedings* conducted by the USDOC;
- these measures all involved that authority's *determination of the dumping margin*;
- in any given group of measures (identified in the annex to the EC's panel request by numbered rows), the *subject product is always identical*;
- in any given group of measures, the *exporter is always identical* (identified in the annex to the EC's panel request in the fifth column);

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[402] Japan's Third Party Submission, Executive Summary, para. 8, citing Appellate Body Report, *Canada – Aircraft (Article 21.5)*, para. 41 (emphasis added) and Appellate Body Report, *US – Softwood Lumber IV (Article 21.5)*, para. 89. See also, Opening Statement of Japan at the meeting of the Panel with third parties (hereinafter "Japan's Opening Statement "), para. 5.

[403] Japan's Third Party Submission, Executive Summary, para. 8.

[404] Japan's Third Party Submission, Executive Summary, para. 9, citing Panel Report, *Australia – Salmon (Article 21.5)*, para. 7.10 (sub-para. 22).

[405] Japan's Third Party Submission, Executive Summary, para. 9, citing Appellate Body Report, *US – Softwood Lumber IV (Article 21.5)*, para. 77.

[406] Japan's Third Party Submission, Executive Summary, para. 9.

[407] Japan's Third Party Submission, Executive Summary, para. 10, citing Appellate Body Report, *US – Softwood Lumber IV (Article 21.5)*, para. 68.

[408] Japan's Third Party Submission, Executive Summary, para. 10, citing Appellate Body Report, *US – Softwood Lumber IV (Article 21.5)*, paras. 77 and 79. See also Japan's Opening Statement, para. 6.

[409] Japan's Third Party Submission, Executive Summary para. 11, citing Appellate Body Report, *US – Softwood Lumber IV (Article 21.5)*, para. 83.

[410] Japan's Third Party Submission, Executive Summary, para. 11.

- any given group of measures is adopted pursuant to the *same anti-dumping order*; and,
- for any given order, the measures provide *succeeding bases for the continued imposition* of anti-dumping duties on the subject product, with each new measure replacing the cash deposit rate of the previous measure, and determining the definitive duty rate for entries initially subjected to the cash deposit rate of the previous measure.[411]

6.16 Japan considers that another important parallel between this dispute and *US – Softwood Lumber IV (Article 21.5)* is that this dispute also concerns "*a specific component*" of the original measures and the subsequent periodic reviews challenged under Article 21.5; and in both disputes, the specific component concerns a calculation methodology applied by the USDOC.[412] The word chosen by the United States – "superseded" – expresses clearly that the challenged periodic reviews are substantively linked, creating an unbroken chain of measures in which the newest measure supersedes the previous one.[413] In this dispute, the connections between the original and the subsequent periodic reviews are extremely close indeed. The measures constitute an unbroken chain that provides *succeeding legal bases* for the *continued imposition of anti-dumping duties* on the *same product* and the *same exporters*, under the *same order*, and, with respect to each measure, the dispute concerns *same "specific component"*, namely the application of the zeroing methodology.[414]

6.17 In sum, Japan asserts that the case-law shows that a series of closely linked measures adopted over time – starting with the original measures, continuing with measures adopted during consultations[415], the original proceedings[416], and into implementation[417] – may all relate to "fundamentally the same 'dispute'",[418] and all be subject to the DSB's recommendations and rulings in that dispute, provided they are substantively the same.[419] As Japan has explained, the periodic reviews that the EC challenges in these proceedings constitute just such a chain of inter-connected measures. Each measure is, in its essence, precisely the same as the previous "superseded" measure with respect to "the specific component"[420] that is disputed. The original measures and the measures challenged in these compliance proceedings all concern the application of the *same zeroing methodology* to the *same products* and the *same exporting companies*, under the *same anti-dumping order*, and they provide *succeeding bases for the continued imposition* of anti-dumping duties under that order.[421]

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[411] Japan's Third Party Submission, Executive Summary, para. 12. See also, Japan Opening Statement, para. 8.

[412] Japan's Third Party Submission, Executive Summary, para. 13.

[413] Japan's Third Party Submission, Executive Summary, para. 14.

[414] Japan's Third Party Submission, Executive Summary, para. 15.

[415] Japan's Third Party Submission, Executive Summary, citing Appellate Body Report, *Brazil – Aircraft*.

[416] Japan's Third Party Submission, Executive Summary, para. 16, citing Appellate Body Report, *Chile – Price Band System*; Panel Report, *Dominican Republic – Cigarettes*; Panel Report, *Argentina – Footwear Safeguards*, para. 8.45; and Appellate Body Report, *EC – Chicken Cuts*.

[417] Japan's Third Party Submission, Executive Summary, para. 16, citing Appellate Body Report, *US – Softwood Lumber IV (Article 21.5)*; Panel Report, *Australia – Salmon (Article 21.5)*, para. 6.5; and Panel Report, *Australia – Leather (Article 21.5)*, para. 7.10.

[418] Japan's Third Party Submission, Executive Summary, para. 16, citing Panel Report, *Brazil – Aircraft*, para. 7.11.

[419] Japan's Third Party Submission, Executive Summary, para. 16.

[420] Japan's Third Party Submission, Executive Summary, para. 17, citing Appellate Body Report, *US – Softwood Lumber IV (Article 21.5)*, para. 83.

[421] Japan's Third Party Submission, Executive Summary, para. 17.

6.18 Japan notes that in this dispute, the United States avers that, because the periodic reviews challenged in the original proceedings have been superseded by subsequent reviews, *no* further action is required to bring the WTO-inconsistent periodic reviews into conformity with the United States' obligations.[422] In Japan's view, as a general matter, *inaction* by an implementing Member to bring its WTO-inconsistent measure into conformity with WTO law is justified solely in circumstances where the measure at issue is *no longer legally operational after the end of the implementation period*. In that event, no affirmative action is needed by the implementing Member to prevent the measure from continuing to cause nullification or impairment because, by the end of the RPT, the measure has ceased to have effects, and the result required by Article 19.1 of the DSU has already been achieved.[423]

6.19 For Japan, a WTO-inconsistent measure that is still "operational"[424] after the end of the RPT continues to cause the nullification or impairment of benefits at a time when the measure must be fully compliant with WTO law. Such a measure must be brought into conformity with the covered agreements to ensure that the nullification or impairment ceases.[425] In this dispute, the importer-specific assessment rates in the contested periodic reviews have not expired, been revoked, modified or replaced in a manner that makes them WTO-consistent.[426] The rates continue to be inflated as a result of the application of the simple zeroing methodology. Thus, the amount of duties yet to be collected on the basis of these rates continues to exceed the properly determined margin of dumping, which is in violation of Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994. In these proceedings, the issue is whether the contested periodic reviews continue to operate in this fashion after the end of the RPT.[427]

6.20 Japan notes that if the United States has *already* collected the definitive duties, and liquidated an entry, before expiration of the RPT, it cannot be required to undo that action through repayment of the duties.[428] However, if at the end of the RPT, the United States has not yet taken action to collect the definitive duties, and liquidate an entry, *its future actions* in so doing must be based on an importer-specific assessment rate in a periodic review that has been brought into conformity with WTO law. In Japan's view, the United States has omitted to take any action to bring the periodic reviews into conformity with WTO law, and ensure that the importer-specific assessment rate provides a WTO-consistent basis for duty collection after the end of the RPT.[429]

6.21 At the Panel meeting with third parties, Japan focused on two issues: (1) the scope of these compliance proceedings with respect to subsequent periodic reviews; and (2) the prospective character of the implementation action sought by the European Communities ("EC").[430]

6.22 Japan noted that the United States argues that periodic reviews not expressly addressed by the DSB's recommendations and rulings are outside the scope of these proceedings. Japan asserted it had demonstrated, at length, that this Panel has jurisdiction over these periodic reviews, which were

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[422] Japan's Third Party Submission, Executive Summary, para. 18, citing US First Written Submission, paras. 96 ff. *See* also the US statement to the DSB, WT/DS294/20/Add.6, 20 August 2007.

[423] Japan's Third Party Submission, Executive Summary, para. 19.

[424] Japan's Third Party Submission, Executive Summary, para. 20, citing Panel Report, *EC – Commercial Vessels*, para. 8.4.

[425] Japan's Third Party Submission, Executive Summary, para. 20.

[426] (*original footnote)* Japan references to contested and WTO-inconsistent periodic reviews includes all the periodic reviews challenged by the EC that are closely connected to the DSB's recommendations and rulings.

[427] Japan's Third Party Submission, Executive Summary, para. 21.

[428] Japan's Third Party Submission, Executive Summary, para. 22.

[429] Japan's Third Party Submission, Executive Summary, para. 23.

[430] Japan's Opening Statement, para. 1.

identified in the EC's Panel Request.[431] Japan did not repeat its written arguments in its opening statement but highlighted, briefly, several key points regarding the scope of Article 21.5 of the DSU. Japan also notes that the United States has failed to address Japan's written arguments.[432]

6.23 Japan observed that the United States argues that the subsequent periodic reviews challenged by the EC are not "measures taken to comply" within the meaning of Article 21.5 of the DSU and, therefore, are outside the scope of these compliance proceedings.[433] According to the United States, this is because the reviews in question are "separate and distinct"[434] and "[n]one of the[se] other 'measures' . . . was the basis for a DSB recommendation or ruling."[435] The United States requests this Panel to find instead "that the only measures within the terms of reference of this proceeding are the 15 original investigations and 16 administrative reviews" that were the basis of the recommendations and rulings of the DSB.[436] However, as Japan demonstrated, there is no support for the United States' arguments.[437] On the contrary, Article 21.5 panels and the Appellate Body have specifically found "separate and distinct" measures – that is, measures not challenged in the original proceedings – to fall within the scope of Article 21.5 of the DSU when those measures are closely connected to the original measures.[438]

6.24 In the present dispute, Japan has shown that a close connection exists between the subsequent periodic reviews and the original measures that are the subject of the DSB's recommendations and rulings.[439] In *US – Softwood Lumber IV (Article 21.5)*, the Appellate Body also concluded that the new measure at issue – that is, the subsequent periodic review – "directly affected" the United States' compliance with the DSB's recommendations and rulings.[440] Similarly, the periodic reviews challenged by the EC in the present dispute have a direct effect on the United States' compliance by moving the United States away from compliance with each successive review undertaken under a given anti-dumping order.[441]

6.25 Moreover, as Japan explained[442], the United States' claim that measures covered by Article 21.5 of the DSU are those "taken in the direction of, or for the purpose of achieving compliance [with the recommendations and rulings of the DSB]"[443] is devoid of support. In fact, the Appellate Body reached the exact opposite conclusion in *US – Softwood Lumber IV (Article 21.5)*. Recognizing that Article 21.5 of the DSU provides a mechanism by which to assess compliance, while also accepting that implementing Members may fail to adopt any compliance measures, the Appellate Body concluded that "measures taken to comply" may include measures that move away

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[431] Japan's Third Party Submission, paras. 7-75.

[432] Japan's Opening Statement, para. 2.

[433] Japan's Opening Statement, para. 3, citing US First Written Submission, paras. 36-47; US Rebuttal Submission, paras. 28-32.

[434] Japan's Opening Statement, para. 3, citing US First Written Submission, para. 42.

[435] Japan's Opening Statement, para. 3, citing US First Written Submission, para. 40.

[436] Japan's Opening Statement, para. 3 citing US First Written Submission, para. 54 and US Rebuttal Submission, para. 32.

[437] Japan's Opening Statement, para. 4, citing Japan's Third Party Submission, paras. 7-75.

[438] Japan's Opening Statement, para. 4, citing Japan's Third Party Submission, paras. 27-32

[439] Japan's Opening Statement, para. 7, citing Japan's Third Party Submission, paras. 45-75.

[440] Japan's Opening Statement, para. 9, citing Appellate Body Report, *US – Softwood Lumber IV (Article 21.5)*, para. 85.

[441] Japan's Opening Statement, para. 9.

[442] Japan's Opening Statement, para. 10, citing Japan's Third Party Submission, paras. 21-26.

[443] Japan's Opening Statement, para. 10, citing US First Written Submission, para. 38 (emphasis in original omitted).

from, and do not have the objective of achieving, compliance.[444] Japan notes that the United States did not respond to Japan's argument in its Rebuttal Submission.[445]

6.26 Finally, contrary to the United States' claim, Japan asserts that the timing of the adoption of a subsequent measure is not the decisive criterion in determining whether that measure is covered under Article 21.5 of the DSU. Otherwise, a Member would be able to circumvent Article 21.5 proceedings by adopting new measures, even ones very closed connected to the original measures, prior to the adoption of the DSB's recommendations and rulings. Moreover, as the Appellate Body has emphasized, a measure may be subject to Article 21.5 of the DSU, even though it was not adopted with the intention of complying with the DSB's recommendations and rulings. The crucial consideration is whether, viewed as a whole, sufficiently close links exist between the original measure and the new measure.[446] Furthermore, with respect to the facts surrounding the periodic reviews taken before the adoption of the DSB's recommendations and rulings, Japan notes that an important temporal connection exists between these reviews and the recommendations and rulings because, after adoption, the United States issues liquidation instructions and payment notices pursuant to these reviews. Thus, besides the substantive connections already addressed, these measures enjoy important temporal links with the DSB's recommendations and rulings.[447]

6.27 In short, as discussed in greater detail in Japan's written submission, the periodic reviews challenged by the EC are closely connected to the original measures that are the subject of the DSB's recommendations and rulings and therefore are within the jurisdiction of this Panel.[448]

6.28 According to Japan, the question before the compliance Panel is whether the United States must amend the WTO-inconsistent periodic reviews at issue by the end of reasonable period of time or "RPT" in order to ensure that, after the end of the RPT, any definitive anti-dumping duties are collected pursuant to revised review determinations that are consistent with Article 9.3 of the *Anti-Dumping Agreement*.[449] The United States contends that, on implementation, it was not required to take any action to change the WTO-inconsistent periodic reviews with respect to *imports that had occurred before the end of the RPT*. As regards these imports, the United States believes that it can collect definitive duties, after the end of the RPT, on the basis of periodic reviews that should have been brought into conformity with WTO law by that time.[450] The United States argues that "the text of the GATT 1994 and the *Anti-Dumping 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 anti-dumping duties."[451] In support of this argument, the United States relies on Articles VI:2 and VI:6(a) of the GATT 1994, and Articles 8.6, 10.1, 10.6, and 10.8 of the *Anti-Dumping Agreement*.[452] The United States' reliance on these provisions, however, is misplaced.[453]

6.29 In Japan's view, these provisions establish that the importation of goods is an *event* that triggers *potential* liability to pay anti-dumping duties. Furthermore, the provisions set forth obligations limiting the retroactive application of an anti-dumping measure. The United States

[444] Japan's Opening Statement, para. 10, citing Appellate Body Report, *US – Softwood Lumber IV (Article 21.5)*, paras. 66-67.
[445] Japan's Opening Statement, para. 10.
[446] Japan's Opening Statement, para. 11, citing Japan, Third Party Submission, paras. 61-75.
[447] Japan's Opening Statement, para. 12.
[448] Japan's, Opening Statement, para. 13.
[449] Japan's Opening Statement, para. 15.
[450] Japan's Opening Statement, para. 16.
[451] Japan's Opening Statement, para. 17, citing US Rebuttal Submission, para. 38.
[452] Japan's Opening Statement, para. 17, citing US Rebuttal Submission, paras. 38-42.
[453] Japan's Opening Statement, para. 17.

appears to believe that, provided it respects these rules, no other WTO obligations apply to its actions *after importation*, including the determination of the amount of definitive anti-dumping duties due.[454]

6.30 The United States' argument ignores, in particular, Article 9.3 of the *Anti-Dumping Agreement*, the very provision that the United States was found to have violated. Under that provision, irrespective of the "legal regime", or legal framework, that applies to an individual import on the date of importation, a Member is required to take action, *long after importation*, to ensure that the amount of definitive anti-dumping duties collected does not exceed the margin of dumping. The mere fact that a Member correctly applies the provisions cited by the United States on importation does not mean that it is liberated from its obligations under Article 9.3 to ensure that the amount of definitive anti-dumping duties collected does not exceed the margin of dumping.[455]

6.31 The same holds true on implementation. For these purposes, Japan assumes that, at the time of importation, the United States correctly applied the legal provisions it cites with respect to the entries covered by the WTO-inconsistent periodic reviews at issue. However, by so doing, the United States was not absolved of its duty to comply with other provisions of the *Anti-Dumping Agreement*, including Article 9.3, when conducting the periodic reviews with respect to those entries. Likewise, having initially failed to comply with Article 9.3, the United States is not exonerated from its duty to bring the periodic reviews into conformity with Article 9.3 simply because, at the time of importation, it respected the provisions it cites.[456]

6.32 The existence of the review procedure in Article 9.3, which is always carried out long after importation, demonstrates another fallacy in the United States' argument. To recall, the United States argues that the "legal regime" that applied at the time of importation determines "whether [an] import is liable" for anti-dumping duties, and a Member is not required to change that "legal regime" during implementation.[457] The premise of this argument is that altering the "legal regime" that applied at the time of importation would retrospectively "undo" a legal situation definitively fixed on importation.[458]

6.33 Japan considers that the United States' argument is wrong. The "legal regime" that applies to an import at the time of importation is merely *provisional*, and notably *does not even include the contested periodic reviews* that were adopted, under Article 9.3, *long after importation*. The United States itself recognizes that, at the time of importation, the importing Member establishes only that an import is *potentially* liable for duties. Indeed, the United States even argues that, on importation into the United States, no anti-dumping duties are paid, and a cash deposit is paid merely as a form of security, pending the determination and collection of definitive duties *some time after importation*.[459]

6.34 Whether the cash deposit is regarded as a security or as anti-dumping duties, Japan agrees with the following statement:

> "The United States argues that *in no case is assessment* – whether at the cash deposit rate or otherwise – *conducted at the time of entry*, and *in all cases the cash deposit collected at the time of entry is a baseline proxy of the amount that may ultimately be assessed, and is never itself the final liability*."[460]

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[454] Japan's Opening Statement, para. 18.
[455] Japan's Opening Statement, para. 19.
[456] Japan's Opening Statement, para. 20.
[457] Japan's Opening Statement, para. 21, citing US Rebuttal Submission, para. 38.
[458] Japan's Opening Statement, para. 21.
[459] Japan's Opening Statement, para. 22, citing US Rebuttal Submission, para. 40.
[460] Japan's Opening Statement, para. 23, citing Panel Report, *US – Customs Bond Directive*, para. 7.89 (emphasis added).

6.35 In other words, Japan asserts, the United States accepts – as it must – that, at the time of importation, solely a *potential* liability for duties arises, and this potential liability "is *never* itself the final liability". Thus, the "legal regime" that applies to an entry at the time of importation is a provisional regime that serves merely as a "*baseline proxy*" pending the subsequent determination of the "*final liability*".[461] The consequence of the *provisional* character of the "legal regime" in place at the time of importation is that, *at that time*, the importing Member does *not* definitively establish any right to collect a specific amount of anti-dumping duties. Instead, when a periodic review occurs, that right is established much later in the procedure under Article 9.3.[462]

6.36 For example, in the United States' system, at the time of importation, a cash deposit is paid for the duties potentially due on the imported merchandise. Only later, in a subsequent periodic review, is the "final liability" established in the importer-specific assessment rate – which may be more or less than the cash deposit rate – and definitive duties are subsequently collected on each import at the importer-specific assessment rate. A WTO-consistent periodic review may even determine that *no* duties are due on entries that were potentially liable for duties at the time of importation, which leads to a refund of the deposit.[463] Thus, a periodic review under Article 9.3 establishes a *new "legal regime"* that replaces the *provisional* regime that applied, at the time of importation, pursuant to other provisions of the *Anti-Dumping Agreement* and the GATT 1994.[464]

6.37 As a result, Japan argues, there is a logical inconsistency in the United States' argument. Its excuse for not correcting the WTO-inconsistent periodic reviews is that the *provisional* "legal regime" that applied on importation as a "baseline proxy" cannot be changed. However, that provisional "legal regime" *has already been changed by the periodic reviews at issue*, which establish the "final liability" for anti-dumping duties.[465] Thus, again, the United States' arguments ignore the significance of Article 9.3. *First*, as noted above, as a matter of law, Article 9.3 imposes obligations on the United States *additional* to those it cites;[466] and *second*, as a matter of fact, the contested periodic reviews carried out under Article 9.3 *had already changed* the provisional "legal regime" that the United States now argues must be preserved.[467]

6.38 Japan, therefore, sees no basis in law or in fact for the United States' argument that the periodic reviews cannot be brought into conformity with WTO law simply because a *long-since-changed* provisional "legal regime" must be preserved. Indeed, the fact that the United States has already changed the provisional "legal regime" once – when it adopted the contested periodic reviews – demonstrates that the alleged need to preserve the provisional "legal regime" is, in reality, not an impediment to changing the "legal regime" again, by bringing the periodic reviews into conformity with WTO law.[468]

6.39 Finally, the "legal regime" in existence at the time of importation is not without significance because it fixes the universe of imports that are potentially liable to anti-dumping duties. Bringing the periodic reviews into conformity with WTO law does not alter that universe – if and when the periodic reviews are brought into conformity with WTO law, the same entries that were potentially liable to duties at the time of importation will continue to be potentially liable to duties following implementation. However, the amount of definitive duties collected on these entries, after the end of the RPT, cannot exceed a WTO-consistent margin of dumping, as required by Article 9.3 of the *Anti-*

[461] Japan's Opening Statement, para. 24.
[462] Japan's Opening Statement, para. 25.
[463] Japan's Opening Statement, para. 26.
[464] Japan's Opening Statement, para. 27.
[465] Japan's Opening Statement, para. 28.
[466] Japan's Opening Statement, para. 29, referring to paras. 15-20 of its Opening Statement.
[467] Japan's Opening Statement, para. 29.
[468] Japan's Opening Statement, para. 30.

Dumping Agreement and Article VI:2 of the GATT 1994.[469] In sum, given the provisional character of the "legal regime" in place at the time of importation, the United States is wrong to suggest that requiring a Member to bring a periodic review into conformity with WTO law by the end of the RPT would change a legal situation definitively fixed at the time of importation.[470]

6.40 For Japan, the United States' argument that its implementation obligations apply solely to *new entries that occur on or after the end of the RPT* produces absurd consequences that nullify the disciplines in Article 9.3 of the *Anti-Dumping Agreement*.[471] By definition, new entries that occur on or after the end of the RPT are *not* covered by the WTO-inconsistent periodic reviews at issue, which relate solely to past entries. The *new* entries would necessarily be subject to a *new* periodic review that, in the United States' view, would have to be challenged in a *new* WTO proceeding. Yet, if that new review were WTO-inconsistent, the United States contends that no implementation obligations would apply because the new review, by definition, covers entries that occurred *before* the end of the *new* RPT.[472] In short, the United States' argument creates a "Catch-22" that deprives exporting Members of the protection afforded by Article 9.3: viewed from the perspective of the end of the RPT, a WTO-inconsistent periodic review *always relates to past entries*, whereas the WTO implementation obligations with respect to that review could *apply solely to future entries*.[473]

6.41 Japan asserts that the consequence of this argument is that an individual "as applied" periodic review is *totally immune* from the disciplines in Article 9.3. Ignoring the requirements of that provision, a Member could always determine a WTO-inconsistent "margin of dumping" in a review, and there would be no obligation to bring the periodic review into conformity with WTO law because, *by definition*, the WTO-inconsistent periodic review relates to entries that occurred before the end of the RPT. Implementing the review with respect to future entries would be both impossible and meaningless because these entries are not subject to the review at issue. The United States' circular argument, therefore, eviscerates Article 9.3.[474]

6.42 The United States' argument also reduces to a nullity its obligation to bring the WTO-inconsistent reviews into conformity with WTO law. Despite the explicit terms of the recommendations and rulings made regarding the WTO-inconsistent periodic reviews, the United States believes that no action is required with respect to these measures because they relate to past entries.[475]

6.43 In Japan's view, the decisive issue in deciding whether the United States must modify the WTO-inconsistent periodic reviews is *whether these reviews continue to produce legal effects after the end of the RPT*. If a review continues to operate after that date, it must be modified to ensure that it is applied in the future in a WTO-consistent fashion.[476] Japan's written submission explains how the importer-specific assessment rate in a periodic review continues to be legally operational until definitive duties are collected, and entries liquidated, on the basis of the review.[477] Thus, where the United States collects definitive duties on entries covered by a contested periodic review *after the end of the RPT*, it does so by applying the importer-specific assessment rate determined in the review[478].[479]

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[469] Japan's Opening Statement, para. 31.
[470] Japan's Opening Statement, para. 32.
[471] Japan's Opening Statement, para. 33, citing US Rebuttal Submission, para. 44.
[472] Japan's Opening Statement, para. 34.
[473] Japan's Opening Statement, para. 35.
[474] Japan's Opening Statement, para. 36.
[475] Japan's Opening Statement, para. 37.
[476] Japan's Opening Statement, para. 38.
[477] Japan's Third Party Submission, paras. 78, 80-83.
[478] Japan's Third Party Submission, paras. 78, 80-83.
[479] Japan's Opening Statement, para. 39.

6.44 Accordingly, Japan considers that with respect to any periodic reviews for which there are unliquidated entries at the end of the RPT, the DSB's recommendations and rulings require the United States to bring the measure into conformity with WTO law to ensure that it is applied in a WTO-consistent fashion after the RPT expires. In short, after the end of the RPT, the United States' subsequent actions taken pursuant to the contested periodic reviews must be WTO-consistent. The United States should have ensured that they were WTO-consistent by re-calculating the importer-specific assessment rate without zeroing by the end of the RPT.[480]

6.45 Japan emphasizes that, by correcting the importer-specific assessment rate, the United States would not retrospectively "undo" a legal situation definitively fixed at an earlier time. The EC's claims focus on situations where liquidation had not occurred by the end of the RPT. Prior to liquidation, the United States has *not* collected any definitive anti-dumping duties. Thus, there is *no* question of *repaying* duties that have already been definitively collected on an entry. Nor does the EC seek to reduce retrospectively the cash deposit collected on the entries in question. Instead, the implementation of DSB's recommendations and rulings ensures the WTO-consistency of the United States' *future actions* in collecting definitive duties *for the first time* after the end of the RPT.[481]

6.46 Concerning the equal footing between the retrospective duty assessment system and the prospective duty assessment system, Japan disagrees with the United States' argument that this interpretation places "retrospective" duty assessment systems at a disadvantage compared with "prospective" systems.[482] The same interpretive principles apply to both systems. A periodic review may occur under either system. If that periodic review is found to be WTO-inconsistent, it must be brought into conformity with WTO law to the extent that the review remains legally operational after the end of the RPT. In other words, even in a prospective duty assessment system under Article 9.3.2, once the DSB finds that a final liability determined through this system is inconsistent with certain provisions of the anti-dumping agreement, as long as the entries concerned have not been liquidated at the time of expiration of the RPT, the importing Member is required to re-calculate the margin of dumping and apply this newly calculated margins in the coming liquidation procedures in order to comply with the DSB's recommendation and rulings. In both systems, a periodic review could continue to produce legal effects well after the end of the RPT because, for example, a Member's actions pursuant to that review are delayed by domestic litigation regarding the review.[483]

6.47 As Japan described in its third party submission and this oral statement, in order to comply with the DSB's recommendation and rulings concerning the periodic reviews, first, the United States is not allowed to liquidate entries subject to this proceedings with the margins of dumping calculated with zeroing after the end of RPT. Second, the United States was required to take positive actions, *i.e.*, recalculation of the margins of dumping without zeroing, by the end of the RPT in order to ensure that the USDOC and the USCBP would not liquidate these entries in a WTO inconsistent manner. [484]

3. Korea

6.48 Korea observes that it has systemic interests in the interpretation and application of various provisions of the *Anti-Dumping Agreement*, which, individually and collectively, prohibit the utilization of the zeroing practice in all proceedings regulated by the *Anti-Dumping Agreement*.

[480] Japan's Opening Statement, para. 40.
[481] Japan's Opening Statement, para. 41.
[482] Japan's Opening Statement, para. 42, citing US Rebuttal Submission, paras. 45 and 46.
[483] Japan's Opening Statement, para. 42.
[484] Japan's Opening Statement, para. 43.

Therefore, Korea reserved its third party rights pursuant to Article 10.2 of Understanding on Rules and Procedures Governing the Settlement of Dispute ("DSU").[485]

6.49 In Korea's view, although the Appellate Body unequivocally held that the USDOC's application of "zeroing" in both the original investigations and subsequent reviews constitute violation of relevant provisions of the *Anti-Dumping Agreement*, the United States simply failed to implement the recommendations. The United States resorts to various technical elements of its domestic procedure to avoid the implementation, to delay the implementation as much as possible or to effectively neutralize the effect of the decision of the Appellate Body in the original dispute.[486] Korea therefore supports the arguments raised by the EC in its first submission dated 11 January 2008. Korea offers its comments below on certain core issues discussed in the submissions of the disputing parties. For the interest of brevity, Korea only focuses on some key issues in Korea's opinion. This should not be interpreted as Korea approving US positions in other issues omitted in this submission.[487]

6.50 Korea notes that, in its decision of April 18, 2006, the Appellate Body held that the utilization of zeroing by the United States Department of Commerce ("USDOC") in challenged administrative reviews constitutes violation of Article 9.3 of the *Anti-Dumping Agreement*.[488] The Appellate Body thus recommended that the United States bring the measure into conformity with its obligations under the *Anti-Dumping Agreement*. The EC and the United States agreed upon an RPT of 11 months, which ended on 9 April 2007.[489]

6.51 Regarding 16 administrative reviews challenged in the original dispute, however, Korea contends that the United States effectively ignored the recommendation of the Appellate Body. The United States now attempts to justify its position by arguing that in each administrative review case, a prior administrative review is superseded by a subsequent review, and that since the administrative reviews challenged in the original dispute do not exist any more, the United States is not required to do anything to implement.[490] In Korea's view, however, the US position completely misconstrues the operating mechanism of an administrative review and seriously threatens to undermine the basic purpose of the dispute settlement procedure of the WTO. Such interpretation would make it impossible for a Member, who successfully challenged an administrative review by another Member, to get a viable remedy.[491]

6.52 It appears that the United States equates the completion of a new administrative review with the termination of the previous review. In Korea's view, however, that is not the case. Unlike other instances where a measure is terminated, an administrative review does not simply disappear when a new, subsequent review is under way or completed. The results of the previous review still affect interested parties and subsequent, equally critical, procedures.[492] For instance, a cash deposit rate (that is, inflated by zeroing) will continue to be applied before it is replaced with a new one, which directly affects foreign respondents and importers of the subject merchandise. Likewise, a zero margin in one review may be combined with previous or subsequent zero margins to potentially lead

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[485] Third Party Submission of Korea (hereinafter "Korea's Third Party Submission"), para. 1.

[486] Korea's Third Party Submission, para. 2. See also, Korea, Opening Statement at the meeting of the Panel with third parties (hereinafter "Korea's Opening Statement"), para. 2.

[487] Korea's Third Party Submission, para. 3.

[488] Korea's Third Party Submission, para. 4, citing Appellate Body Report, *US – Zeroing (EC)*, para. 263(a)(i).

[489] Korea's Third Party Submission, para. 4.

[490] Korea's Third Party Submission, para. 5. See also, Korea's Opening Statement, Executive Summary, para.3.

[491] Korea's Third Party Submission, para. 6. See also, Korea's Opening Statement, Executive Summary, para.4.

[492] Korea's Third Party Submission, para. 7.

to revocation of the underlying order.[493] A zero or low margin in an administrative review is also an important factor to be taken into account when the underlying order is subject to a sunset review[494] [495]

6.53 Therefore, Korea considers that by all accounts, an administrative review has not been terminated yet simply because there is a new administrative review going on or completed. An administrative review found to be WTO-inconsistent thus equally requires adequate implementation by the losing party irrespective of existence or completion of a subsequent review or reviews.[496]

6.54 In Korea's opinion, each administrative review examined in the original dispute constitutes a distinct measure that has not been terminated yet and that has a continuing effect to the foreign manufacturers or importers. By maintaining that the previous reviews have been superseded by subsequent reviews, the United States simply attempts to create a fiction which does not reflect reality. As a matter of fact, as a measure an administrative review can only be terminated when the underlying order is terminated, either through a sunset review, a changed circumstances review or for some other grounds.[497]

6.55 Furthermore, Korea contends, the US position would lead to bizarre consequences. If we adopt the US logic, no Member could successfully challenge an administrative review at the WTO dispute settlement procedure or even if the Member is successful, it cannot hope for an effective remedy. Given that an administrative review takes about a year followed by continuing administrative reviews on an annual basis, it is almost certain that there is always a new review going on or completed by the time a panel procedure regarding an administrative review of a Member is completed.[498] Thus, it would be like "chasing a ghost" from the perspective of the Member challenging the measure. A challenged measure is always gone or terminated by the time a panel reaches its decision and the Member is required to initiate a new dispute to challenge a subsequent review, which would also be gone by the time that panel reaches its decision. Such being the case, the US position effectively insulates administrative reviews from any meaningful oversight by a panel or the Appellate Body. Given the significant role an administrative plays in the operation of domestic Anti-dumping proceedings of Members and detailed obligations laid out in the *Anti-Dumping Agreement* relating to administrative reviews, such a position should be flatly rejected.[499]

6.56 In the light of the above, Korea requests the Panel to reject the US position that all administrative reviews originally challenged did not require any action on the part of the United States simply because there were subsequent reviews afterwards. Korea requests the Panel to hold that the United States failed to implement the recommendation in this respect.[500]

6.57 Korea asserts that for a losing Member to comply with the recommendation of the Appellate Body, the Member must "withdraw" or "eliminate" the measure, or take otherwise comparable action, *before* the expiration of the RPT. If the challenged measure continues for whatever reason after the lapse of the RPT, the Member has simply failed to comply with the recommendation.[501] In the original dispute, the United States agreed to an RPT of 11 months and it ended on 9 April 2007.

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[493] Korea's Third Party Submission, para. 8, citing *Code of Federal Regulation of the USDOC*, Section 351.222(b).

[494] Korea's Third Party Submission, para. 8, citing *Code of Federal Regulation of the USDOC*, Section 351.218(d).

[495] Korea's Third Party Submission, para. 8.

[496] Korea's Third Party Submission, para. 9. See also, Korea's Opening Statement, Executive Summary, para.6.

[497] Korea's Third Party Submission, para. 10.

[498] Korea's Third Party Submission, para. 11.

[499] Korea's Third Party Submission, para. 12.

[500] Korea's Third Party Submission, para. 13.

[501] Korea's Third Party Submission, para. 14.

Therefore, if any aspect of the challenged measure which has been confirmed by the panel and the Appellate Body to be WTO-inconsistent continues after 9 April 2007, it simply constitutes US failure to comply with the recommendation.[502]

6.58 In this case, the record evidence proves that the USDOC continued to apply the zeroing practice for original investigations and administrative reviews after 9 April 2007. The United States, therefore, simply failed to implement the recommendation in due course.[503] Here again, however, the United States attempts to avoid the required implementation by imposing a technical "timing" element. In its 129 Determinations, the USDOC states that the effect of the Determinations will apply only to entries made *on or after* the date on which the USTR directs the USDOC to implement an adverse ruling of the DSB (9 April 2007 in this case).[504] In other words, as long as particular subject merchandise entered the United States customs territory *before* 9 April 2007, the merchandise will not be affected by the 129 Determinations and will be subject to model or simple zeroing, even if the liquidation or other consummation of procedures occurs after the date.[505]

6.59 Korea considers that what was challenged and found to be WTO-inconsistent in the original dispute was a "measure" called "zeroing." The original dispute was not about dates of entries or any other date for that matter. The United States cannot try to minimize or circumvent the impact of the DSB recommendation by simply establishing an arbitrary entry date deadline.[506] In Korea's view, it does not and should not matter when an entry date was for a particular subject product in the current process. What matters instead is whether a challenged measure which was found to be WTO-inconsistent is still maintained even if the RPT has lapsed. As long as the measure continues as of the date of the RPT expiration, the Member has failed to implement the recommendation.[507] In this case, the USDOC continues to apply the zeroing methodology for certain original investigations and administrative reviews even after 9 April 2007. This should be dispositive in this inquiry and the Panel should find for the EC for this issue.[508]

6.60 Korea argues that in conducting a sunset review, the margins and results of the original investigations and administrative reviews are regarded by the USDOC as key factors in reaching a likelihood determination.[509] If applicable margins or results are inflated as a result of the application of zeroing and if the inflated data are then taken into account in a sunset review, such a sunset review also constitutes violation of relevant provisions of the *Anti-Dumping Agreement*, such as Articles 2.1, 2.4, 2.4.2 and 11.3 of the *Anti-Dumping Agreement*.[510]

6.61 In Korea's view, the sunset reviews of the USDOC cannot be separated from previous anti-dumping proceedings. Rather, considering the way it is implemented, sunset reviews are more or less an extension of previous findings or prediction based on previous findings, to the extent the USDOC

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[502] Korea's Third Party Submission, para. 15. See also, Korea's Opening Statement, Executive Summary, para.7.

[503] Korea's Third Party Submission, para. 16.

[504] Korea's Third Party Submission, para. 17, citing United States Department of Commerce, *Issues and Decision Memorandum for the Final Results of he Section 129 Determinations* (9 April 2007), at 17.

[505] Korea's Third Party Submission, para. 17. See also, Korea's Opening Statement, Executive Summary, para. 8.

[506] Korea's Third Party Submission, para. 18. See also, Korea's Opening Statement, Executive Summary, para. 9.

[507] Korea's Third Party Submission, para. 19. See also, Korea's Opening Statement, Executive Summary, para. 10.

[508] Korea's Third Party Submission, para. 20. See also, Korea's Opening Statement, Executive Summary, para. 11.

[509] Korea's Third Party Submission, para. 21, citing *Code of Federal Regulation of the USDOC*, Section 351.218(d).

[510] Korea's Third Party Submission, para. 21.

relies on dumping margins calculated in a prior original investigation or an administrative review as the basis for the sunset review's likelihood determination. Therefore, Korea submits that the violation of these provisions is unavoidable.[511]

6.62 Korea considers that despite the Appellate Body's decisions and recommendations to bring its measures into conformity, the United States has simply failed to do so. Nor have the USDOC's 129 Determinations adequately addressed the decisions and recommendations of the Appellate Body. The United States repeatedly attempts to locate loopholes in DSB recommendations and technical requirements in its domestic statutes for an apparent reason: to refuse to accept the decisions of the Appellate Body.[512]

6.63 At the Panel meeting with third parties, Korea agreed with the EC that, not only an affirmative action to implement an adverse ruling of the Appellate Body, but also omissions and deficiencies thereof clearly fall under the jurisdiction of an implementation panel. Korea notes that the EC is challenging in this proceeding not only an affirmative action by the United States (*i.e.*, its Determinations under 129), but also omissions of the United States to take a necessary step to comply with the decisions of the Appellate Body.[513]

6.64 Furthermore, what the EC seeks in this proceeding is a prospective remedy. The EC is not asking the Panel to provide a remedy that applies retrospectively. All it points out is that the United States continues to fail to eliminate the zeroing practice at issue *after* the lapse of the RPT (*i.e.*, 9 April 2007). This clearly constitutes a request for a prospective remedy.[514] Korea respectfully submits that for the reasons stated above the Panel should hold that the United States failed to comply with recommendations of the DSB in the original dispute.[515]

4. Norway

6.65 As a third party to this dispute, Norway addresses the following issues discussed in the First Written Submission of the EC and United States:

- What measures are included in the scope of this proceeding – in other words – what measures are within the Panel's jurisdiction; and
- The extension of the measures challenged in the original dispute pursuant to sunset review proceedings which relied on dumping margins calculated with the use of zeroing.[516]

6.66 Norway notes the EC claims that in addition to the measures that the United States recognizes as being taken to comply, also measures that have confirmed, superseded and replaced the original measures may be included in the scope of the current proceedings.[517] The United States, on the other hand, sets out that the EC attempts to "include certain determinations within the terms of reference of this proceeding (…) that are not measures taken to comply".[518] In addition, the United States claims

[511] Korea's Third Party Submission, para. 22.

[512] Korea's Third Party Submission, para. 23. See also, Korea's Opening Statement, Executive Summary, para. 14.

[513] Korea's Opening Statement, para. 12.

[514] Korea's Opening Statement, para. 13.

[515] Korea's Third Party Submission, para. 24. See also, Korea's Opening Statement, Executive Summary, para. 15.

[516] Executive Summary of the Third Party Submission of Norway (hereinafter "Norway's Third Party Submission, Executive Summary"), para. 1.

[517] Norway's Third Party Submission, para. 2, citing EC First Written Submission, para. 47.

[518] Norway's Third Party Submission, para. 3, citing United States First Written Submission, para. 30.

that the administrative reviews and the sunset reviews are not properly identified in the Panel request submitted by the EC.[519] This point will not be discussed by Norway.[520]

6.67 Norway observes that Article 21.5 of the Dispute Settlement Understanding (DSU) determines the scope of a Panel's jurisdiction in compliance proceedings. Panels and the Appellate Body have ruled on the scope of this Article several times, and set out the correct legal interpretation to be given to the provision.[521] It follows from the wording of Article 21.5 that both positive acts taken to comply and omissions are covered. The Appellate Body confirmed this in *US – Softwood Lumber IV (21.5 – Canada)*.[522] A complaining Member may thus challenge measures that have been adopted to comply with the recommendations and rulings of the DSB ("consistency"), but also lack of such measures ("existence").[523] Further, Panels and the Appellate Body have underlined that it is not up to the complaining Member alone to determine what constitute a measure taken to comply. Rather, it is for the panel to make this determination.[524] To assist a panel in making a decision on what is a measure taken to comply, the Appellate Body has identified some additional criteria, requiring the panel to scrutinize the relationship between the relevant measures and to examine the timing, nature and effects of the various measures.[525]

6.68 The EC claims that the United States after the end of the reasonable period of time continued to take positive acts, including administrative review investigations, assessment instructions and final liquidations, based on zeroing.[526] The EC is of the opinion that the Panel may examine these acts as parts of the current proceeding, and it "challenges the omissions by the United States to take the necessary measures to comply in this case".[527] The United States disagrees with the view set out by the EC, and contends that none of the subsequent review proceedings and assessment instructions mentioned by the EC are measures taken to comply [528]

6.69 As is set out above, both omissions and positive acts are covered by Article 21.5. Any subsequent administrative reviews, assessment instructions and liquidations based on zeroing must in Norway's opinion be viewed as evidencing omissions to comply with the recommendations and rulings by the DSB, and as such be within the Panel's jurisdiction. The United States should after the reasonable period of time have stopped collecting anti-dumping duties calculated with the use of zeroing in connection with any of the measures that were part of the original dispute, as well as in connection with any administrative review of the dumping margins in these cases. The same assessment goes for the contested sunset reviews: The United States was under an obligation to recalculate without the use of zeroing the previous dumping margins, in order to rely in these margins when assessing the likelihood of recurrence of dumping in sunset review proceedings. The omission to do so falls within the Panel's jurisdiction.[529]

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[519] Norway's Third Party Submission, para. 3, citing United States First Written Submission, paras. 33, 34 and 53.

[520] Norway's Third Party Submission, para. 3.

[521] Norway's Third Party Submission, para. 4.

[522] Norway's Third Party Submission, para. 5, citing Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 67.

[523] Norway's Third Party Submission, para. 5.

[524] Norway's Third Party Submission, para. 6, citing Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 73 with references.

[525] Norway's Third Party Submission, para. 6, citing Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77.

[526] Norway's Third Party Submission, para. 7, citing EC First Written Submission, para. 6.

[527] Norway's Third Party Submission, para. 7, citing EC First Written Submission, para. 60.

[528] Norway's Third Party Submission, para. 8, citing US First Written Submission, para. 46.

[529] Norway's Third Party Submission, para. 9.

6.70 The United States argues that the determinations attacked by the EC were not part of the original panel proceeding, and that there consequently are no DSB recommendations and rulings relating to these determinations, and that the determinations cannot fall within the scope of Article 21.5. Regarding this argument, Norway would like to point out that the panel in *US – Subsidies on Upland Cotton (21.5 – Brazil)* found that even if a measure has not been the subject of DSB's recommendations and rulings in the original proceeding, a "claim relating to a measure that has sufficiently close nexus with the measure taken to comply or with the DSB recommendations and rulings in the original proceeding can be within the scope of Article 21.5.[530]

6.71 As mentioned, the Appellate Body has set out three elements – nature, effect and timing – as additional criteria when assessing whether a measure which is not declared by the respondent to be a "measure taken to comply" nevertheless may be characterized as such. In Norway's opinion, a consideration of these three elements with regard to the current case, supports the view that the determinations that constitute the contested omissions must be evaluated as having a sufficiently close relationship with the recommendations and rulings of the DSB to be included in the scope of the proceeding.[531]

6.72 As regards nature, there can be no doubt that there exist a clear link between the measures in the original dispute and the contested administrative and sunset reviews. The dumping determinations (with zeroing) that were found to violate the *Anti-Dumping Agreement* in the original dispute are the ones that are reviewed and continued in the contested reviews. The effect of these administrative and sunset reviews is to continue the violations of the *Anti-Dumping Agreement* through measures that supersede or replace the measures that were the subject of the original dispute.[532]

6.73 Norway would also like to point to the effect of the line of argument set out by the United States: If these determinations were not to fall within the scope of the proceeding, a new panel would need to be started for each administrative review, and when another administrative review superseded the first, another panel would have to be started. This would run counter to the aim of Article 21.5, which is "to promote the prompt compliance with DSU recommendations and rulings and the consistency of "measures taken to comply" with the covered agreements by making it unnecessary for a complainant to begin new proceedings and by making efficient use of the original panelist and their relevant experience".[533]

6.74 With regard to the timing element, the United States argues that "determinations made by a member prior to the adoption of a dispute settlement report are not taken for the purpose of achieving compliance and cannot be within the scope of an Article 21.5 proceeding".[534] In Norway's view, the timing of a review is not the determining factor when it comes to whether or not it is a "measure taken to comply".[535] The important point is rather whether it was completed and/or continued to have effects after the end of the reasonable period of time.[536]

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[530] Norway's Third Party Submission, para. 10, citing Panel Report, *US – Subsidies on Upland Cotton (Article 21.5 – Brazil)*, para. 9.26.

[531] Norway's Third Party Submission, para. 11.

[532] Norway's Third Party Submission, para. 12.

[533] Norway's Third Party Submission, para. 13, citing Appellate Body Report, *US – OCTG Sunset Review (Article 21.5 – Argentina)*, para. 151, referring to Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 72.

[534] Norway's Third Party Submission, para. 14, citing US First Written Submission, para 46.

[535] Norway's Third Party Submission, para. 14, observing that this is also recognized by the Appellate Body: In *US – Softwood Lumber IV (Article 21.5 – Canada)* it found a measure that was initiated prior to the adoption of the original report to be within the scope of the proceeding.

[536] Norway's Third Party Submission, para. 14.

6.75 In light of the above, it is Norway's opinion that all measures referred to in EC's First Written Submission fall within the scope of the Panel's jurisdiction as provided for in Article 21.5 of the DSU, including measures that have confirmed, superseded and/or replaced the original measures.[537]

6.76 Norway notes that the EC contends that the United States has extended the duration of the measures challenged in the original dispute pursuant to sunset review proceedings concluded partly before and partly after the expiry of the reasonable period of time, by relying on past dumping margins calculated with the use of zeroing in determining the likelihood of dumping in those cases.[538] The EC submits that the United States by doing so violated Articles 2.1, 2.4, 2.4.2 and 11.3 of the *Anti-Dumping Agreement*.[539]

6.77 Norway contends that the Appellate Body has held that all dumping margins in sunset reviews conducted in accordance with Article 11.3, must conform to the disciplines of Article 2.4. If the margins are calculated using a methodology that is inconsistent with Article 2.4, then this could give rise to an inconsistency not only with Article 2.4, but also with Article 11.3.[540] The Appellate Body has confirmed that this also applies where the investigating authority relies on margins calculated (with the use of zeroing) during periodic reviews.[541]

6.78 Based on the above, Norway considers that the United States has violated Article 2.1, 2.4, 2.4.2 and 11.3 of the *Anti-Dumping Agreement* by relying on past dumping margins calculated with zeroing, in determining the likelihood of dumping in the sunset review proceedings related to measures challenged in the original dispute.[542] Norway respectfully requests the Panel to examine carefully the facts presented by the parties to this case in light of its arguments, in order to ensure a proper and consistent interpretation of the DSU and the *Anti-Dumping Agreement*.[543]

VII. INTERIM REVIEW

7.1 On 12 August 2008, the Panel issued its Interim Report to the Parties. On 9 September 2008, both parties submitted requests for the review of precise aspects of the Interim Report, and on 16 September 2008, the parties submitted comments on each other's requests for review. In addition, on 23 September 2008, the United States submitted a letter in response to the EC Comments, and the European Communities submitted a letter in response on 26 September 2008. Neither party requested an interim review meeting.

7.2 This section of our Report summarizes each party's request for interim review as well as our response to the arguments made at the interim review stage, wherever we felt that an explanation was necessary. Due to changes as a result of interim review, the numbering of paragraphs and footnotes in the Final Report has changed from the Interim Report. The parties' requests and comments referred to sections, paragraph numbers and footnotes in the Interim Report. For the sake of clarity, we have indicated the corresponding paragraphs and footnotes in the Final Report where changes have been made. We have also made additional editorial corrections to the Interim Report for the purposes of clarity and accuracy.

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[537] Norway's Third Party Submission, para. 15.
[538] Norway's Third Party Submission, para. 16, citing EC First Written Submission, para. 69.
[539] Norway's Third Party Submission, para. 16, citing EC First Written Submission, para. 71.
[540] Norway's Third Party Submission, para. 17, citing Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, paras. 127 and 130.
[541] Norway's Third Party Submission, para. 17, citing Appellate Body Report, *US – Zeroing (Japan)*.
[542] Norway's Third Party Submission, para. 18.
[543] Norway's Third Party Submission, para. 19.

A. EC REQUESTS FOR REVIEW

7.3 The European Communities requests that we include, in the description of the measures at issue contained in paragraph 3.2 of the Interim Report, the "US omissions or deficiencies when complying with the DSB's recommendations and rulings", which it submits it has brought before us in addition to contesting US measures in the form of certain Section 129 Determinations and subsequent reviews (including cash deposits and liquidations resulting from the measures at issue in the original dispute and subsequent reviews).[544] The United States objects to the EC request, arguing that neither such omissions nor deficiencies were set forth as distinct measures in the EC panel request or First Written Submission, and considers that paragraph 62 of the EC First Written Submission does not support its request.

7.4 We note that the European Communities has, in its arguments before us, referred to the US omissions and deficiencies in the US implementation of the DSB's recommendations and rulings. Those references were, however, primarily made in the context of the EC arguments that all the measures challenged by the European Communities, and in particular the subsequent reviews, fall within our terms of reference. Yet, it is clear from the EC requests for findings and from Section VIII of our report that part of the "measures" placed by the European Communities before us are indeed not positive acts, but rather omissions on the part of the US in bringing itself into compliance with the DSB's recommendations and rulings. We have therefore made the addition to paragraph 3.2 suggested by the European Communities, but have qualified it by the addition of the term "related", to better reflect the subsidiary role of such "omissions" in the EC arguments.

7.5 The European Communities requests that we include, in paragraphs 4.1 and 5.185 of the Interim Report, a reference to its request for a finding concerning the Panel's composition. The United States did not comment on the EC request for review in this respect. We have made the inclusion suggested by the European Communities in what are now paragraphs 4.2 and 5.185 of the Final Report.

7.6 The European Communities requests, and we have made, an addition to what is now paragraph 8.22, to reflect an EC argument that the United States seems to have correctly understood the measures covered by this dispute when referring to Charts I and II of the Annex to the EC panel request in its First Written Submission. As it is clear that this paragraph reproduces the EC arguments before the Panel, we see no need to use the alternative language suggested by the United States in its Comments on the EC request. In addition, the European Communities also requests that we insert, after the third sentence of paragraph 8.31 of the Interim Report, a cross-reference to this same paragraph 8.22. The United States objects to this EC request. We decline to make the change requested by the European Communities. The European Communities has provided no justification for its request in this respect. Paragraph 8.31 of the Interim Report sets out the Panel's interpretation of Article 6.2 (as opposed to the parties' arguments) and, as pointed out by the United States, the change suggested by the European Communities would modify the sense of this paragraph.

7.7 The European Communities requests that we make certain changes to the description of the measures at issue by the original panel and the Appellate Body in paragraphs 8.67-8.71 of the Interim Report.

7.8 First, the European Communities requests that we specify, in paragraph 8.67 of the Interim Report, that the footnote at the end of paragraph 8.1(a) of the report of the original panel refers back to the findings contained in paragraph 7.32 of that same report which, as indicated in paragraph 8.66 of the Interim Report, refers back to footnote 119. The United States does not comment on this EC

[544] The European Communities refers to para. 62 of its First Written Submission.

request, and we made the modification suggested by the European Communities to what is now paragraph 8.66.

7.9 Second, the European Communities requests that we modify paragraph 8.69 of the Interim Report, substituting the words "refer to this footnote directly or indirectly" to the words "refers either to this footnote[608] or to Exhibits EC-16 to EC-31[609]", and making corresponding changes to footnotes 608 and 609 in the Interim Report, to reflect the fact that all the paragraphs cited refer directly or indirectly to footnote 202. The United States suggests alternative language. Rather than making the change suggested by the European Communities, we have amended what are now footnotes 610 and 611 to reflect the fact that even where the original panel refers to Exhibits EC-16 to EC-31, by virtue of cross-references, the reference to these Exhibits in turn, eventually refers back to footnote 202.

7.10 Third, the European Communities requests that we add, at the beginning of paragraph 8.70 of the Interim Report, a reference to footnote 9 of the Appellate Body report concerning the original investigations at issue in the original dispute, and which refers to paragraph 2.6 and footnote 119 of the report of the original panel. The United States objects to the change proposed by the European Communities, on the ground that paragraph 8.70 of the Interim Report concerns administrative reviews, not original investigations. We decline to make the addition suggested by the European Communities. Our report includes a discussion of the Appellate Body's description of the administrative reviews at issue because, with respect to administrative reviews, it was the findings of the Appellate Body that were adopted by the DSB. The Appellate Body did not disturb the panel's findings on the EC "as applied" claims with respect to original investigations; we therefore see limited relevance in describing the Appellate Body's description of these measures in the introductory section of its report. We now explain this in new footnote 612. In any case, the Appellate Body merely refers back to paragraph 2.6 and footnote 119 of the report of the original panel, which are already reproduced in paragraph 8.63 of the Final Report.

7.11 Fourth, the European Communities requests that we include, in footnote 612 to paragraph 8.71 of the Interim Report, additional references to other paragraphs of the Appellate Body Report where, the European Communities indicates, the Appellate Body also referred to original investigations and administrative reviews "at issue". The United States objects to the EC request. It submits that paragraph 8.71 pertains to administrative reviews and that some of the additional paragraphs listed by the EC concern original investigations; others concern the Appellate Body's summarization of either the EC or the US arguments. We have, in response to the EC request, made it clear that the list contained in what is now footnote 613 is not exhaustive (it lists those paragraphs most relevant to the Appellate Body's findings with respect to the EC "as applied" claims concerning administrative reviews). Consistent with the preceding paragraph, we see no need to make reference to the Appellate Body's description of the measures at issue with respect to the EC claims concerning original investigations.

7.12 Finally, the European Communities requests that we include, before paragraph 8.71 of the Interim Report, a reference to its Notice of Appeal in the original dispute, which described the measures at issue by reference to paragraph 2.6 of the report of the original panel, and that we indicate that the US did not bring any claims against such a description before the Appellate Body. The United States submits that the EC's own description of the measures at issue has no place in this portion of the report. In addition, the US contests the EC assertion that "the United States did not contest such a description before the Appellate Body". As the United States points out, this section of our report describes the description of the measures at issue by the panel and the Appellate Body in the original dispute. While we consider that the EC's panel request in the original dispute sheds light on the scope of the measures at issue (see paragraph 8.74 of the Final Report), in our view the EC's Notice of Appeal did not have the effect of delimiting the scope of the original proceeding. Indeed, the EC's Notice of Appeal described the measures at issue by reference to paragraph 2.6 of the report

of the original panel. As a result, we decline to make the addition suggested by the European Communities.

7.13 The European Communities requests that we add language at the end of paragraph 8.114 of the Interim Report in order to fully reflect its arguments. The United States does not object to this request of the European Communities, and we have made the addition suggested by the European Communities in what is now paragraph 8.113. The European Communities also requests that we insert the words "based on zeroing" in the text of paragraph 8.119 of the Interim Report. The United States objects to this proposed change, which it submits would change the meaning of the Panel's finding. While the EC request concerns, as the United States points out, our findings, we consider that the addition suggested by the European Communities eliminates an ambiguity which existed in the text of the Interim Report and better reflects the intent behind our findings. We have therefore made the change requested by the European Communities in what is now paragraph 8.118.

7.14 The European Communities requests that, in order to provide a complete description of the issues not contested by the United States on this point, the Panel make a reference, at the end of footnote 897 of the Interim Report to the fact that the United States has not contested the 75 per cent figure provided by the European Communities. The United States objects to the EC request, submitting that, as indicated in footnote 897 of the Interim Report, the European Communities failed to support the 75 per cent figure with any documentary evidence and failed to even make a *prima facie* case. Therefore, the United States considers that no response from it was necessary on this point. We have, in light of the parties' comments, clarified what is now footnote 905 by noting the fact that the United States did not comment on the 75 per cent figure presented by the European Communities. We have also made it clear that our conclusion that the European Communities has made a *prima facie* case that the volume of "dumped imports" decreased by virtue of the Section 129 determinations is not dependent on the evidence submitted by the European Communities with respect to the precise volume of imports that could no longer be regarded as dumped.

7.15 The European Communities requests that, in order to fully reflect its argument on this point, we insert the term "cooperating" in paragraph 8.280 of the Interim Report to qualify the terms "exporters and producers". The United States did not comment on this EC request. We do not consider that the addition requested by the European Communities is warranted. What is now paragraph 8.281 contains our findings on the scope of Article 9.4. Its primary aim is not to reproduce the detail of the EC argument. Further, making the addition suggested by the European Communities would detract the reader from the point that this paragraph seeks to make, *i.e.*, the contrast between disciplines with respect to the *calculation* of the "all others" rate itself (the EC argument) and disciplines concerning the *ceiling* applicable to the "all others" rate (our interpretation of Article 9.4).

B. US REQUESTS FOR REVIEW

7.16 The United States requests that we eliminate the references to the original panel in the fourth and fifth sentences of paragraph 8.107 of the Interim Report. The United States submits that it was the Appellate Body, and not the panel in the original dispute that relied on the rationale discussed in the fifth sentence of paragraph 8.107, and that the original panel did not find that the definition of dumping in Article 2 contained a general obligation not to zero. The European Communities objects to the US request and disagrees with the US view that the original panel did not rely on the rationale quoted in the fifth sentence of paragraph 8.107. In addition, the European Communities submits that the United States fails to read the original panel report *as modified* by the Appellate Body Report, which is what was adopted by the DSB. The European Communities further submits that the present panel is correct to observe that the considerations that have played a role in prior panel and Appellate Body reports condemning zeroing are fundamentally slightly different ways of expressing the same basic point, reflecting coherent reasoning that respects the overall design and architecture of the relevant provisions and the *Anti-Dumping Agreement* and Article VI of the GATT 1994, considered as

a whole. We agree with the United States that paragraph 8.107 of the Interim Report primarily reflected the Appellate Body's reasoning in the original dispute. We have, in order to clarify the situation, added a discussion of the rationale for the original panel's finding with respect to zeroing in original investigations in new paragraph 8.106. That being said, we agree with the European Communities concerning the reasoning of the panel and Appellate Body, and believe it is clear from new paragraph 8.106 that the panel and the Appellate Body both relied in their reasoning on a basic requirement to calculate dumping for the product as a whole, and to take into account all intermediate comparisons where such comparisons are made by the investigating authority, which derives from Article 2.1 of the *Anti-Dumping Agreement*, and also finds expression in Article 2.4.2 ("all comparable export transactions").

7.17 The United States suggests that the Panel clarify the first sentence of paragraph 8.175 of the Interim Report by deleting the words "the date of the final assessment of the duties, *i.e.*" The United States submits that this phrase does not specifically characterize either of the two dates to which the Panel refers, and that it creates ambiguity as to the Panel's view of the appropriate dates. The European Communities objects to the US request in this respect. The European Communities considers that the phrase at issue does not create ambiguity, and that its deletion would imply that the Panel would only provide a partial explanation of its views. In addition, the European Communities notes that the Panel refers to "final assessment of duties" in other paragraphs of the Interim Report.[545] We do not consider that the phrase at issue creates any real ambiguity as to our views on the relevant date. When read in light of paragraph 8.174, it is clear that the relevant date is that of the determination of the amount of anti-dumping liability due. We have now made this more explicit. Further, we consider it useful to maintain the phrase at issue because the purpose of the first sentence of paragraph 8.175 is to explain that such a determination occurs either at the time of the conclusion of the administrative review proceedings or, where such proceedings are not requested, on the date on which the right to request such a review has lapsed. In addition, where an administrative review proceeding is rescinded, the relevant date would be that of the rescission of the proceeding. This has now been made clear in what is now footnote 769.

7.18 The United States submits that the last clause of the fifth sentence of paragraph 8.192 of the Interim Report, ("even where the court proceedings were unsuccessful in challenging the final duty liability determination"), could be misinterpreted to mean that the outcome of litigation is somehow relevant to the date of implementation, and suggest that we replace it with "as a result of court proceedings". In addition, the United States submits that the relevant date of implementation appears less clear in the phrase "at the time of the administrative review proceedings" contained in paragraph 8.193 of the Interim Report. In order to be consistent with our finding that the relevant date for implementation is the date of the final determination, the United States suggests that we use the formulation "the date that the United States made its final administrative review determination". The European Communities objects to these US requests. The European Communities considers that the United States bases its request on an incorrect interpretation of footnote 798 of the Interim Report, and submits that the reference to "court proceedings" in paragraph 8.192 of the Interim Report is clearly made in the context of the Panel's rebuttal of the EC's theory of implementation and, thus, does not mean that the Panel implied that "the outcome of litigation is somehow relevant to the date of implementation". Finally, the European Communities considers that the reference to "at the time of the administrative review proceedings" in paragraph 8.193 of the Interim Report is sufficiently clear.

7.19 We decline to make the changes requested by the United States. We do not agree with the United States that paragraph 8.192 of the Interim Report, as drafted, suggests that the outcome of the litigation is relevant to the date of implementation, and note in this respect, our use of the term "even" at the beginning of the phrase at issue. Likewise, we see no need to modify paragraph 8.193 of the

[545] The European Communities refers to, *e.g.*, paras. 8.110, 8.183, 8.207, and 8.212 of the Interim Report.

Interim Report as requested. In this respect, we have now made it clear in what is now footnote 769 that we do not use the term "final determination" to distinguish between the issuance of the "Final Results" and any "Amended Results" in the administrative review process.

7.20 The United States argues that our finding, set forth in paragraphs 8.211-214 and 8.127 of the Interim Report, that the 2004-2005 administrative review in case 6 falls within our terms of reference is contrary to our finding that our terms of reference only properly include definitive duty determinations made *after* the end of the reasonable period of time. The United States also submits that we have elsewhere emphasized that the relevant date for implementation is that on which the administering authority *makes the decision* of final liability (paragraph 8.174 of the Interim Report). The United States notes that while the final determination of the 2004-2005 review in case 6 was published in the Federal Register on 10 April 2007, it was signed by the USDOC on 4 April 2007. The United States considers that it is this date that is relevant under the Panel's line of reasoning because that is the date on which the USDOC made its substantive decision of final liability Furthermore, the United States argues that the date of the USDOC's amended final determination (9 May 2007) cannot legitimately be construed as the date the USDOC *made* its decision because the sole purpose of that amended determination was to make ministerial corrections to the substantive decision made on 4 April 2007. The United States submits that, were the Panel to include this determination within its terms of reference by virtue of the date of the amended final determination, it would in effect be requiring the USDOC to remake a substantive determination that was made prior to the end of the reasonable period of time, and solely as a result of the USDOC's decision to recognize and correct ministerial errors that have nothing to do with the substantive issues being argued before this Panel. As a result, the United States requests that we find that the determination falls outside our terms of reference and otherwise not make any findings with respect to this determination in our Final Report.

7.21 The European Communities objects to the US request for review, and submits that, as stated in paragraph 8.127 of the Interim Report, the Panel's terms of reference include subsequent reviews "adopted" following the date when the original reports were adopted by the DSB. Thus, the assessment review at hand (conducted in 2007) clearly falls under the Panel's terms of reference. Further, the European Communities observes that the United States mistakenly assumes that the Panel took into account the date on which the investigating authority "makes the decision of final liability". Yet, it is evident from Interim Report that the Panel took into account the date when the results of the assessment proceeding were *published* in the Federal Register, as this is the moment when the results of the assessment review are made public to all interested parties, and the date as of which new cash deposits are established. The European Communities also notes that the results of the amendment published on 9 May 2007 did not modify the cash deposits resulting from the original determination made on 10 April 2007: the notice published in the Federal Register on 9 May 2007 states that "The Department will also notify CBP of the revised cash deposit rate for FSAB, effective upon publication of these amended final results of the review". Thus, the amended cash deposit entered into force on 9 May 2007. Consequently, since the original and the amended determinations were published after the end of the reasonable period of time, the European Communities requests that the Panel reject the US request for review.

7.22 We see no reason to modify our finding that the 2004-2005 administrative review in case 6 falls within our terms of reference and that the US obligation to implement extended to that determination. First, as is clear from what is now paragraph 8.121, we consider that this review falls within our terms of reference because it was published following the adoption of the DSB's recommendations and rulings. Second, we have, in our findings with respect to the temporal scope of the US obligation to implement, made it clear that it is the date of the determination of the final anti-dumping liability that is the relevant date to determine the US obligation to implement. Here, the final anti-dumping liability was determined on the date of the amended administrative review determination, since that determination changed the margin of dumping established for Fagersta in the

original administrative review determination from 20.42 per cent to 19.36 per cent, and thus changed its liability for anti-dumping duties. See also, in this respect, new footnote 769. Further, we consider that the relevant date cannot, in this context, be the date of the internal decision-making process, but rather, has to be the date on which a measure takes effect, *i.e.*, the date of publication.

7.23 The United States requests that we amend footnote 825 to paragraph 8.219 of the Interim Report and suggests alternative language to clarify it. The European Communities considers that the original footnote reads well and reflects the US arguments. The European Communities also suggests alternative language, should the Panel wish to modify the footnote. We agree with the United States that the footnote could be better formulated and have clarified what is now footnote 819.

7.24 The United States requests that we reverse our findings on the injury determinations in cases 2, 3, 4 and 5 (paragraphs 8.252-8.270 of the Interim Report). The main elements of the lengthy argument submitted by the United States on this issue are as follows: First, the United States submits that we need not address the EC claims with respect to "injury", and that our findings in this respect will do nothing to help resolve the dispute, given that the AD orders at issue have been revoked. Next, United States submits that the injury determinations are not within our terms of reference as they are not "measures taken to comply". The United States also argues that the Appellate Body Report in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5)*, on which, the United States argues, we rely to support our findings, is distinguishable from the instant compliance proceeding. In addition, the United States argues that there is no obligation in the *Anti-Dumping Agreement* automatically to revise an injury determination in light of a revised dumping determination. In the US view, other provisions of the *Anti-Dumping Agreement*, specifically Articles 11.2 and 11.3, provide a vehicle to review an injury determination in order to address developments arising after the issuance of the determination. The United States concludes by noting that how it complies with DSB recommendations and rulings is up to the United States and that, in this case, it conducted sunset reviews of the orders that took into account the USDOC's Section 129 determinations, and led to the revocation of the orders.

7.25 The European Communities objects to the US request. The European Communities considers that the Panel was required to make the findings at issue given that, at the time of the Panel's establishment, the orders were still in place. The European Communities also submits that, contrary to what the United States asserts, our findings did not concern the original injury determinations *per se*: rather, our findings concerned the US failure to reassess the injury determinations in light of the new volumes of dumped imports when keeping the anti-dumping duties in place as a result of the Section 129 Determinations. The European Communities adds that a compliance panel can examine the "totality" of claims relating to the consistency of "measures taken to comply" with the covered agreements (continuing violations, new violations and consequential violations of the covered agreements) and that, in this case, it argued that its claims related to new measures (*i.e.*, the Section 129 Determinations) against which new claims could be made. In this respect, the US obligation to reassess the injury determinations derives from the original DSB recommendation to bring its measures into conformity with the *Anti-Dumping Agreement*; if the measures taken to comply do not comply with the *Agreement*, then the United States cannot argue that there is no obligation to revise its injury determinations as a consequence of the revised dumping determinations. Finally, the European Communities argues that the United States has, in its request for review, submitted new evidence, and made new arguments that were not made previously during this compliance proceeding – for instance, the European Communities submits that the United States never argued that the injury determinations were not measures taken to comply, and cannot do so at the interim review stage.

7.26 We note first that the US request for review contains a number of arguments which were not made, or at least were not developed, during the course of this proceeding. For instance, while the United States argued during the course of the proceeding that there were no DSB recommendations

and rulings concerning the issue of "injury", the United States did not previously explicitly assert that the EC claims regarding injury concerned measures which are not "measures taken to comply". The purpose of the interim review stage is not to allow a party to raise new arguments or develop arguments which were at most merely alluded to during the course of the proceeding. That said, we consider it useful to address certain of the points made by the United States in its request for review.

7.27 First, while it may be permissible for the United States to bring its measures into conformity through the conduct of sunset reviews resulting in the revocation of the orders as a general matter, in this case, as of the date of establishment of this panel, the orders remained in force. As we explain in our findings, it is for that reason, *i.e.*, the fact that the United States had allegedly **not** brought itself into conformity as of the date of the Panel's establishment, that we consider that the US measures at issue fall within our terms of reference. The US argument that it could bring itself into conformity in the manner it chose, in this case, through the revocation of the orders as a result of the sunset review determinations, overlooks that temporal element of the US obligation to bring itself into conformity with its obligations. We need not comment further on the US arguments that it can do nothing more to bring itself into conformity; we have already addressed this issue in paragraph 8.249 of the Report. We have, however, substantially revised that same paragraph to make it clear that while we consider that the US measures taken to comply fall within our terms of reference, we consider that we, as any other panel, retain the discretion to make, or not make, findings with respect to the claims and measures falling within our terms of reference (the "matter" referred to us by the DSB).

7.28 We have already addressed, at paragraph 8.258 of our Report, the US arguments (already made in its Response to Panel Question 51) concerning the Appellate Body Report in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*. The Appellate Body Report in that case concerns more than the scope of the measure take to comply, the aspect of the decision to which the United States limits its comments; it also addresses the applicability of the "stare decisis" principle enunciated in *EC – Bed Linen (Article 21.5 – India)*. This latter element is the one which was specifically addressed in the report at paragraphs 8.258-8.259. Finally, and related to this, even though in our view the United States did not, in the course of this proceeding, argue that the EC claims concerned measures that are not "measures taken to comply", for the sake of completeness, we have now addressed that issue explicitly in our findings. See what is now paragraph 8.264.

C. REQUESTS BY BOTH PARTIES CONCERNING THE SAME ASPECTS OF THE INTERIM REPORT

7.29 The European Communities requests that the Panel make certain changes to paragraphs 8.139 and 8.140 of the Interim Report in order to avoid a potential contradiction between these two paragraphs. The European Communities requests that we modify the first sentence of paragraph 8.140 of the Interim Report to read "even if the EC has made a *prima facie* case" or, alternatively, that we delete the first part of the first sentence of paragraph 140, and start with "[H]owever, we cannot make ..."

7.30 In its own request for review, the United States submits that the European Communities has not supplied any evidence to demonstrate that zeroing was actually employed in calculating the margins relied upon in the sunset reviews at issue and has therefore not made a *prima facie* case in this respect. For this reason, the United States does not believe that there exists a basis for our conclusion that the margins relied upon in the sunset reviews were calculated by using zeroing and requests that we delete the last sentence of paragraph 8.139. In its Comments on the EC request, the United States indicates that it considers that both the last sentence of paragraph 8.139 and the first sentence of paragraph 8.140 are not relevant to the Panel's finding because the Panel ultimately declines to make a finding as to the contested sunset reviews. The United States also agrees with the EC's alternative suggestion to modify the first sentence of paragraph 8.140. The European Communities objects to the US request to delete the last sentence of paragraph 8.139, and disagrees

with the US view that it has failed to make a *prima facie* case that zeroing was actually employed in the margins relied upon in the sunset reviews at issue.

7.31 We have examined the parties' requests to amend paragraphs 8.139-8.140 of the Interim Report, as well as their comments on each other's request, and decline to amend either of these paragraphs. We consider that they are clear and accurately reflect our reasoning.

7.32 Both parties submit that paragraph 8.208 of the Interim Report contains a factual error: the rate challenged by the European Communities in the 2004-2005 administrative review in case 1 stems from the 2004-2005 administrative review, not from the original investigation. Each party suggests alternative language. We agree that as originally drafted, what is now paragraph 8.207 suggested that the Panel was referring to the cash deposit rate from the 2004-2005 review in the sentence identified by the parties. We have reformulated this paragraph, and the following paragraph, in order to eliminate that confusion.

VIII. FINDINGS

A. ORDER OF THE PANEL'S ANALYSIS

8.1 Our findings are organized as follows: In the next few pages, we recall the basic principles that govern the exercise of our authority under Article 21.5 of the DSU. Next, we examine two preliminary issues. The first concerns claims of the European Communities in relation to the composition of this Panel. The second concerns US requests for preliminary rulings, in which the United States requests us to find that "subsequent" administrative and sunset reviews, taken in relation to the same AD orders as the measures at issue in the original dispute, and with respect to which the European Communities makes claims, are not properly before us.

8.2 We will then proceed to examine the substance of the EC claims insofar as they are within our terms of reference. We will first consider the EC claims with respect to all the measures which the European Communities includes in its panel request; these claims concern whether the United States has complied with the recommendations and rulings of the DSB in the original dispute. Lastly, we will address EC claims concerning the consistency of certain US measures taken to comply (specific Section 129 determinations) with the *Anti-Dumping Agreement* and the GATT 1994.

B. RELEVANT PRINCIPLES REGARDING STANDARD OF REVIEW, TREATY INTERPRETATION AND BURDEN OF PROOF

1. Rules of treaty interpretation

8.3 Article 3.2 of the DSU provides that the dispute settlement system serves to clarify the provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". It is generally accepted that these customary rules are reflected in Articles 31-32 of the *Vienna Convention on the Law of Treaties*. Article 31(1) of the *Vienna Convention* provides:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

2. Standard of review

8.4 Article 11 of the DSU provides the standard of review applicable in WTO panel proceedings in general. This provision imposes upon panels a comprehensive obligation to make an "objective assessment of the matter before it". Article 11 of the DSU provides, in relevant part:

> "The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements."

8.5 Article 17.6 of the *Anti-Dumping Agreement* sets forth a special standard of review applicable to disputes under that Agreement. It provides that:

> "(i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;
>
> (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where 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."

8.6 Taken together, Article 11 of the DSU and Article 17.6 of the *Anti-Dumping Agreement* establish the standard of review this Panel must apply with respect to both the factual and the legal aspects of the present dispute.

3. Burden of proof

8.7 The general principles regarding the allocation of the burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of a WTO agreement by another Member assert and prove its claim.[546] These rules apply equally to proceedings under Article 21.5 of the DSU.[547] The European Communities, as the complaining party, must therefore make a *prima facie* case of violation of the relevant provisions of the WTO agreements it invokes, which the United States must refute. A *prima facie* case is one which, in the absence of effective refutation by the other

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[546] Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India* ("*US – Wool Shirts and Blouses*"), WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, 323, p. 14. With respect to these general rules on allocation of the burden of proof, the Appellate Body has observed:

> "[I]n WTO dispute settlement, as in most legal systems and international tribunals, the burden of proof rests on the party that asserts the affirmative of a claim or defence. A complaining party will satisfy its burden when it establishes a *prima facie* case by putting forward adequate legal arguments and evidence. The nature and scope of arguments and evidence required 'will necessarily vary from measure to measure, provision to provision, and case to case'. When a claim is brought against a WTO Member's legislation or regulation, a panel may, in some circumstances, consider that the text of the relevant legal instrument is sufficiently clear to establish the scope and meaning of the law. However, in other cases, a panel may consider that additional evidence is necessary to do so. Once the complaining party has established a *prima facie* case, it is then for the responding party to rebut it." (footnotes omitted).

Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina* ("*Chile – Price Band System (Article 21.5 – Argentina)* "), WT/DS207/AB/RW, adopted 22 May 2007, para. 134.

[547] Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 136.

party, requires a panel, as a matter of law, to rule in favour of the party presenting the *prima facie* case. We also note, however, that it is generally for each party asserting a fact, whether complainant or respondent, to provide proof thereof.[548] In this respect, therefore, it is also for the United States to provide evidence supporting the facts which it asserts.

8.8 The Appellate Body recently discussed the application of the general rules on the allocation of the burden of proof in the context of Article 21.5 of the DSU as follows:

> "The text of Article 21.5 expressly links the 'measures taken to comply' with the recommendations and rulings of the DSB concerning the original measure. A panel's examination of a measure taken to comply cannot, therefore, be undertaken in abstraction from the findings by the original panel and the Appellate Body adopted by the DSB. Such findings identify the WTO-inconsistency with respect to the original measure, and a panel's examination of a measure taken to comply must be conducted with due cognizance of this background. Thus, the adopted findings from the original proceedings may well figure prominently in proceedings under Article 21.5, especially where the measure taken to comply is alleged to be inconsistent with WTO law in ways similar to the original measure. In our view, these considerations may influence the way in which the complaining party presents its case, and they may also be relevant to the manner in which an Article 21.5 panel determines whether that party has discharged its burden of proof and established a *prima facie* case."[549]

C. EC CLAIMS WITH RESPECT TO THE COMPOSITION OF THE PANEL

8.9 We first address an issue raised by the European Communities in its Second Written Submission concerning the composition of this Panel. The European Communities considers that this is an issue which the Panel has an inherent jurisdiction and the duty to examine *ex officio* by providing a proper interpretation of the DSU. The United States argues that the EC claims in this respect are not within the terms of reference of the Panel because they are not part of the "matter" referred to the DSB by the European Communities in this dispute, and that this claim is not about a measure identified in the EC Article 21.5 panel request.

1. Main arguments of the parties

8.10 The **European Communities**[550] argues that the Panel was improperly constituted under Articles 8.3 and 21.5 of the DSU. The European Communities notes that with the agreement of the parties pursuant to Article 8.3 of the DSU, the original panel included citizens of the Members whose governments are parties the dispute. When this Article 21.5 panel was established, two members of the original panel were unavailable. During the ensuing composition process, the United States withdrew its agreement pursuant to Article 8.3 to the service of citizens of Members whose governments are parties to the dispute. The European Communities argues that it "had to accede" to the appointment of three new panelists in order for composition to proceed, whilst protesting that it was not consistent with the DSU and without prejudice to its rights.

8.11 Substantively, the European Communities argues that under Articles 8.3 and 21.5 of the DSU, when panelists of the original dispute are available to serve in a 21.5 proceedings, they cannot be unilaterally removed from the panel by one of the parties. In the EC view, the original agreement under Article 8.3 DSU cannot be revoked at any stage of the dispute proceedings, including the compliance panel stage. The European Communities finds contextual support for its interpretation of

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[548] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.
[549] Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 136.
[550] EC Second Written Submission at paras. 4 *ff*.

Article 8.3 of the DSU in Article 8.6, pursuant to which parties shall not oppose panelists other than for "compelling" reasons. According to the European Communities, the nationality of a panelist may not constitute a "compelling" reason to dismiss him, when both parties have already agreed to him serving on any panel concerned with the dispute. The European Communities also finds further support for its arguments in the object and purpose of the DSU, which includes the prompt and effective settlement of disputes (Article 12) by independent panelists (Article 8.2), resulting in binding panel reports (Article 17). The European Communities argues that the Panel has an inherent jurisdiction and a duty to rule *ex officio* on the propriety of its own composition, and requests the Panel to find that composition was not consistent with Articles 21.5 and 8.3 of the DSU.

8.12 The **United States**[551] considers that the EC claim is not within the terms of reference of the Panel because it is not part of the "matter" referred to the DSB by the European Communities in this dispute, and that this claim is not about a measure identified in the EC Article 21.5 panel request – in fact, the United States questions whether such a claim could ever fall within the scope of a panel's terms of reference.[552]

2. Evaluation by the Panel

8.13 The European Communities claims that Articles 8.3 and 21.5 of the DSU were violated in the panel composition process and that, as a result, this Panel was improperly composed.[553] Should we agree with the European Communities that we may rule on the issue of our own composition and agree with the EC arguments on substance, we would have to conclude that we have no jurisdiction to examine and rule on the other EC claims in this dispute.

8.14 The EC claims and arguments raise the question whether a panel may rule on the propriety or consistency with the DSU of its own composition. It is surprising that it is the complaining party in this dispute that raises this issue. But in any event, we do not believe that we need to address this question comprehensively.

8.15 We note that this Panel was composed by the Director-General of the WTO pursuant to the provisions of Article 8.7 of the DSU. That paragraph provides:

> "If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, *the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with*

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[551] US Second Written Submission at para. 4 *ff*.

[552] The United States also submits that the European Communities did not have its permission to disclose anything that the United States may or may not have said during the panel composition process, and requests the Panel to strike from the record any discussion of the panel selection process other than the EC allegations concerning its own positions, and to request third parties to destroy or return this information. In response to the US request, we have edited the summaries of the parties' arguments in order to redact any reference to statements by the United States during the panel composition process.

[553] Article 8.3 of the DSU provides as follows:

> "Citizens of Members whose governments are parties to the dispute or third parties as defined in paragraph 2 of Article 10 shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise." (footnote omitted)

Article 21.5 provides, in relevant part, that:

> "Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel."

> *any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute*. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request." (emphasis added)

8.16 The European Communities has failed to point to any provision of the DSU, and we know of none, that would give us authority to make a finding or ruling with respect to the application, by the Director-General of the WTO, of the provisions of the DSU regarding panel composition contained in Article 8.7.[554]

8.17 Article 8.7 is clear that whenever there is no agreement between the parties, the ultimate power to compose the panel rests with the Director-General of the WTO. Consequently, we refrain from ruling on the substance of the EC claim with respect to the composition of this panel by the Director-General.[555]

D. US REQUEST FOR PRELIMINARY RULINGS

8.18 The United States makes a request for preliminary rulings, based on two grounds. First, the United States argues that the European Communities seeks to include within the terms of reference of this proceeding measures that were not identified in the EC Article 21.5 request for the establishment of a panel as required by Article 6.2 of the DSU. Second, the United States argues that the European Communities makes claims with respect to determinations that are not measures taken to comply with the recommendations and rulings of the DSB in the original proceeding. Specifically, the United States challenges the inclusion, by the European Communities, of claims concerning administrative reviews that were not at issue in the original proceedings and of claims concerning sunset reviews.

8.19 We examine, in turn, each of the two grounds raised by the United States, starting with the US argument that some measures were not identified by the European Communities in its Article 21.5 panel request.

1. Whether the European Communities makes claims with respect to measures that were not identified in its panel request

(a) Main arguments of the parties

8.20 The **United States**[556] notes that Article 6.2 of the DSU provides that a panel request shall "identify the specific measures at issue". The United States submits that the key passage of the EC

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[554] At least two prior WTO panels have taken a similar view. See Panel Report, *United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil* ("*US – Upland Cotton (Article 21.5 – Brazil)*"), WT/DS267/RW and Corr.1, adopted 20 June 2008, as modified by Appellate Body Report, WT/DS267/AB/RW, para. 8.28; Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico* ("*Guatemala – Cement II*"),WT/DS156/R, adopted 17 November 2000, DSR 2000:XI, 5295, para. 8.11.

[555] In light of our conclusion that the DSU provides no legal basis for us to make any ruling on the exercise, by the Director-General, of his authority under Article 8.7 of the DSU, we do not consider it necessary to examine further the US argument that the EC claims with respect to our composition are not within our terms of reference.

[556] The US arguments are found in the US First Written Submission, paras. 33-35, and in the US Second Written Submission, paras. 10-36.

Article 21.5 panel request in this respect is paragraph 7.[557] The United States asserts that this paragraph plainly states that the measures at issue in this proceeding are the 15 original investigations and 16 administrative reviews that were at issue in the original proceeding. The United States notes that the European Communities, in its submissions, states that the measures listed in the Annex to its Article 21.5 panel request fall within the terms of reference of the Panel. According to the United States, the only reference in the EC Article 21.5 panel request to the Annex is in paragraph 7 ("Details of the reviews in question are set out in the annex"), and that paragraph is clear that the subsequent reviews listed in the Annex are not themselves "measures in question", but only "related to" the "measures in question". For the United States, the European Communities seeks to expand the terms of reference beyond the specific measures identified in its panel request to transform the "reviews", referenced in its panel request as separate and distinct from the "measures at issue", into "measures" within the terms of reference. Therefore, the United States argues, any "measures" other than those reviews are not "measures" subject to findings in this proceeding.

8.21 The **European Communities**[558] asks the Panel to reject the US arguments. The European Communities considers that the United States either ignores or misconstrues the express terms of paragraph 7 of its Article 21.5 panel request when it asserts that the phrase "measures in question" in that paragraph, which refers to the 15 original investigations and 16 administrative reviews at issue in the original dispute, does not encompass the measures that the European Communities seeks to place before this compliance panel. The European Communities submits that the express terms of paragraph 7 refer to "the *reviews related to* the measures in question", and expressly cross-reference the Annex to the panel request, which lists the measures that the European Communities *does* place before this compliance panel.

8.22 In any event, the European Communities considers that it has adequately identified the measures at issue in this dispute in its panel request. The European Communities refers to the Appellate Body Report in *US – FSC (Article 21.5 – EC II)*, where the Appellate Body observed that in order to identify the "specific measures at issue" in an Article 21.5 proceeding, the complaining party must (i) cite the recommendations and rulings made by the DSB in the original dispute, which have allegedly not been complied with, and (ii) identify with sufficient detail the measures allegedly taken to comply with those recommendations and rulings, as well as any omissions or deficiencies therein, or state that no such measures have been taken. The EC panel request fully meets these requirements. The EC request identifies not only the positive acts taken by the United States to comply, but also the omissions and deficiencies in the US compliance: paragraphs 4 and 7 of the EC Article 21.5 panel request state that the "US continues to impose, collect, or liquidate anti-dumping duties at a rate inflated by 'zeroing' beyond 9 April 2007" and that "the US has continued zeroing in the reviews related to the measures in question. The United States has not eliminated zeroing in these reviews...". Moreover, for the purpose of further detailing the omissions and deficiencies, the EC panel request includes an Annex listing "subsequent reviews" carried out by the United States in connection with the 15 original investigations and 16 administrative reviews referred to in the original dispute. Finally, the European Communities argues that the list of "subsequent reviews" contained in the Annex is sufficiently clear so that the United States can know of the measures which are the object of this proceeding. The European Communities observes that the United States seems to have

[557] Quoted at para. 8.28 below – see WT/DS/294/25, Annex A-1 cited in US First Written Submission, para. 33.

[558] See EC Second Written Submission, paras. 25-31. We note that the European Communities anticipated the US request for a preliminary ruling: the European Communities addressed the issue of the jurisdiction of the panel in its First Written Submission, before the United States challenged the jurisdiction of the Panel over EC claims with respect to certain measures. See EC First Written Submission, paras. 47-64.

correctly understood the measures covered by this dispute when referring to Charts I and II of the Annex in its First Written Submission.[559]

8.23 In response, the **United States** submits that the European Communities elected, in its panel request, to refer to the determinations in the 15 original investigations and 16 administrative reviews at issue in the original proceeding as "measures", which the United States considers is a term of art having a particular meaning in the context of Article 6.2 DSU, but only referred to all other determinations in that request as "reviews". The European Communities 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. Further, the United States submits that the reviews are "actions", not omissions, so a fair reading of the panel request does not allow subsequent reviews to be read into the panel request.[560] In response to the EC argument that the US ability to reference the reviews in the Annex is somehow evidence that those reviews are measures, the United States argues that the question is not whether the European Communities listed the reviews. Rather, it is whether the European Communities identified those reviews *as measures* for purposes of this proceeding. Finally, while the European Communities contends that its reference to "omissions" brings the reviews in the Annex within the terms of reference, 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."

(b) Main arguments of the third parties

8.24 **Japan**[561] believes that the EC panel request specifically identified the periodic and sunset reviews that are related to the original measures. Japan notes that the US First Written Submission itself states that the EC panel request "identifies" the very measures that the United States simultaneously says were not "identified".[562] Thus, for Japan, the United States takes issue with the fact that the EC panel request does not state that the reviews are "measures <u>in question</u>", even though it specifically "identifies" them. Japan notes that paragraph 7 of the panel request explains that the reviews specifically identified in the Annex were related to the original measures and describes these reviews as being "in question", the very words that the United States says were not used by the European Communities in connection with the measures.

(c) Evaluation by the Panel

8.25 Article 6.2 of the DSU provides that:

> "The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, *identify the specific measures at issue* and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly...." (emphasis added)

The Appellate Body confirmed, in its Report in *US – FSC (Article 21.5 – EC II)*, that the Article 6.2 requirement to identify the measures at issue in the panel request applies in the context of an Article 21.5 compliance dispute. The Appellate Body observed that:

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[559] EC Second Written Submission, para. 30, referring to US First Written Submission, paras. 23-25.

[560] See also footnote 49 to the US First Written Submission and paras. 12-17 of the US Second Written Submission, where the United States mentions that by using different terms to describe the reviews in question, the EC First Written Submission (as opposed to the EC Article 21.5 panel request) fails to precisely identify the matters and measures at issue.

[561] Japan's Third Party Submission, paras. 7-12.

[562] Japan refers to paras. 24 and 25 of the US First Written Submission.

> "in order to identify the "specific measures at issue" and to provide "a brief summary of the legal basis of the complaint" in a panel request under Article 21.5, the complaining party must identify, at a *minimum*, the following elements in its panel request. First, the complaining party must cite the recommendations and rulings that the DSB made in the original dispute as well as in any preceding Article 21.5 proceedings, which, according to the complaining party, have not yet been complied with. Secondly, the complaining party must either identify, with sufficient detail, the measures allegedly taken to comply with those recommendations and rulings, as well as any omissions or deficiencies therein, or state that *no* such measures have been taken by the implementing Member. Thirdly, the complaining party must provide a legal basis for its complaint, by specifying how the measures taken, or not taken, fail to remove the WTO-inconsistencies found in the previous proceedings, or whether they have brought about new WTO-inconsistencies ..."[563]

8.26 In *US – FSC (Article 21.5 – EC II)*, the United States had argued that the European Communities failed to properly identify certain of the measures at issue in its second Article 21.5 panel request.[564] Thus the issue before the Appellate Body was that of the identification of measures (the second element identified by the Appellate Body in the paragraph quoted above); the Appellate Body characterized this issue as "whether the EC panel request *put the United States on sufficient notice* that a challenge was being brought against the continued operation of" the measure at issue in the first compliance dispute.[565]

8.27 The US arguments before us are, similarly, limited to the issue of the identification of the measures in the EC panel request. Consequently, we must determine whether the EC panel request sufficiently put the United States on notice that it was bringing a challenge against the measures listed in the Annex to that panel request, which the parties and we have, in the course of this proceeding, referred to as "subsequent reviews". The other consideration is, in our view, whether the EC panel request clearly defines the scope of this compliance dispute.[566] Expressed differently, we need to determine whether the EC Article 21.5 panel request creates uncertainty as to the measures that are the subject of this compliance proceeding.

8.28 The parties agree that the paragraph of the EC Article 21.5 panel request that is relevant to the issue of the identification of the "subsequent reviews" as measures at issue in this dispute is paragraph 7, which reads as follows:

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[563] Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Second Recourse to Article 21.5 of the DSU by the European Communities* ("*US – FSC (Article 21.5 – EC II)*"), WT/DS108/AB/RW2, adopted 14 March 2006, para. 62.

[564] Specifically, the United States argued that the European Communities had failed to explicitly reference Section 5 of the ETI Act, the measure at issue in the first compliance proceeding.

[565] Appellate Body Report, *US – FSC (Article 21.5 – EC II)*, para. 65

[566] Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* ("*US – Carbon Steel*"), WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, 3779, para. 126:

> "The requirements of precision in the request for the establishment of a panel flow from the two essential purposes of the terms of reference. First, the terms of reference define the scope of the dispute. Secondly, the terms of reference, and the request for the establishment of a panel on which they are based, serve the due process objective of notifying the parties and third parties of the nature of a complainant's case. ..."' (footnotes omitted)

See also Panel Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain* ("*Canada – Wheat Exports and Grain Imports*"), WT/DS276/R, adopted 27 September 2004, upheld by Appellate Body Report, WT/DS276/AB/R, DSR 2004:VI, 2817, para. 6.10, subparas. 5 and 16-17.

> "With regard to the 15 original investigations and 16 administrative reviews, the US has continued zeroing in the reviews related to the measures in question. The United States has not eliminated zeroing in these reviews though they determine the cash deposit rate currently applicable, and/or are relied upon to maintain the AD measure or to impose, collect or liquidate anti-dumping duties at a rate inflated by zeroing after 9 April 2007. Details of the reviews in question are set out in the annex. For the reasons set out above, this is inconsistent with Article 2, including 2.1, 2.4 and 2.4.2, Article 9.3, and Article 11, including 11.1, 11.2 and 11.3 (since, by relying on zeroed dumping margins, the United States did not properly determine that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury) of the *AD Agreement* and Articles VI:1 and VI:2 of the GATT 1994."[567]

8.29 It is obvious from the text of paragraph 7 that the purpose of this paragraph is to indicate that the European Communities considers that the fact that the United States continued to zero in the "subsequent reviews" listed in the Annex is inconsistent with a number of provisions of the *Anti-Dumping Agreement* and of the GATT 1994. In other words, it is clear that the purpose of that paragraph is to identify the "subsequent reviews" as measures at issue, and it does so by stating that the United States "has continued zeroing" and "has not eliminated zeroing" in the reviews listed in the Annex.

8.30 The United States draws a contrast between the use in paragraph 7 of the term "measures" or "measures in question", which the European Communities employs when referring to the measures (15 original investigations and 16 administrative reviews) at issue in the original proceeding, and the description of "subsequent reviews", in the same paragraph of the panel request, as "reviews related to the measures in question". As part of this argument, the United States asserts that the term "measures" is a term of art having a particular meaning in the context of Article 6.2 DSU.[568] The

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[567] WT/DS/294/25, reproduced in Annex A-1.

[568] The United States states, in para. 13 of its Second Written Submission, that:

> "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'?

Later, in its Answers to the Panel's Questions, the US nuanced its arguments in this respect. See US Answer to Panel Question 1:

> "Q1. US: Is it the US position that, in order to "identify" the "subsequent reviews" as measures at issue in this proceeding consistent with Article 6.2 of the DSU, the EC's Article 21.5 panel request should have, when referring to these (subsequent) reviews, used the precise terms 'measure', 'measure in question', or 'measures at issue'? If so, where does the US find support, in the DSU, or in WTO case law, for such a requirement?"
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> US Answer:
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> "The United States does not take the position that, in general, a panel request must use the term 'measure' to identify the measures at issue. However, the EC's panel request must be examined on the basis of the language used.' In its Article 21.5 panel request, the EC used the word 'measure' to describe the determinations that it had challenged as applied in the original proceeding. In that same panel request, the EC did not use the term 'measure' to describe what we have come to term the 'subsequent reviews.' The EC repeated its deliberate choice of words in the Annexes to its Article 21.5 panel request. Examining the panel request 'on the basis of the language used,' and reading the panel request 'as a whole,' one must give meaning to the EC's deliberate use of 'measures' to describe the determinations in the original proceeding, and its deliberate use of a different term to describe the 'subsequent reviews.' This is particularly so when the EC chose to use the operative term from the text of Article 6.2 itself since the EC is to be understood as invoking Article 6.2 to the extent it uses the language therein, and thus to be understood as choosing not to have the legal effect under Article 6.2 when using different language. ...

United States also submits that "the question is not whether the European Communities listed the reviews. The question is whether the European Communities identified those reviews *as measures* for purposes of this proceeding".[569]

8.31 Insofar as the United States may be ascribing particular significance to the use, by the European Communities, of the term "measure" only in relation to the 31 determinations at issue in the original dispute, we consider that the US arguments are overly formalistic. Article 6.2 does not mandate the use of any particular term in identifying the measures at issue. What that provision requires is that the panel request state with sufficient precision the measures that the complainant is bringing before the panel, so that the respondent is put on notice of which measures are challenged and no uncertainty remains on the scope of the dispute. Whether in doing so the complainant uses the term "measure" is, in our view, at most secondary. Reading the EC Article 21.5 panel request as a whole, as we must[570], we find that it clearly expresses the EC intent to place the "subsequent reviews" before us as part of the "specific measures at issue" in this compliance dispute.

8.32 In light of the above, we find that the EC Article 21.5 panel request sufficiently identifies the "subsequent reviews" as "measures at issue" in this dispute and we therefore decline to make the ruling under Article 6.2 of the DSU requested by the United States.

2. Whether the "subsequent reviews"[571] fall within our terms of reference

(a) Arguments of the parties

8.33 The **United States** submits that the subsequent reviews are not "measures taken to comply" and therefore do not fall within the Panel's terms of reference. The United States requests the Panel to find that the only measures within the terms of reference of this proceeding are the 15 original investigations and 16 administrative reviews at issue in the original dispute.[572] The United States

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> The United States is not asking the Panel to find that Article 6.2 would require the EC to use the term 'measure' to describe the subsequent reviews. Rather, the United States is asking the Panel to find that, reading the EC's panel request as a whole and in context, the EC's deliberate use of the term 'measure' to describe the determinations challenged as applied in the original proceeding, and its deliberate choice not to use that term to describe the 'subsequent reviews,' leads to the conclusion that the EC's Article 21.5 panel request did not identify the 'subsequent reviews' as measures for purposes of this proceeding."

See also United States, Closing Statement at the substantive meeting of the Panel (hereinafter "US Closing Statement"), para. 12:

> "To be sure, a Member is not necessarily obliged to refer to the measures in question as 'measures'; but when a Member expressly uses the term 'measure' – a term of art referenced in Article 6.2 – to describe certain determinations, it can be reasonably inferred that not describing other determinations as 'measures' has meaning, and that those determinations are in fact not measures subject to challenge in the proceeding."

[569] US Second Written Submission, para. 15 (emphasis original).

[570] Appellate Body Report, *US – Carbon Steel*, para. 127: "[C]ompliance with the requirements of Article 6.2 must be determined on the merits of each case, having considered the panel request as a whole, and in the light of attendant circumstances." See also Appellate Body Report, *US – FSC (Article 21.5 – EC II)*, para. 67.

[571] As noted above, we use the terms "subsequent reviews" as a shorthand for the various administrative and sunset review determinations listed in the Annex to the EC Article 21.5 Panel Request, other than the 15 original investigations and 16 administrative reviews at issue in the original dispute.

[572] US First Written Submission, para. 54. The United States also argues that the European Communities apparently understood this to be the case, as it filed a second challenge to the US calculation methodology in an entirely separate proceeding (DS350) and, in its panel request in that dispute, included some

argues that there must be an express link between the alleged measures taken to comply and the recommendations and rulings of the DSB, and that not every measure that has some connection with, or could have some impact upon a measure taken to comply may be scrutinized in an Article 21.5 proceeding. Rather, only those measures "taken *in the direction of, or for the purpose of achieving* compliance [with the recommendations and rulings of the DSB]" fall within the competence of an Article 21.5 panel.[573]

8.34 The United States argues that the European Communities seeks to add to the Panel's terms of reference reviews that are distinct from the measures that were the subject of the DSB recommendations and rulings. With respect to administrative reviews, only the 16 administrative reviews at issue in the original proceeding were the subject of DSB recommendations and rulings; none of the other measures the European Communities seeks to include in these proceedings was the basis for a DSB recommendation or ruling. Further, the European Communities, in its original panel request, identified USDOC determinations in 16 administrative reviews, but challenged *particular margins* in those determinations. The European Communities also challenged *multiple reviews* arising out of the same AD order. Thus, in the original proceeding, the European Communities treated each review as a separate measure, and challenged specific margins in such measures and, in its original panel request, recognized that a determination in one administrative review is separate and distinct from a determination made in a subsequent administrative review. For the United States, this is consistent with the fact that in an investigation and in each administrative review, the USDOC examines different facts for a different time period, and a different set of transactions. The European Communities cannot bring entirely new and distinct review determinations concerning different periods of time into the scope of this proceeding simply because these determinations involved the same subject merchandise.

8.35 The United States also argues based on the timing of the subsequent reviews. First, the United States contests the inclusion by the European Communities of administrative review determinations that *pre-date* the adoption of the DSB recommendations and rulings.[574] Relying on the Appellate Body's statement in *US – Softwood Lumber IV (Article 21.5 – Canada)* that "[a]s a whole, Article 21 deals with events *subsequent* to the DSB's adoption of recommendations and rulings in a particular dispute",[575] the United States considers that determinations that pre-date the adoption of a dispute settlement report are not taken for the purpose of achieving compliance and cannot be within the scope of an Article 21.5 proceeding. The United States notes that some of the disputed determinations even pre-date the revised panel request in the original dispute, meaning that the European Communities is seeking to include in this proceeding determinations that it could have challenged, but did not challenge, in the original dispute.[576]

8.36 The United States argues that the European Communities attempts to use this proceeding to obtain the effect of an "as such" finding with respect to administrative reviews when it argues that the US implementation obligations with respect to the "as applied" claims extend to distinct determinations which supersede the measures at issue in the original dispute. The United States notes that only "as applied" findings were made with respect to administrative reviews in the original dispute and thus there are no DSB recommendations or rulings relating to "as such" findings. With

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of the same measures that are listed in the Annex to its panel request in the present dispute. US First Written Submission, para. 44.

[573] The United States cites from Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 of the DSU* ("*US – Softwood Lumber IV (Article 21.5 – Canada)*"), WT/DS257/AB/RW, adopted 20 December 2005, DSR 2005:XXIII, 11357, para. 66 (emphasis in the original).

[574] See US First Written Submission, footnote 62 for the determinations identified by the United States as having been made prior to the adoption by the DSB of the panel and Appellate Body reports.

[575] Appellate Body Report, *US – Softwood Lumber (Article 21.5 – Canada)*, para. 70.

[576] US Second Written Submission, para. 27.

respect to sunset reviews, the United States recalls that the European Communities did not challenge any sunset review in the original proceeding and thus, there are no DSB recommendations or rulings relating to sunset reviews. The United States argues that, as a consequence, the sunset reviews identified in the EC Article 21.5 panel request cannot be within the terms of reference of this Panel.[577]

8.37 The **European Communities**[578] considers that all the measures referred to in its submissions (*i.e.*, the measures mentioned in the Annex to its Panel request, in addition to the Section 129 determinations explicitly designated by the United States as "measures taken to comply") fall within the scope of this proceeding. The European Communities submits that a complaining party in an Article 21.5 proceeding can challenge either a Member's implementing actions (*i.e.*, measures which have been adopted) or their *omissions* (*i.e.*, measures which should have been adopted) – an Article 21.5 proceeding is not only about the *consistency* of a measure taken to comply with the covered agreements, but also about the *existence* of such a measure.

8.38 The European Communities first argues that the subsequent reviews and assessment instructions with respect to the measures challenged in the original dispute are measures which were covered by the DSB's recommendations and rulings in the original dispute and adds that the "measures taken to comply" necessarily flow from the particular "recommendations and rulings" in question. The European Communities argues that in the present case, the "as applied" measures challenged in the original dispute were described as: (i) the 15 original investigations, *including "any amendments"* and "*each of the assessment instructions* issued pursuant to any of the 15 Anti-Dumping Duty Orders" and (ii) the 16 administrative reviews, including "*any amendment*" and "*each of the assessment instructions* issued pursuant to any of the 16 Notices of Final Results".[579] Therefore, the United States was required to bring the 15 original investigations and 16 administrative reviews at issue in the original dispute, including any amendments and assessment instructions, into conformity. The European Communities considers, in particular, that the United States has failed to take the necessary measures to eliminate zeroing in the subsequent reviews – it has continued using the same methodology which was found inconsistent with the *Anti-Dumping Agreement* and the GATT 1994 by the reports adopted by the DSB when carrying out dumping determinations in subsequent review proceedings referring to the measures at issue in the original dispute. The European Communities also submits that the United States cannot now reopen an issue that was already settled by the panel and the Appellate Body in the original dispute. The European Communities asserts that the United States had tried without success to change the description of the measures when the original panel issued the descriptive part of its report, but that the panel considered that the description of the measures was clear and respected the EC description of the measures, including any amendments and any assessment instructions.[580] The European Communities further argues that the ordinary meaning of the term "amendment" is "change, modification", which is not limited only to "corrections", as the United States submits.

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[577] The United States observes that "the EC appears to have recognized that claims against sunset reviews must be made in the original panel request, because it has expressly done so in its other zeroing dispute [DS350] against the United States". US First Written Submission, para. 52. The United States adds, in footnote 70 to its First Written Submission, that four of the sunset review determinations cited by the European Communities have been terminated because the USDOC revoked the AD orders (cases 2, 3, 4 and 5) effective 7 March 2007. The United States refers to Exhibit US-13.

[578] The European Communities included in its First Written Submission a section entitled "Preliminary Issue: Jurisdiction of the Panel". EC First Written Submission, paras. 47-64.

[579] The European Communities indicates that the original panel described the measures at issue, both in its description of the EC claims, and in its findings, as including "any amendments, including the assessment instructions" to the AD orders, and that the Appellate Body merely referred to the original panel's description of the measures. EC Second Written Submission, paras. 39-43.

[580] EC Opening Statement, para. 13, referring to Exhibit EC-32 and Panel Report, *US – Zeroing (EC)*, paras. 6.12-613.

8.39 The European Communities also submits that the *omissions* and *deficiencies* by the United States are also covered by this proceeding and that, accordingly, the Panel is called upon to examine the existence (or non-existence) of measures taken to comply by the United States, in particular by examining the subsequent review proceedings listed in the Annex to the Panel Request. The complainant in an Article 21.5 case can challenge either a Member's implementing actions (measures that have been adopted, *i.e.*, measures taken to comply) or omissions (measures which should have been adopted, *i.e.*, measures which do not exist).[581] The European Communities considers that the Section 129 determinations are insufficient to comply with the DSB recommendations and rulings because the United States has continued using zeroing when calculating the duties to be collected and establishing new cash deposits with respect to the measures challenged in the original dispute (including those listed in the Annex as subsequent measures), and because the United States has relied on the dumping margins calculated with zeroing when finding a likelihood of recurrence of dumping in sunset review proceedings. In this sense, in addition to challenging certain Section 129 determinations, the European Communities challenges the *omissions* by the United States to take the necessary measures to comply. According to the European Communities, the United States, on 9 April 2007, (i) should have stopped taking any positive acts providing for the collection of anti-dumping duties based on zeroing in connection with any of the measures at issue in the original dispute, and thus, with respect to the "subsequent reviews",[582] and (ii) should have recalculated, without zeroing, the previous dumping margins based on zeroing in order to rely on them in assessing likelihood of dumping in sunset review proceedings with respect to the measures at issue in the original proceedings. According to WTO jurisprudence, a measure that essentially replaces an earlier measure remains within the terms of reference of an original panel.[583] The European Communities asserts that an Article 21.5 panel must be in a position to assess whether an annual administrative review (or sunset review) that confirms and supersedes the original determination relating to the same anti-dumping duty and the same methodology (*i.e.*, zeroing) constitutes a "continuing violation".

8.40 For the European Communities, the consequence of concluding that the subsequent administrative and sunset reviews are not before the panel would be that the US system of duty assessment is turned into a moving target that escapes from AD disciplines: each administrative review would have to be the subject of a new panel request, and by the time the panel, Appellate Body and implementation procedures were completed, another administrative review would have overtaken the results of any Section 129 determination. Such a result would run contrary to the purpose and objective of Article 21.5 of the DSU.[584]

8.41 In the alternative, the European Communities argues that even if the subsequent reviews were to be considered as separate determinations or different measures than those covered by the DSB's recommendations and rulings in the original dispute, they can be regarded as "measures taken to comply" because they are closely connected with the 15 original investigations and the 16

[581] The European Communities rejects the US argument that only measures that are "taken in the direction of, or for the purpose of achieving compliance" fall under the jurisdiction of an Article 21.5 panel.

[582] The European Communities, in its Opening Statement, clarified its argument in this respect: "the United States should, on 9 April 2007, have stopped taking any positive acts providing for the final payment of duties or retention of cash deposits based on zeroing with respect to those entries not finally liquidated before the end of the reasonable period of time, in connection with any of the measures described in the original dispute, and thus, with respect to the measures contained in the Annex to the Panel Request". EC Opening Statement, para. 21.

[583] Panel Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes* ("*Dominican Republic – Import and Sale of Cigarettes*"), WT/DS302/R, adopted 19 May 2005, as modified by Appellate Body Report, WT/DS302/AB/R, DSR 2005:XV, 7425, paras. 7.11-7-21, cited in EC First Written Submission, footnote 57.

[584] EC First Written Submission, para. 63.

administrative reviews in the original dispute.[585] The European Communities relies on the panel report in *US – Upland Cotton (Article 21.5 – Brazil)* and the Appellate Body Report in *US – Softwood Lumber IV (Article 21.5 – Canada)* for the proposition that measures with a sufficiently *close nexus* to the measures taken to comply or with the DSB recommendations and rulings fall within the scope of Article 21.5 proceedings. The European Communities argues that the *nature* of the subsequent reviews is, in essence, the same as the measures (original investigations and administrative reviews) in the original dispute (*i.e.*, collect anti-dumping duties and establish cash deposits based on zeroing) and that the violation originally challenged (the use of zeroing when calculating dumping margins) still remains in the subsequent review proceedings. Further, the subsequent review proceedings relate to the same products, the same countries and the same exporting companies; they are a continuation of the 15 original investigations and 16 administrative reviews at issue in the original dispute, whose effects based on zeroing still remain in place after the end of the reasonable period of time. The European Communities submits that the United States itself admits this close relationship when it argues that the subsequent reviews (and/or the revocation of the original orders) relieves it of any obligation to act in order to comply with the DSB's recommendations and rulings. But for these reviews, the United States would have been required to revise the challenged measures. As to *timing*, the close relationship between the subsequent review proceedings remains, regardless of when they were issued; the fact that a measure predates the adoption of the reports by the DSB cannot exclude *per se* such a measure from the scope of compliance proceedings.

8.42 The European Communities responds to the US argument that it is attempting to use this Article 21.5 proceeding to obtain the effect of an "as such" finding[586] by asserting that it is not arguing *in general* that the US implementation obligations with respect to the "as applied" claims extend to distinct determinations – for example related to other products or other sub-regions of the European Communities, or entirely new original investigations. Rather, what the European Communities argues is that, in this particular case, since the subsequent reviews and assessment instructions were part of the measures challenged in the original dispute, the US implementation obligations with respect to the "as applied" claims extend to any subsequent determination and assessment instruction in connection with the measures in the original dispute, as well as the related US omissions or deficiencies. In other words, the scope of the "as applied" finding covered, in the EC view, every instance of application (and omission or deficiency) of the zeroing methodology by the United States with respect to any amendments (which in the EC view includes subsequent reviews) and assessment instructions, relating to the 15 original investigations and 16 administrative reviews, since those were part of the measures originally challenged "as applied". Limiting the "as applied" finding as the United States suggests would in the EC view lead to absurd results: it would imply that an investigating authority could adopt new measures to replace the one found to be WTO-inconsistent but containing exactly the same violations. In addition, the European Communities argues that the distinction between "as such" and "as applied" findings should not be mechanistically applied in this case.[587] Regardless of the characterisation of the findings made by the Panel and the Appellate Body in the original dispute, the DSB's recommendations and rulings clearly stated that the zeroing methodology applied by the United States in the 15 original investigations and the 16 administrative reviews was inconsistent with Articles 2.4.2 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994. When it applied the same zeroing methodology in the subsequent reviews listed in the Annex to the Panel Request, the United States failed to comply with the DSB's recommendation to bring the measures into conformity with its obligations.

[585] The European Communities clarified in its Opening Statement that its arguments in this respect are made in the alternative, should the Panel consider that the subsequent reviews were not included in the description of the measures in the original dispute. EC Opening Statement, para. 24.

[586] EC Second Written Submission, paras. 52-58.

[587] EC Opening Statement, para. 40.

8.43 With respect to sunset reviews, the European Communities makes essentially the same arguments as it makes in relation to administrative reviews:[588] the DSB recommendations and rulings also covered any amendments to the 15 original investigations and 16 administrative reviews. By their nature, the European Communities argues, sunset review proceedings are amendments to the original measures because they restart the application of the duty for another five years and, thus, they were covered by the DSB's recommendations and the findings in the original dispute. The European Communities also argues that, like the administrative reviews, the sunset reviews listed in the Annex are "measures taken to comply" since they are closely connected to the original investigations and administrative reviews in the original dispute.

8.44 The **United States**, in response, maintains that the EC contentions that (i) the subsequent reviews were part of the terms of reference of the original proceeding, (ii) that they are measures taken to comply, and (iii) that they are "omissions", are mutually contradictory. The United States notes in addition that the European Communities argues that measures taken to comply both exist and do not exist, at the same time. These propositions are, the United States submits, mutually contradictory.[589] The European Communities cannot have it both ways – if the United States failed to comply by "omission", then any corresponding finding against the United States should be that a measure was *not* taken to comply, not that subsequent determinations are inconsistent with the US obligations.

8.45 The United States refutes the EC argument that the subsequent reviews were part of the original proceedings as "amendments" to the 15 original investigations and 16 administrative reviews at issue in the original dispute. The United States submits that the term "amendment" had a precise meaning in the original dispute: it referred to corrections to the measures identified in the original proceeding *e.g.* to correct for ministerial errors[590] or amendments resulting from domestic litigation, but not to subsequent determinations, which involve different entries, different time periods, and perhaps even different parties. This is evidenced by the EC panel request in the original dispute: in that request, the European Communities referred to specific determinations as "amended",[591] but listed as separate "cases" the investigation and the administrative review relating to the same order and listed separately multiple administrative reviews relating to the same order. Thus, the original EC panel request confirms that the term "amendments" did not refer to subsequent reviews. Similarly, the United States argues that sunset reviews are not amendments to the original measures; sunset reviews do not determine anti-dumping liability, they are not mere corrections or removal of errors from an investigation, but rather are a separate determination for a separate purpose based on different facts and evidentiary standards.

8.46 In addition, the United States asserts that the original "as applied" claims of the European Communities could not have been as broad as it contends: most of the subsequent determinations did not exist at the time of establishment of the original panel (19 March 2004).[592]

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[588] EC Second Written Submission, paras. 47-50.

[589] The US recalls that the Appellate Body has indicated that "[i]n principle, a measure which has been taken to comply ... will not be the same measure as the measure which was the subject of the original dispute..." US Second Written Submission, footnote 11.

[590] Under US law and regulations, parties to an anti-dumping investigation (or review) may, within a specified period after publication of the final determination, identify "ministerial" errors – *i.e.,* calculation and other similar errors, which USDOC will consider and, if it finds the error exists, will correct in an amendment to the final determination and anti-dumping order.

[591] See US Second Written Submission, para. 19.

[592] As indicated above, the United States further notes that some determinations listed in the Annex to the EC Article 21.5 panel request were made *prior* to the EC original corrected panel request, meaning that the European Communities seeks to include in this proceeding determinations that it could have included in its corrected panel request. US Second Written Submission, para. 27.

They could therefore not have been part of the original panel's terms of reference.[593] Likewise, the DSB's recommendations and rulings could not have covered any liquidation instructions that were not issued as of 19 March 2004.[594]

8.47 The United States argues, in response to the EC view that the determinations are "closely connected" to the measures at issue in the original proceeding, that the Appellate Body has stated that 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. The United States notes that in *US – Softwood Lumber IV (Article 21.5 – Canada)*, the Appellate Body found it significant that the United States acknowledged that the "methodology used by the USDOC in the First Assessment Review was adopted 'in view of' the recommendations and rulings of the DSB." This was evident from the fact that the Section 129 determination and the determination in the first administrative review both closely corresponded to the expiration of the reasonable period of time, which provided the USDOC with the ability to take account of the DSB's recommendations and rulings in the first administrative review. The situation in this dispute is different: in this dispute, many of the "subsequent" determinations were made prior to the adoption of the DSB's recommendations and rulings. The United States maintains that they could not have taken into consideration the recommendations and rulings of the DSB, and the European Communities has failed to provide any evidence that these subsequent determinations were adopted "in view" of the DSB's recommendations and rulings.

8.48 The United States notes that two of the subsequent determinations identified by the European Communities were in changed circumstances reviews, and were made before the adoption of the DSB's recommendations and rulings; moreover, both determinations addressed whether one company was successor in interest to another company, and was therefore entitled to that company's cash deposit rate – the USDOC did not recalculate any margins of dumping in these two changed circumstances reviews. The remaining 36 determinations were administrative reviews; the USDOC made its determinations in 26 of these reviews before the adoption of the DSB's recommendations and rulings. Of the 10 remaining determinations, 4 gave no indication that the USDOC's treatment of non-dumped sales was an issue in the review; another four were made before the end of the reasonable period of time, and in those, the USDOC made clear that the determinations were not being issued in view of the recommendations and rulings. The United States further indicates that in one of the two remaining determinations, the 2005-2006 administrative review in Stainless Steel Bar from the United Kingdom, no party specifically raised the issue of non-dumped sales (although one party raised the issue of the recalculation of the all others rate from the Section 129 determination). In the last administrative review, the 2004-2005 administrative review in Hot Rolled Steel from the Netherlands, the Section 129 determination resulted in the revocation of the AD order. The United States considers that it therefore had no further obligation with respect to the Appellate Body's specific "as applied" finding, which was made only with respect to the original investigation in that determination. Moreover, that administrative review determination cannot be said to have been made

[593] The United States submits that under WTO jurisprudence, 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; it cites in this regard the Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts* ("*EC – Chicken Cuts*"), WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, DSR 2005:XIX, 9157, para. 156; Panel Report, *United States – Subsidies on Upland Cotton* ("*US – Upland Cotton*"), WT/DS267/R, Corr.1, and Add.1 to Add.3, adopted 21 March 2005, as modified by Appellate Body Report, WT/DS267/AB/R, DSR 2005:II, 299, para. 7.158; Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry* ("*Indonesia – Autos*"), WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R and Corr.1 and 2, adopted 23 July 1998, and Corr. 3 and 4, DSR 1998:VI, 2201, para. 14.3.

[594] The United States argues that the Panel should likewise find that it has no authority to review the sunset review determinations in cases 2, 3, 4 and 5 (Stainless Steel Bar from France, Germany, Italy and the United Kingdom) as the determination to revoke these antidumping duty orders occurred after the establishment of not only the original panel, but also of this Panel. US Second Written Submission, footnote 27.

"in view of" the DSB's recommendations and rulings since the USDOC clearly stated that it did not consider that the DSB's recommendations and rulings required it to take any action with respect to the treatment of non-dumped sales in that review, in particular because it considered that the challenged reviews were no longer in effect as each of the reviews at issue in the original dispute had been superseded by a subsequent administrative review.[595]

8.49 The United States also notes that the original EC "as applied" claims did not include any challenges to determinations in sunset reviews. Consequently, neither the original panel, nor the Appellate Body, made any findings in this dispute with respect to sunset reviews.[596]

8.50 Further, the United States recalls that an "as applied" challenge concerns the "application of a general rule to a specific set of facts"; by contrast, an "as such" claim challenges instruments of a Member that have general effect, and seeks to prevent a Member from engaging in certain conduct *ex ante*. The European Communities complains of the "continued" use of the allegedly "same methodology" that was the subject of DSB recommendations and ruling "when carrying out dumping determinations in the subsequent review proceedings"; that is, the European Communities complains of the general and prospective application of the so-called zeroing methodology, and is attempting to gain the benefit of an "as such" finding when the Appellate Body declined to make one.

8.51 Finally, the United States submits that the legal and factual distinctions between the two types of proceedings with respect to the issue of zeroing are more relevant here than was the case in *Softwood Lumber*, in which the issue was the pass-through of subsidies, and the legal basis for the panel's consideration did not differ as between the investigation and the administrative review. With respect to the issue of zeroing, however, there is a distinction between "model zeroing" in investigations and "simple zeroing" in reviews. This distinction flows through to the legal bases for the findings against zeroing – which rely significantly on the text of Article 2.4.2 and, in particular, the phrase "all comparable export transactions" in the context of investigations. In the context of reviews, however, that textual basis is absent and the Appellate Body has, instead, relied on the term "product" and the non-textual phrase "product as a whole" to find that a margin of dumping cannot be calculated in a proceeding using zeroing. Given the distinctions in the factual and legal basis for the findings on investigations as compared to reviews, it would be inappropriate for the Panel to find that there is a sufficiently close nexus to address the subsequent reviews in an Article 21.5 proceeding.

(b) Arguments of the third parties

8.52 **Norway** considers that all the measures referred to in the EC First Written Submission fall within the scope of the Panel's jurisdiction. It recalls that both positive acts taken to comply and omissions are covered by Article 21.5, and considers that that any subsequent administrative reviews, sunset reviews, assessment instructions and liquidations based on zeroing must be viewed as evidencing "omissions" on the part of the United States.[597] Like the European Communities, Norway

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[595] US Opening Statement at the substantive meeting of the Panel (hereinafter "US Opening Statement"), paras. 17 *ff*.

[596] In its Opening Statement, the United States noted, in addition, that in 11 of the sunset reviews challenged by the European Communities, the USDOC issued its determination regarding the likelihood of a continuation or recurrence of zeroing *before* the adoption of the reports by the DSB, and that four resulted in the revocation of the AD order. In the one remaining sunset review determination, the interested parties did not raise, and the USDOC made no mention of the issue of non-dumped sales and thus, the determination could not have been made "in view of" the DSB's recommendations and rulings. See US Opening Statement, para. 16 *ff*.

[597] Like the European Communities, Norway considers that the United States should, after the reasonable period of time, have stopped collecting anti-dumping duties calculated with the use of zeroing in connection with any of the measures that were part of the original dispute, as well as in connection with any administrative review in these cases and that the US was under an obligation to recalculate without the use of

also relies on *US – Upland Cotton (Article 21.5 – Brazil)*. It recalls that, in that case, the Appellate Body set out three elements – nature, effect and timing – as additional criteria when assessing whether a measure which is not declared by the respondent to be a "measure taken to comply" nevertheless may be characterized as such. In Norway's opinion, a consideration of these three elements with regard to the current case leads to the conclusion that the subsequent reviews have a sufficiently close relationship with the recommendations and rulings of the DSB to be included in the scope of this proceeding. With regard to the *timing* element, Norway points out that in *US – Softwood Lumber IV (Article 21.5 – Canada)*, the Appellate Body assessed a measure resulting from a review that was initiated before the adoption of the report. The timing of a review is not the determining factor when it comes to whether it is a measure taken to comply; the important point is rather whether the review was completed and/or continued to have effects after the end of the reasonable period of time. Finally, Norway submits that following the line of argument set out by the United States would lead to the need to start a new panel for each administrative review, and when another administrative review superseded the first, another panel would have to be started. This would run counter to the aim of Article 21.5 of the DSU.

8.53 **Japan** agrees with the European Communities that the "subsequent" periodic and sunset reviews are covered by this proceeding. Japan recalls that Article 21.5 proceedings may involve either acts and omissions (or a combination of both) and that, contrary to what is argued by the United States, the Appellate Body has indicated that not only measures that formed the basis of DSB recommendations and rulings or measures that have been taken in the direction of compliance or with the objective of achieving compliance fall under the scope of Article 21.5. Rather, Article 21.5 proceedings may include closely connected measures that are "separate and distinct" from the original measures. Japan recalls that, in *US – Softwood Lumber IV (Article 21.5 – Canada)*, the Appellate Body examined the connection between the measures challenged under Article 21.5 and the original measures under what it describes as a "nexus-based test" that paid attention to (i) the nature or subject-matter of the measures; and (ii) the "effects" of the challenged measures on United States compliance with the DSB's recommendations and rulings. Applying these criteria, Japan asserts that the links between the original and subsequent measures in this dispute are virtually the same as those that led the Appellate Body, in *US – Softwood Lumber IV (Article 21.5 – Canada)*, to conclude that a subsequent periodic review was subject to the Article 21.5 proceedings.[598]

8.54 Japan considers that, contrary to the US argument, the DSB's recommendations and rulings are *not* converted into rulings on an "as such" measure as a result of the position taken by the European Communities and Japan. Only a very small subset of all US periodic reviews is challenged by the European Communities in these proceedings – those subsequent reviews that are closely connected to the DSB's recommendations and rulings (same product, same exporters, same order or "proceeding", same "specific component": zeroing). Japan also considers that the United States itself admits that the various measures are closely connected when it argues that each of the reviews at issue in the original dispute has been "superseded" by subsequent administrative review determinations (an argument of the United States with which Japan does not agree). Accepting the US position would

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zeroing the previous dumping margins, in order to rely on these margins in sunset reviews. Norway's Third Party Submission, para. 14.

[598] In particular, Japan notes that, in the present Article 21.5 dispute, (i) the original measures and the subsequent periodic reviews *all resulted from anti-dumping proceedings* conducted by the USDOC; (ii) these measures all involved that authority's *determination of the dumping margin*; (iii) in any given group of measures (identified in the annex to the EC panel request by numbered rows), the *subject product is always identical*; (iv) in any given group of measures, the *exporter is always identical* (identified in the annex to the EC panel request in the fifth column); (v) any given group of measures is adopted pursuant to the *same anti-dumping order*; and, (vi) for any given order, the measures provide *succeeding bases for the continued imposition* of anti-dumping duties on the subject product, with each new measure replacing the cash deposit rate of the previous measure, and determining the definitive duty rate for entries initially subjected to the cash deposit rate of the previous measure. Japan's Third Party Submission, para. 46.

mean that the WTO dispute settlement system *cannot* effectively resolve disputes regarding the application of calculation methodologies in AD proceedings.

8.55 With respect to the US arguments on *timing*, Japan argues that the United States incorrectly assumes that the timing of a measure's adoption is decisive under Article 21.5 because a measure can only be "taken" *with the intent* "to comply" after the date of adoption of the DSB's recommendations and rulings. Yet, it is well-established that a measure may be "taken to comply" even if the Members *intent* in taking the measure was not "to comply". Were Article 21.5 not to apply to measures adopted prior to adoption by the DSB of the relevant report(s), it would be straightforward for the implementing Member to force the complainant to begin new dispute settlement proceedings by adopting closely connected measures, prior to adoption by the DSB of the relevant report(s), that undermine or prevent compliance. The case-law under Article 6.2 of the DSU also suggests that the United States is incorrect in arguing that closely connected measures adopted during a WTO dispute, but prior to adoption, must be split into separate WTO proceedings. Past panels and the Appellate Body[599] have, in assessing the scope of a panel's jurisdiction, focused on the *substantive connection*, with respect to the disputed component, between an original measure and a replacement or amendment measure adopted at any stage after the consultations request. The Appellate Body's approach in *US – Softwood Lumber IV (Article 21.5 – Canada)* is very similar. In sum, the case-law shows that a series of closely linked measures adopted over time – starting with the original measures, continuing with measures adopted during consultations, the original proceedings, and into implementation – may all relate to "fundamentally the same 'dispute'", and all be subject to the DSB's recommendations and rulings in that dispute, provided they are substantively the same.

(c) Evaluation by the Panel

(i) Introduction

8.56 The US request for preliminary rulings raises the issue of the scope of Article 21.5 proceedings, and more specifically, the issue of which measures may be examined by an Article 21.5 panel to assess the responding Member's implementation of DSB recommendations and rulings.

8.57 Article 21.5 of the DSU provides, in relevant part, that:

> "Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel."

8.58 The parties fundamentally disagree as to whether the "subsequent reviews" – administrative reviews, changed circumstances reviews, and sunset reviews listed in the Annex to the EC Article 21.5 request for the establishment of a panel, as well as related "assessment instructions" fall within the scope of this proceeding. The following table lists, in the right hand column, the subsequent reviews included in the Annex to the EC panel request, and in the left hand column, the measure at issue in the original dispute with which each is associated (numbers 1-15 are the original

[599] Japan refers to Panel Report, *Brazil – Export Financing Programme for Aircraft* ("*Brazil – Aircraft*"), WT/DS46/R, adopted 20 August 1999, as modified by Appellate Body Report, WT/DS46/AB/R, DSR 1999:III, 1221, para. 7.11 and Appellate Body Report, *Brazil – Export Financing Programme for Aircraft* ("*Brazil – Aircraft*"), WT/DS46/AB/R, adopted 20 August 1999, DSR 1999:III, 1161, para. 132; Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products* ("*Chile – Price Band System*"), WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3045, and Corr.1, para. 139; Panel Report, *Dominican Republic – Cigarettes*, paras. 7.15 and 7.21; Appellate Body Report, *EC – Chicken Cuts*, para. 157.

determinations challenged in the original dispute, numbers 16-31 are the administrative reviews challenged in the original dispute):

Measures at issue in the original dispute	**Subsequent reviews**
1. Certain Hot-Rolled Carbon Steel from the Netherlands	Administrative reviews: 3 May 2001 – 31 October 2002 (69FR 43801, 22 July 2004) 4.8%
	1 November 2002 – 31 October 2003 (70FR 18366, 11 April 2005) 4.42%
	1 November 2004 – 31 October 2005 (72FR 34441, 22 June 2007) 2.26%
2. Stainless Steel Bar from France	Administrative reviews: 1 March 2003 – 29 February 2004 (70 FR 46482, 10 August 2005) Ugitech 14.98%
	1 March 2004 – 28 February 2005 (71 FR 30873, 31 May 2006) Ugitech 9.68%
	Sunset Review: DOC Final Determination (72 FR 30772, 4 June 2007)
3. Stainless Steel Bar from Germany	Administrative reviews: 2 August 2001–28 February 2003 (69 FR 32982, 14 June 2004) BGH 0.52%
	1 March 2004–28 February 2005 (71 FR 52063, 1 September 2006) BGH 0.73%
	Sunset Review: DOC Preliminary Determination (72 FR 29970, 30 May 2007)
4. Stainless Steel Bar from Italy	Administrative reviews: 2 August 2001– 28 February 2003 (69 FR 32984, 14 June 2004) Foroni 4.03% Ugine 33%
	Sunset Review: DOC Final Determination (72 FR 30772, 4 June 2007)
5. Stainless Steel Bar from the United Kingdom	Administrative review: 1 March 2005 – 28 February 2006 (72 FR 15106, 30 March 2007) Enpar Special Alloys 33.87%
	Sunset Review: DOC Final Determination (72 FR 30772, 4 June 2007)
6. Stainless Steel Wire Rod from Sweden	Administrative reviews: 1 September 2004 – 31 August 2005 (72 FR 26337, 9 May 2007) Fagersta 19.36%
	Sunset Review: Continuation order, (69 FR 50167, 13 August 2004)
7. Stainless Steel Wire Rod from Spain	Administrative review: 5 March 1998 – 31 August 1999 (66 FR 10988, 21 February 2001) Roldan SA 0.8%
	Sunset Review: Continuation order, (69 FR 50167, 13 August 2004)

Measures at issue in the original dispute	Subsequent reviews
8. Stainless Steel Wire Rod from Italy	Sunset Review: Continuation Order (69 FR 50167, 13 August 2004)
9. Certain Stainless Steel Plate in Coils from Belgium	See case 18 below
10. Stainless Steel Sheet and Strip in Coils from France	See cases 25 & 26 below Measure revoked July 2004 (70 FR 44894, 4 August 2005)
11. Stainless Steel Sheet and Strip in Coils from Italy	See cases 21 & 22 below
12. Stainless Steel Sheet and Strip in Coils from the United Kingdom	Measure revoked: July 2004 (70 FR 44894, 4 August 2005)
13. Certain Cut-to-Length Carbon-Quality Steel Plate from France	Measure revoked: February 2005 (70 FR 72787, 7 December 2005)
14. Certain Cut-to-Length Carbon-Quality Steel Plate from Italy	Sunset review: Continuation Order (70FR 72607, 6 December 2005).
15. Certain Pasta from Italy	See cases 19 & 20 below
16. Industrial Nitrocellulose from France	Two subsequent administrative reviews were rescinded, covering the periods: 1 August 2000 – 31 July 2001 1 August 2002 – 31 July 2003 Measure revoked: (69 FR 52231, 25 August 2004)
17. Industrial Nitrocellulose from the United Kingdom	Two subsequent administrative reviews were rescinded, covering the periods: 1 July 2001 – 30 June 2002 1 July 2002 – 30 June 2003
	Changed circumstance review (December 2003) confirmed the rate of 3.06% to apply to Troon Investments, successor to ICI
	Measure revoked: (69 FR 52231, 25 August 2004)
18. Stainless Steel Plate in Coils from Belgium	Two subsequent reviews resulting in change to rate: 1 May 2002 – 30 April 2003 (70FR 2999, 19 January 2005) 2.71%
	1 May 2003 – 30 April 2004 (70FR 72789, 7 December 2005) 2.96%
	Sunset Review: Continuation Order (70 FR 41202, 18 July 2005)

Measures at issue in the original dispute	Subsequent reviews
19. Certain Pasta from Italy	Ferrara: Order revoked in February 2005 following third consecutive review where the company had *de minimis* rate (70 FR6832, 9 February 2005)
	Pallante: Order revoked in November 2005 following third consecutive review where the company had *de minimis* rate (70 FR71464, 29 November 2005)
	PAM: Two subsequent reviews resulting in change to rate: 1 July 2001 – 30 June 2002 (69 FR 6255, 10 February 2004) 45.49%
	1 July 2002 – 30 June 2003 (70 FR 6832, 9 February 2005) 4.78%
	Sunset review: DOC Final Determination (72 FR 5266 5 February 2007)
20. Certain Pasta from Italy	Pastifi Garofalo: One subsequent review resulting in change to rate: 1 July 2001 – 30 June 2002 (69 FR 22761, 27 April 2004) 2.57% One review rescinded covering period: 1 July 2002 – 30 June 2003
21. Stainless Steel Sheet Strip Coils from Italy	See case 22
22. Stainless Steel Sheet Strip Coils from Italy	Two subsequent reviews resulting in change to rate: 1 July 2001 – 30 June 2002 (68 FR 69382, 12 December 2003) 1.62%
	1 July 2002 – 30 June 2003 (70FR 13009, 17 March 2005) 3.73%
	Sunset review: Continuation Order (70 FR 44886, 4 August 2005)
23. Granular Polytetrafluorethylene from Italy	See case 24
24. Granular Polytetrafluorethylene from Italy	Two subsequent administrative reviews were rescinded, covering the periods: 1 August 2002 – 31 July 2003 1 August 2003 – 31 July 2004 Changed circumstance review (May, 2003) confirmed the rate of 12.08% to apply to Solvay Solexis, successor to Ausimont

Measures at issue in the original dispute	Subsequent reviews
	1 subsequent review resulting in change to rate: 1 August 2004 – 31 July 2005 (72FR 1980, 17 January 2007) 39.13%
	Sunset review: Continuation Order (70 FR 76026, 22 December 2005)
25. Stainless Steel Sheet Strip Coils from France	See case 26
26. Stainless Steel Sheet Strip Coils from France	3 subsequent reviews resulting in change to rate: 1 July 2001 – 30 June 2002 (68 FR 69379, 12 December 2003) 2.93%
	1 July 2002 – 30 June 2003 (70 FR 7240, 11 February 2005) 9.65%
	1 July 2003 – 30 June 2004 (71 FR 6269, 7 February 2006) 12.31%
	Measure revoked: (70 FR 44894, 4 August 2005)
27. Stainless Steel Sheet Strip Coils from Germany	See case 28
28. Stainless Steel Sheet Strip Coils from Germany	4 subsequent reviews resulting in change to rate: 1 July 2001 – 30 June 2002 (69FR 6262, 10 February 2004) 3.72%
	1 July 2002 – 30 June 2003 (69 FR 75930, 20 December 2004) 7.03%
	1 July 2003 – 30 June 2004 (70 FR 73729, 13 December 2005) 9.5%
	1 July 2004 – 30 June 2005 (71 FR 74897, 13 December 2006) 2.45%
	Sunset review: Continuation Order (70 FR 44886, 4 August 2005)
29. Ball Bearings from France	SKF: 4 subsequent reviews resulting in change to rate: 1 May 2001 – 30 April 2002 (68 FR 43712, 24 July 2003) 6.70%
	1 May 2002 – 30 April 2003 (69 FR 55574, 15 September 2004) 5.25%

Measures at issue in the original dispute	Subsequent reviews
	1 May 2003 – 30 April 2004 (70 FR 54711, 16 September 2005) 8.41%
	1 May 2004 – 30 April 2005 (71 FR 40064, 14 July 2006) 12.57%
	Sunset Reviews: Continuation Order (71 FR 54469, 15 September 2006)
30. Ball Bearings from Italy	FAG: 4 subsequent reviews resulting in change to rate: 1 May 2001 – 30 April 2002 (68 FR 35623, 16 June 2003) 2.87%
	1 May 2002 – 30 April 2003 (69 FR 55574, 15 September 2004) 4.79%
	1 May 2003 – 30 April 2004 (70 FR 54711, 16 September 2005) 5.88%
	1 May 2004 – 30 April 2005 (71 FR 40064, 14 July 2006) 2.52%
	SKF: 4 subsequent reviews resulting in change to rate: 1 May 2001 – 30 April 2002 (68 FR 35623, 16 June 2003) 5.08%
	1 May 2002 – 30 April 2003 (69 FR 55574, 15 September 2004) 1.38%
	1 May 2003 – 30 April 2004 (70 FR 54711, 16 September 2005) 2.59%
	1 May 2004 – 30 April 2005 (71 FR 40064, 14 July 2006) 7.65%
	Sunset Reviews: Continuation Order (71 FR 54469, 15 September 2006)
31. Ball Bearings from the United Kingdom	NSK Bearings: No subsequent administrative reviews

Measures at issue in the original dispute	Subsequent reviews
	Barden: 1 subsequent administrative review rescinded for period: 1 May 2001 – 30 April 2002 2 subsequent reviews resulting in change to rate: 1 May 2002 – 30 April 2003 (69 FR 55574, 15 September 2004) 4.10%
	1 May 2003 – 30 April 2004 (70 FR 54711, 16 September 2005) 2.78%
	Sunset Reviews: Continuation Order (71 FR 54469, 15 September 2006)

8.59 The European Communities argues that the subsequent reviews fall within our terms of reference for three reasons:

(a) The subsequent reviews are covered by the DSB's recommendations and rulings as "amendments" to the original investigations and administrative reviews at issue in the original dispute since the measures at issue in the original dispute included "any amendments" and "any assessment instructions" to the 15 original investigations and 16 administrative reviews challenged by the European Communities in that proceeding;

(b) The subsequent reviews fall within the terms of reference as "omissions" or "deficiencies" in the US implementation of the DSB recommendations and rulings;

and, in the alternative:

(c) The subsequent reviews are "measures taken to comply" because of the *close nexus* that exists between these reviews and the measures at issue and the DSB's recommendations and rulings in the original dispute.

8.60 We examine each of the EC arguments in turn.

(ii) Whether the subsequent reviews are "amendments" to the measures at issue in the original dispute

8.61 The European Communities' first line of argumentation is that the original dispute "covered" not only the 15 original investigations and 16 administrative reviews specifically identified in the context of the original dispute, but also any amendments thereto and any "assessment instructions", and that the subsequent reviews are such "amendments". The United States rejects the EC arguments in this respect, and submits that the use of the term "amendments" in the original proceeding – in particular in the EC request for the establishment of the original panel – referred to amendments in the form of corrections for ministerial errors or corrections adopted following litigation in US courts.[600]

[600] See, *inter alia*, US Second Written Submission, para. 21, US Opening Statement, para. 13.

8.62 We must, to resolve this question, first examine the findings of the panel and of the Appellate Body in the original dispute.

8.63 In the descriptive part of its report, at paragraph 2.6 of its report, the original panel identified the measures challenged by the European Communities in the context of its "as applied" claims as follows:

> "the 15 Notices of Final Determinations of Sales at Less Than Fair Value, including any amendments, and including all the Issues and Decision Memoranda to which they refer, and all the Final Margin Program Logs and Outputs to which they in turn refer, for all the firms investigated; each of the 15 Anti-dumping Duty Orders; each of the assessment instructions issued pursuant to any of the 15 Anti-dumping Duty Orders; and each of the USITC final injury determinations.[21] ... the 16 Notices of Final Results of Antidumping Duty Administrative Reviews, including any amendments, and including all the Issues and Decision Memoranda to which they refer, and all the Final Margin Program Logs and Outputs to which they in turn refer, for all the firms investigated; and each of the assessment instructions issued pursuant to any of the 16 Notices of Final Results." [22]
>
> _____
>
> [21] Exhibits EC-1 to EC-15; EC-First Written Submission, paras. 48-56, 63 and 102; EC-Rebuttal Submission, para. 55.
>
> [22] Exhibits EC-16 to EC-31; EC-First Written Submission, paras. 57-61, 148 and 211.; EC-Rebuttal Submission, para. 91."[601] (underline added)

8.64 Exhibits EC-1 to EC-15 include documents and information of the type referred to in this paragraph with respect to the 15 original investigation proceedings challenged by the European Communities in the original case; Exhibits EC-16 to EC-31 contain similar documents and information with respect to the 16 administrative reviews at issue in the original dispute. The documents contained in the Exhibits correspond to the various measures or aspects thereof[602] listed by the European Communities in its request for establishment in the original dispute. The EC panel request in the original dispute[603] contained two Annexes: Annex I listed original investigation "cases", with different columns for (1) the DOC Final Determination in the case, (2) the Final USITC Determination, and (3) the Final AD Order. Further specifics were provided: rates for each exporter and what the rate without zeroing would allegedly be. Similarly, Annex II listed the administrative review "cases", with columns identifying (1) the reference to the publication of the Final Results, (2) the exporter(s) concerned and the relevant dumping margin found, and (3), the period covered by the review. Later, still in the descriptive part of its report, the original panel described the findings sought by the European Communities with respect to its "as applied" claims by referring to the "original investigations" "identified" and "periodic reviews" "listed" in the relevant EC Exhibits.[604]

8.65 In describing again the EC requests for findings with respect to its "as applied" claims in the "Findings" section of its report, the original panel used a slightly different formulation and referred to the "cases and measures" "listed" in the EC exhibits.[605] In the same "Findings" section of its report,

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[601] Panel Report, *US – Zeroing (EC)*, para. 2.6. (underline added)

[602] See *infra*, para. 8.78.

[603] WT/DS294/7Rev.1. The European Communities made a request for the establishment of the panel on 5 February 2004, (WT/DS294/7), which it revised on 16 February 2004. Unless otherwise indicated, we refer here to the revised EC request for the establishment of a panel in the original dispute.

[604] Panel Report, *US – Zeroing (EC)*, para. 3.1.

[605] Panel Report, *US – Zeroing (EC)*, para. 7.1.

when addressing the EC claims with respect to the identified original investigations, the original panel indicated that the European Communities claimed that:

> "the United States has acted inconsistently with its WTO obligations in 15 anti-dumping investigations listed in Exhibits EC-1 to EC-15[119]..."

Footnote 119 identifies the 15 original investigations and notes:

> "The measures at issue also include the anti-dumping duty order and any amendments, including the assessment instructions, and the USITC injury determination. EC-First Written Submission, para. 63."[606]

8.66 In its findings, and in its conclusions, the original panel refers back to footnote 119 when describing the measures at issue, and uses the terms "the anti-dumping investigations at issue". For instance, the panel concludes in para. 7.32 that:

> "In light of the foregoing considerations, the Panel **finds** that the United States has acted in breach of Article 2.4.2 of the *AD* Agreement when <u>in the anti-dumping investigations at issue</u>[132] ..."
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> _____
>
> [132] *Supra*, footnote 119."[607]

In the final section of its report ("Conclusions and recommendations"), the panel refers once again to the original investigations listed in Exhibits EC-1 to EC-15 by reference to paragraph 7.32 (which, again, refers to footnote 119):

> "In light of our findings above, we conclude that:
>
> The United States acted inconsistently with Article 2.4.2 of the *AD Agreement* when <u>in the anti-dumping investigations listed in Exhibits EC-1 to EC-15 </u>USDOC did not include in the numerator used to calculate weighted average dumping margins any amounts by which average export prices in individual averaging groups exceeded the average normal value for such groups.[382]
>
> _____
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> [382] *Supra*, para. 7.32."[608]

8.67 The findings of the original panel with respect to the EC claims concerning administrative reviews describe the measures at issue in similar fashion:

> "The European Communities requests the Panel to find that the United States has acted inconsistently with its WTO obligations in 16 'anti-dumping duty administrative review' proceedings listed in Exhibits EC-16 to EC-31[202]..."

Footnote 202 identifies the 16 administrative review proceedings and notes:

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[606] Panel Report, *US – Zeroing (EC)*, para. 7.9 and footnote 119.

[607] Panel Report, *US – Zeroing (EC)*, para. 7.32. See also paras. 7.24 and footnote 125 and para. 7.28 and footnote 128, which use similar language and references to footnote 119.

[608] Panel Report, *US – Zeroing (EC)*, para. 8.1(a) (underline added).

> "The European Communities indicates that in addition to the *Final Results* of the administrative review, the measures at issue include the amendments to these Final Results and that the *Final Results* of the administrative review refers to the accompanying *Issues and Decision Memorandum*, which in turn refers to the Margin Calculations, *i.e.*, the Final Margin Program Log and Outputs for the firms investigated, and to the assessment instructions. EC-First Written Submission, para. 148."[609]

Later, when referring to the measures challenged by the European Communities in its findings with respect to the EC claims concerning administrative review, the original panel again refers either to this footnote[610] or to Exhibits EC-16 to EC-31.[611]

8.68 The Appellate Body, in the introductory section of its report, describes the measures at issue with respect to the EC "as applied" claims concerning administrative reviews, by referring to the description of the measures in the report of the panel and to Exhibits EC-16 to EC-31:

> "The administrative reviews challenged by the European Communities are listed in Exhibits EC-16 through EC-31 submitted by the European Communities to the Panel. Further details may be found in para. 2.6 and footnote 202 to para. 7.110 of the Panel Report."[612]

8.69 In its analysis of the EC appeal with respect to the findings of the original panel concerning the EC "as applied" claims with respect to administrative reviews, the Appellate Body refers to the "administrative reviews of anti-dumping duty orders listed in Exhibits EC-16 through EC-31",[613] or to "the administrative reviews at issue".[614]

8.70 This description of the measures at issue by the original panel and the Appellate Body is consistent with the Annexes to the EC request for the establishment of the panel, in which it lists 15 original investigation proceeding "cases" or "measures" and 16 administrative review proceeding "cases" or "measures" and lists a number of aspects of each such case.

8.71 The EC arguments before us focus on the fact that both the original panel and the Appellate Body described the measures at issue as including "amendments" to the 15 original investigations and 16 administrative review "cases". While we agree with the European Communities as to the description of the measures at issue, we cannot agree with the European Communities that these references to "amendments" encompass any subsequent determinations in the same "case", in the form of subsequent administrative reviews or sunset reviews. A close examination of the EC panel request

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[609] Panel Report, *US – Zeroing (EC)*, para. 7.110 and footnote 202. (underline added)

[610] Panel Report, *US – Zeroing (EC)*, para. 7.142 and footnote 235; para. 7.223 and footnote 305; para. 7.224 and footnote 306; para. 7.248 and footnote 335; para. 7.284 and footnote 372; para. 7.286 and footnote 375; para. 7.288 ("the administrative reviews at issue", without any reference to footnote 202, this time, although such a reference is made at the beginning of the section).

[611] Panel Report, *US – Zeroing (EC)*, para. 7.223 (referring to "the administrative reviews listed in Exhibits EC-16 to EC-31", but containing a footnote reference to footnote 202) and paras. 8.1(d), (e), and (f) ("Conclusions and Recommendations"). The latter include footnote references to, respectively, paragraphs 7.223, 7.284 and 7.288, and thus, in turn, also eventually refer back to footnote 202.

[612] Appellate Body Report, *US – Zeroing (EC)*, footnote 11. We limit ourselves to the Appellate Body's identification of the administrative reviews at issue; the Appellate Body did not disturb the Panel's findings on the EC "as applied" claims with respect to original investigations.

[613] Appellate Body Report, *US – Zeroing (EC)*, para. 108.

[614] See, notably, Appellate Body Report, *US – Zeroing (EC)*, paras. 133, 134, 135 (the latter containing the Appellate Body's finding of inconsistency with Article 2.4.2), and 263(a) (overall "Findings and Conclusions").

in the original dispute and of the reports of the original panel and of the Appellate Body shows that what the European Communities challenged in its "as applied" claims in that case, and therefore what the panel and the Appellate Body actually ruled on, was the use of zeroing in calculating margins of dumping in the context of specific "determinations", either original investigations or administrative reviews, which the European Communities had explicitly identified.

8.72 While, in the abstract, the term "amendment" might be understood to include any subsequent measure that bears some relationship to or somehow modifies the measures that were specifically identified in the original dispute as the measures at issue, we are of the view that, in the circumstances of this dispute, the term "amendment" must be read as referring to amendments of the nature identified by the United States – amendments to correct the original investigation and administrative review determinations specifically identified by the European Communities to correct for ministerial or similar errors[615] or, in some cases, to amend the determination following US court rulings.[616]

8.73 The EC argument that the term "amendment" extends to the subsequent reviews finds, in our view, no support in the manner in which the measures at issue were described in the original dispute. Put simply, even assuming that it could have done so, the European Communities did not frame its claims, in the original dispute, as a challenge of (i) specific original investigations (or administrative reviews), including various "aspects" of these determinations and (ii) any subsequent determinations that might be adopted by the USDOC in the context of the same AD order. It limited itself to the former, and did not raise the latter.

8.74 We find, in this respect, the EC request for the establishment of the panel in the original dispute, to be of particular assistance. We recall that the terms of reference of a dispute are dependent on a party's request for the establishment of a panel – measures not "identified" in that request are not before the panel, and therefore are not the subject of any DSB recommendations and rulings. The EC request for the establishment of a panel in the original dispute sheds light, we believe, on the meaning of the term "amendment" in the context of the original dispute. Paragraph 3.2 of that request reads:

> "In the <u>specific anti-dumping proceedings annexed</u> to the present request, the United States applied the methodologies and the laws, regulations, administrative procedures and measures described under point 2 above. [*i.e.*, pertaining to "zeroing"]. In consequence, the European Communities considers that the determinations of dumping by DOC, the determinations of injury by the United States International Trade Commission, the imposition of definitive duties <u>in the original investigations and the outcome of the administrative review investigations as detailed in the annexes are inconsistent with the *AD Agreement*</u>. ..." (underline added).

[615] See EC Article 21.5 request for the establishment of a panel, WT/DS294/25, Annex A-1: amended USDOC final determination in case 1 (66 FR 55637, 2 November 2001), amended USDOC final determination in case 3 (67 FR 10382, 7 March 2002), amended USDOC final determination in case 4 (67 FR 8228, 22 February 2002), amended AD order in case 9 (68 FR 20114, 24 April 2003) (in this case, a first amendment, not listed in the Annex, amended the AD order to implement a USITC decision on remand, amending the scope of the order; a second amendment, this one listed by the European Communities, corrects a clerical error in the listing of HTS numbers in the amended AD order), amended final results of administrative review in case 19 (67 FR 5088, 4 February 2002), amended final results of administrative review in case 25 (67 FR 12522, 19 March 2002), amended final results of administrative review in case 26 (68 FR 4171, 28 January 2003), amended final results of administrative review in case 28 (68 FR 14193, 24 March 2003).

[616] See EC Article 21.5 request for the establishment of a panel, WT/DS294/25, Annex A-1: amended USDOC final determination in case 15 (66 FR 65889, 21 December 2001); amended final results of administrative review in case 27 (67 FR 15178, 29 March 2002); see also the discussion of the amendment to case 9 in the previous footnote.

8.75 As indicated above, Annex I to the EC original panel request listed original investigation "cases", with different columns for (1) the DOC Final Determination in the case, (2) the Final USITC Determination, and (3) the Final AD Order. Similarly, Annex II provided a list of the administrative review "cases", with columns identifying (1) the reference to the publication of the Final Results, (2) the exporters concerned and the relevant dumping margin found, and (3), the period covered by the review. The European Communities treated subsequent administrative reviews under the same AD order as separate "cases". There are five instances where the European Communities listed two successive administrative reviews as separate "cases"; equally, Annex II includes some administrative reviews adopted pursuant to an original investigation included in Annex I (*e.g.*, cases 21 and 22 of Annex II are two successive administrative reviews pertaining to the original investigation reported in Annex I as case 11).[617]

8.76 There is no indication that the subsequent administrative reviews were included by the European Communities as "amendments" – they are clearly identified as distinct measures. The two Annexes also include specific references to "amendments". In each case, the "amendment" referred to in the Annex is an amendment of the specific measure listed to correct for ministerial errors and/or as a result of litigation in US courts.[618]

8.77 In our view, there is no doubt the EC panel request in the original dispute did not ascribe to the term "amendment" the broad meaning that the European Communities now ascribes to it.

8.78 The European Communities argued, in its Opening Statement, that the United States had tried, without success, to change the description of the measures when the panel in the original dispute issued its descriptive part, but that the original panel declined to do so, considering that the description of the measures was clear and respected the EC description of the measures.[619] The European Communities referred us to paragraphs 6.12-6.13 of the report of the original panel, which read as follows:

> "The United States requests the Panel to replace paragraph 2.6 of the Report with paragraph 2.4 of the original draft descriptive part of the Report. The United States objects in particular to the inclusion in this paragraph of references to three kinds of 'measures': (1) the Issues and Decision Memoranda; the (2) Final Margin Program Logs and Outputs; and (3) assessment instructions. The United States considers that these three measures are not part of the request for establishment of a panel. The European Communities objects to the amendments suggested by the United States.
>
> When read in light of the relevant paragraphs of the First Written Submission of the European Communities, as referred to in footnotes 21 and 22 of the Report, it is clear to us that <u>paragraph 2.6 of the Report does not treat the Issues and Decision Memoranda, the Final Margin Program Logs and Outputs, and the assessment instructions as three separate categories of measures but as aspects of the measures at issue</u>. Thus, paragraph 2.6 of our Report does not imply that we are presented with a

[617] The European Communities submits that it decided to separate the original investigations and administrative reviews as "cases" "even though they all referred to the same anti-dumping measures being in place against specific products from particular countries" in order to allow for a separate examination of the measures and due to the structure of its claims (as such vs. as applied claims with respect to, one the one hand, original investigations, on the other hand, administrative reviews). See EC Answer to Panel Question 1. We are not convinced by this explanation, which does not explain why the European Communities listed subsequent reviews as different measures, and, in any case, do not consider that the reasons for the manner in which the European Communities decided to formulate its claims are decisive.

[618] *Supra*, para. 8.72 and footnotes 615 and 616.

[619] EC Opening Statement, para. 13, referring to Exhibit EC-32 and Panel Report, *US – Zeroing (EC)*, paras. 6.12-613. See also EC Answer to Panel Question 1.

> request for separate findings on the Issues and Decision Memoranda, the Final Margin Program Logs and Outputs and the assessment instructions. While it is certainly true that there is no express mention of these 'measures' in the request for the establishment of a panel, they clearly form part of the measures mentioned in that document. Therefore, we have not made the change requested by the United States." (footnotes omitted, underline added)

8.79 The European Communities contends that the original panel's decision in this regard demonstrates that the term "amendments" includes subsequent reviews. We do not believe paragraphs 6.12-6.13 can be read this broadly. At the most, the original panel's decision may suggest that the original panel considered that these "aspects" of each of the measures at issue were covered by the reference to "amendments".[620] It does not in any way suggest that subsequent determinations in the form of original investigations or administrative reviews are "amendments". In fact, the discussion in paras. 6.12-6.13 of the report of the original panel reinforces our view that the "amendments" at issue in the original dispute did not include any subsequent administrative review or sunset review: in the second paragraph, the original panel indicates that it considered that the "measures" before it were each of the 15 original investigations and 16 administrative reviews at issue, and that it viewed each of the Issues and Decision Memoranda, the Final Margin Program Logs and Outputs, or assessment instructions not as "measures" but as "as aspects of the measures at issue".

8.80 In sum, we reject the EC view that the term "amendments" covers any subsequent review adopted under the same AD order as either an original investigation or administrative review specifically challenged in the original proceeding.[621] The conclusion suggested by the

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[620] The European Communities argues that the reference to "any amendments" in the description of the measure by the Panel and the Appellate Body in the original dispute referred to something more than what the European Communities had already provided in the annex to its original panel request (EC Answer to Panel Question 1). The underpinnings of the EC argument are not clear, but seem to be linked to the EC indication, earlier in the same Reply, that:

> "[I]n the request for establishment of the Panel in the original dispute ('original Panel Request'), the European Communities identified (i) with respect to original investigations, USDOC's determinations, amended results of those determinations, original orders and amendments to those original orders; and (ii) with respect to administrative reviews, USDOC's duty assessment determinations and amended results of those determinations.
>
> In this respect, the European Communities provided the most recent information available to identify the original investigations and administrative reviews in a precise manner, in accordance with the requirements of Article 6.2 of the DSU. Any documents which could be found at that time showing the origin of the measures at issue as well as their most recent amendments were mentioned in the annex to the original Panel Request and provided to the Panel in the original dispute. These included the original order and also various amendments, which did *not only* refer to correction of ministerial errors. For instance, in case 9 of the original request the European Communities identified the original order (dated 21 May 1999) and an amendment (dated 24 April 2003) which modified the *product scope of the order*." (italics original)

The EC Answer to Panel Question 1 seems to indicate that it considers that the reference to "amendments", covered any amendment (to the measures, original investigations and administrative reviews listed in the Annex) that the European Communities had or had not (for whatever reason), identified in its panel request. We recall that the nature of the amendments identified in the EC panel request was limited to amendments to correct for ministerial errors or as a result of litigation in US courts (the amendment to the product scope of the order in case 9 referred to in the citation above was a combination of both). See *supra*, footnotes 615 and 616. In any case, even accepting as true that the term "amendments" included additional *amendments to the measures* at issue that the EC had, for whatever reason, not included in the panel request, does not lead to the result that subsequent *measures*, which is what the subsequent reviews are, were also covered by that reference.

[621] To accept the EC view that the term "amendment" covered the subsequent reviews would imply that the original panel (and the Appellate Body) made findings with respect to measures which did not exist at the

European Communities simply cannot be reconciled with the manner in which the European Communities itself framed the measures at issue in the original dispute.[622]

8.81 We note that the European Communities refers us to the Appellate Body report in *Chile – Price Band* in which, it argues, the Appellate Body "interpreted the reference to 'amendments' or 'any amendments' as part of the measures at issue in panel requests in broad terms".[623] The European Communities notes that in its report in that case, the Appellate Body stated:

> "If the terms of reference in a dispute are *broad enough* to include *amendments* to a measure—as they are in this case—and if it is necessary to consider an amendment in order to secure a positive solution to the dispute—as it is here—then it is appropriate to consider the measure as amended in coming to a decision in a dispute".[624]

8.82 The European Communities also argues that, following the same approach, the panel in *US – Shrimp (Thailand)* concluded that the inclusion of the language "any amendments or extensions to the [measure at issue]" in Thailand's panel request was "broad enough" to allow for the inclusion of a modification of the original measure.[625]

8.83 Both of the reports referred to by the European Communities concern the question of whether amendments to the measures at issue in an original dispute, which are adopted during the course of panel proceedings, may fall within that panel's terms of reference. The Appellate Body in *Chile – Price Band* found that the amendment at issue in that dispute should be considered as part of the measure at issue for two reasons. First, the "amendment" at issue clarified the legislation that established the measure at issue and did not change the original measure into something different from what was in force before the amendment.[626] Second, as noted by the European Communities, the panel request in that case was broad enough to cover "amendments" to the measure at issue.[627] The *US – Shrimp (Thailand)* panel reached a similar conclusion on similar grounds. It found that the amendment at issue in that case "seeks to clarify the legislation that established the measure at issue and does not change the essence of the original measure into something different than what was in force before its issuance".[628]

8.84 Besides the fact that we are not, in this case, dealing with an amendment to a measure in the course of an original proceeding, but rather, to disputed allegations that certain subsequent measures are "amendments" to a measure found to be WTO-inconsistent in an original proceeding, one additional notable difference exists between the situation in the present dispute and those relied on by the European Communities. For the parallel drawn by the European Communities between these cases and the situation at hand to be apt, the subsequent reviews – administrative reviews and sunset reviews – allegedly before us would have had to merely clarify the terms of the original investigations or (and, in certain cases) administrative reviews that were at issue in the original dispute, without

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time they made these findings. It is not clear to us that the DSU allows a panel or the Appellate Body to make findings with respect to measures that are not yet in existence. Even assuming the DSU allowed such a possibility, we would be reluctant to read the findings of the original panel and of the Appellate Body so broadly in this case without an express indication by the original panel and the Appellate Body that this was their intent.

[622] To be clear, we do not consider that reliance on any dictionary definition of the term "amendment" would be of assistance in resolving this issue.

[623] EC Opening Statement, para. 15.

[624] Appellate Body Report, *Chile – Price Band*, para. 144 (emphasis added by the EC).

[625] EC Opening Statement, para. 16, citing Panel Report, *United States – Measures Relating to Shrimp from Thailand* ("*US – Shrimp (Thailand)*"), WT/DS343/R, adopted 1 August 2008, as modified by Appellate Body Report, WT/DS343/AB/R, WT/DS345/AB/R, para. 7.48.

[626] Appellate Body Report, *Chile – Price Band*, para. 137.

[627] Appellate Body Report, *Chile – Price Band*, para. 144.

[628] Panel Report, *US – Shrimp (Thailand)*, para. 7.48.

modifying the essence or the effects of these measures. We do not understand the European Communities to advocate such an extreme position, nor, in our view, would such a position be tenable. Thus, the analogy drawn by the European Communities is, in our view, inapposite.

(iii) Whether the subsequent reviews fall within our terms of reference as "omissions" or "deficiencies" in the US implementation of the DSB's recommendations and rulings

8.85 The European Communities also argues that the subsequent reviews listed in the Annex to its Article 21.5 panel request fall within our terms of reference as "omissions" or "deficiencies" in the US implementation of the DSB's recommendations and rulings.[629]

8.86 We understand this argument to be primarily dependent on the EC argument that the subsequent reviews are "amendments" to the measures at issue in the original dispute, an argument we have rejected. Even if the European Communities intends this argument to be self-standing, and it is far from clear from the EC arguments that this is the case, we do not consider that we need to address it separately in the context of determining whether the subsequent reviews fall within our terms of reference. We examine in the next section of our report whether the subsequent reviews are measures taken to comply because they are closely connected with the measures at issue in the original dispute and/or the DSB's recommendations and rulings. We conduct this analysis in view of the fact that our authority extends not only to those acts which the United States has taken to comply, including allegedly the subsequent reviews adopted after the expiry of the reasonable period of time, but also to those acts which the United States allegedly *should have taken to bring itself into compliance*. As a result, any "omission" or "deficiency" of the United States *in the form of a subsequent review* would be captured in the analysis below and we do not consider that the characterization of the EC claims as challenging omissions and deficiencies in the US implementation can broaden the scope of this proceeding to *measures* which we otherwise determine not to fall within our terms of reference. We recall in this respect that we are, at this stage, addressing the procedural question of whether the subsequent reviews fall within the scope of this proceeding as *measures* that should be regarded as "measures taken to comply", and not the substantive question of whether the United States has omitted to comply with the DSB's recommendations and rulings, a question which we address below, in section E of our findings.

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[629] See EC Answer to Panel Question 8, in which the European Communities indicates that it "considers that the subsequent reviews listed in the Annex to the Panel Request constitute evidence of the US omissions and deficiencies in light of the DSB's recommendations and rulings in the original dispute." See also EC Opening Statement, paras. 21-22:

> "In this proceeding, the European Communities challenges, in addition to certain Section 129 Determinations, the omissions and deficiencies by the United States to take the necessary measures to comply with the adopted DSB's recommendations and rulings, *i.e.*, (i) that the United States should, on 9 April 2007, have stopped taking any positive acts providing for the final payment of duties or retention of cash deposits based on zeroing with respect to those entries not finally liquidated before the end of the reasonable period, in connection with any of the measures described in the original dispute and, thus, with respect to the measures contained in the Annex to the Panel Request; and (ii) that the United States should have recalculated, without zeroing, the previous dumping margins based on zeroing, in order to rely on them for the assessment of likelihood of recurrence of dumping in sunset review proceedings with respect to the measures in the original dispute."

(iv) Whether the subsequent reviews are measures taken to comply because they have a sufficiently close nexus with the measures at issue in the original dispute and the DSB recommendations and rulings

Relevant legal principles

8.87 We now turn to the EC argument that the "subsequent reviews" and any associated assessment instructions are "measures taken to comply" because they bear a sufficiently close nexus with, or are closely connected to, the DSB's recommendations and rulings, and with the measures at issue in the original proceeding. In making this argument, the European Communities relies in particular on the reports of the panel in *US – Upland Cotton* and of the Appellate Body in *US – Softwood Lumber IV (Article 21.5 – Canada)*.

8.88 The terms of Article 21.5 DSU themselves "delimit a particular category of measures that fall within the scope of proceedings conducted pursuant to that provision";[630] Article 21.5 proceedings "do not concern just *any* measures of a Member of the WTO, rather, Article 21.5 proceedings are limited to 'those measures taken *to comply* with the recommendations and rulings' of the DSB."[631] Further, Article 21.5 proceedings concern a disagreement as to either the *existence* or the *consistency* with a covered agreement of such measures taken to comply – "or a combination of both, in situations where the measures taken to comply, through omissions or otherwise, may achieve only partial compliance."[632] One of the preliminary steps in an Article 21.5 proceeding is therefore to decide whether the measures challenged by the claimant are "measures taken to comply" with the DSB's recommendations and ruling and therefore fall within the terms of reference of the compliance panel.

8.89 Further, not only measures taken "in the direction of", or "for the purpose of achieving" compliance may fall within the competence of an Article 21.5 panel. In *US – Softwood Lumber IV (Article 21.5 – Canada)*, the Appellate Body noted that "[o]n its face ... the phrase 'measures taken to comply' seems to refer to measures taken *in the direction of*, or *for the purpose of achieving*, compliance".[633] But crucially, the Appellate Body added that :

> "The fact that Article 21.5 mandates a panel to assess 'existence' and 'consistency' tends to weigh against an interpretation of Article 21.5 that would confine the scope of a panel's jurisdiction to measures that *move in the direction of*, or *have the objective of achieving*, compliance. These words also suggest that an examination of

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[630] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 65.

[631] Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU* ("*Canada – Aircraft (Article 21.5 – Brazil)*"), WT/DS70/AB/RW, adopted 4 August 2000, DSR 2000:IX, 4299, para. 36 (emphasis original), cited with approval in, *inter alia*, Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 65. We note that the Appellate Body has also indicated that, normally, the measure challenged in an Article 21.5 proceeding will not be the same measure that was the subject of the original dispute. See Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 36:

> "In principle, a measure which has been 'taken to comply with the recommendations and rulings' of the DSB will *not* be the same measure as the measure which was the subject of the original dispute, so that, in principle, there would be two separate and distinct measures: the original measure which *gave rise* to the recommendations and rulings of the DSB, and the 'measures taken to comply' which are – or should be – adopted to *implement* those recommendations and rulings." (emphasis original)

[632] Appellate Body Report, *US – FSC (Article 21.5 – EC II)*, para. 60. (emphasis original)

[633] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 66 (emphasis original).

> the effects of a measure may also be relevant to the determination of whether it constitutes, or forms part of, a 'measure[] taken to comply'".[634]

8.90 WTO panels and the Appellate Body have made it clear that it is for the Article 21.5 panel to determine whether a given measure is a "measure taken to comply": while an implementing Member's characterization of a measure as being one "taken to comply" should be taken into consideration by the panel, it is not determinative.[635] Equally, the compliance panel is not bound by the complainant's characterization of a measure as being one "taken to comply".[636]

8.91 As noted by the parties and third parties to this dispute, a number of prior WTO panels and the Appellate Body have found that measures not characterized by the implementing Member as being taken to comply nonetheless were within their terms of reference, on the basis of the close connection of those measures with either the "declared" measures taken to comply, the measures at issue in the original dispute, and/or the DSB's recommendations and rulings.

8.92 In *Australia – Salmon (Article 21.5 – Canada)*,[637] the compliance panel determined that an import ban on salmonids enacted by the Australian State of Tasmania during the course of its proceedings, and therefore not explicitly identified in Canada's Article 21.5 panel request, fell within its terms of reference. The panel reasoned that if a compliance panel were to leave it to the full discretion of the implementing Member to decide whether or not a measure is one "taken to comply",

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[634] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 67 (footnote omitted, italics original). We read the Appellate Body's statement as indicating that the proposition that only measures taken "in the direction of", or "for the purpose of achieving" compliance fall within the terms of reference of an Article 21.5 is at odds with the fact that that provision requires a compliance panel to also examine a Member's omissions in achieving implementation. For a similar reading of the Appellate Body's statement, see Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States* ("*EC – Bananas III (Article 21.5 – US)*"), WT/DS27/RW/USA and Corr.1, circulated to WTO Members 19 May 2008 [adoption pending], paras. 7.304-7.306. In any case, we subscribe to the following observations made by the *Australia – Salmon (Article 21.5 – Canada)* panel:

> "The question of whether a measure is one in the direction of WTO conformity or, on the contrary, maintains the original violation or aggravates it, can, in our view, not determine whether a measure is one 'taken to comply'. If this were so, one would be faced with an absurd situation: if the implementing Member introduces a 'better' measure -- in the direction of WTO conformity -- it would be subject to an expedited Article 21.5 procedure; if it introduces a 'worse' measure -- maintaining or aggravating the violation -- it would have a right to a completely new WTO procedure."

Panel Report, *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada* ("*Australia – Salmon (Article 21.5 – Canada)*"), WT/DS18/RW, adopted 20 March 2000, DSR 2000:IV, 2031, para. 7.10, subpara. 23.

[635] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, paras. 73-74; Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India* ("*EC – Bed Linen (Article 21.5 – India)*"), WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, 965, para. 78; Panel Report, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather – Recourse to Article 21.5 of the DSU by the United States* ("*Australia – Automotive Leather II (Article 21.5 – US)*"), WT/DS126/RW and Corr.1, adopted 11 February 2000, DSR 2000:III, 1189, para. 6.4; Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.10, subparas. 22-23. The Appellate Body cautioned that "characterising an act by a Member as a measure taken to comply when that Member maintains otherwise is not something that should be done lightly by a panel." Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 74.

[636] Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India* ("*EC — Bed Linen (Article 21.5 – India)* "), WT/DS141/RW, adopted 24 April 2003, as modified by Appellate Body Report, WT/DS141/AB/RW, DSR 2003:IV, 1269, para. 6.15.

[637] Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, paras. 7.11-7.22.

that implementing Member could avoid any scrutiny of certain measures "even where such measures would be *so clearly connected to the panel and Appellate Body reports concerned, both in time and in respect of the subject-matter*, that any impartial observer would consider them to be measures 'taken to comply'".[638]

8.93 The panel in *Australia – Leather II (Article 21.5 – US)* applied a similar approach to find that it could examine a measure that it found to be "inextricably linked" to the steps taken by the implementing Member to comply with the DSB's recommendations and rulings, in view of both its timing and its nature.[639] This dispute concerned the implementation, by Australia, of a DSB recommendation to "withdraw the subsidy", a grant, in that case, under Article 4.7 of the *SCM Agreement*. In addition to challenging the measure that Australia declared it had taken to comply (a partial repayment of the grant), the United States also included in its claims a new loan granted to the grant beneficiary's parent company. Australia argued that the loan was not "part of the implementation of the DSB rulings and recommendations" and was not part of the measures that had been notified to the DSB. The panel rejected Australia's objections:

> "The 1999 loan is <u>inextricably linked</u> to the steps taken by Australia in response to the DSB's ruling in this dispute, in view of both its timing and its nature. In our view, the 1999 loan cannot be excluded from our consideration without severely limiting our ability to judge, on the basis of the United States' request, whether Australia has taken measures to comply with the DSB's ruling."[640]

8.94 The Appellate Body upheld a similar conclusion by the panel in *US – Softwood Lumber IV (Article 21.5 – Canada)*.[641] In the original proceeding in that case, the panel and the Appellate Body had found that the calculation of the amount of the subsidy in the final CVD determination on softwood lumber from Canada was inconsistent with the *SCM Agreement* due to the USDOC's failure to conduct a "pass-through" analysis in respect of certain sales. A few days before the expiration of the reasonable of time, the USDOC published a Section 129 determination to implement the DSB recommendations and rulings, in which it performed a pass-through analysis; the rate of subsidization established in the determination became the new cash deposit rate. Four days later, the USDOC published the final results of the first administrative review in the same case, which established a new cash deposit rate. In the review, the USDOC applied the same pass-through analysis that it had used in the Section 129 determination, stating that it did so in view of the findings made in the original dispute. The compliance panel held that the USDOC's treatment of pass-through in the first administrative review, but not the administrative review determination in its entirety, fell within its terms of reference because (i) it was clearly connected to the panel and Appellate Body reports concerning the Final CVD Determination, and (ii) it was inextricably linked to the treatment of pass-through in the Section 129 determination. On appeal, the Appellate Body endorsed the "nexus-based"

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[638] Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.10, subpara. 22 (emphasis added). The panel considered that, in the context of the dispute before it, at least any quarantine measure on imports of salmonids from Canada introduced by Australia subsequent to the adoption of the DSB recommendations and rulings and within a more or less limited period of time thereafter was a "measure taken to comply" and found, on that basis, that the Tasmanian ban fell within its terms of reference.

[639] Panel Report, *Australia – Automotive Leather II (Article 21.5 – US)*, paras. 6.1-6.7.

[640] Panel Report, *Australia – Automotive Leather II (Article 21.5 – US)*, para. 6.5. (underline added) The new loan had been granted concurrently with the repayment of the original grant.

[641] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, paras. 61 *ff*, Panel Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5* ("*US – Softwood Lumber IV (Article 21.5 – Canada)*"), WT/DS257/RW, adopted 20 December 2005, upheld by Appellate Body Report, WT/DS257/AB/RW, DSR 2005:XXIII, 11401, paras. 4.36-4.50.

test used by the panel and upheld its application in the particular circumstances of the dispute.[642] The United States had argued on appeal that the determination in the First Assessment Review was not a measure taken to comply. In explaining that a panel's mandate under Article 21.5 is not necessarily limited to examining those measures declared to be "taken to comply" by the responding party, the Appellate Body indicated that:

> "[S]ome measures with a particularly close relationship to the declared 'measure taken to comply', and to the recommendations and rulings of the DSB, may also be susceptible to review by a panel acting under Article 21.5. Determining whether this is the case requires a panel to scrutinize these relationships, which may, depending on the particular facts, *call for an examination of the timing, nature, and effects of the various measures.* This also requires an Article 21.5 panel to examine the factual and legal background against which a declared 'measure taken to comply' is adopted. Only then is a panel in a position to take a view as to *whether there are sufficiently close links for it to characterize such an other measure as one 'taken to comply'* and, consequently, to assess its consistency with the covered agreements in an Article 21.5 proceeding."[643]

8.95 More recently, the panel in *US – Upland Cotton (Article 21.5 – Brazil)* considered that:

> "[A] claim relating to a measure that has a sufficiently close nexus with the measure taken to comply or with the DSB recommendations and rulings in the original proceeding can be within the scope of Article 21.5 even where that measure itself has not been the subject of DSB recommendations and rulings in the original proceeding."[644]

8.96 In that case, the panel considered that a claim rejected by the original panel in a finding that was reversed by the Appellate Body, but with respect to which the Appellate Body found itself unable to complete the analysis in the original proceeding, was within its terms of reference. The panel found that the measures in question were measures with a "particularly close relationship to the declared measure taken to comply and to the recommendations and rulings of the DSB"; in making this finding, it relied on the Appellate Body's findings in *US – Softwood Lumber IV (Article 21.5 – Canada)*. The Appellate Body upheld the panel's conclusion that the measures at issue fell within the panel's terms of reference, based on a different reasoning. The Appellate Body considered that its reasoning in *US – Softwood Lumber (Article 21.5 – Canada)* was not applicable in the instant case: the dispute in *Lumber* concerned the identification of closely connected measures so as to avoid circumvention, whereas in *Cotton* the issue was whether a single programme may be permissibly atomized for the purposes of Article 21.5 review.[645] [646]

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[642] In addition, the Appellate Body cited *Australia – Automotive Leather II (Article 21.5 – US)* and *Australia – Salmon (Article 21.5 – Canada)* as "useful illustrations" of when a panel may properly decide to characterize a Member's act as a "measure taken to comply" when that Members maintains otherwise. Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 76.

[643] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77 (emphasis added).

[644] Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 9.26.

[645] In the original dispute, export credit guarantees granted with respect to exports of certain commodities were found to be WTO-inconsistent. The original panel rejected claims with respect to other commodities, *e.g.* poultry meat and pig meat. The original panel's finding in this respect was reversed by the Appellate Body, but the Appellate Body found itself unable to complete the analysis. There were therefore no DSB recommendations or rulings with respect to subsidies granted to pig meat and poultry meat. To implement the DSB's recommendations and rulings, the United States implemented *programme-wide* changes to its export credit guarantee programme, which applied to exports of all commodities. The question before the panel and

8.97 We consider that a nexus-based analysis, as articulated in *Australia – Leather II (Article 21.5 – US)*, *Australia – Salmon (Article 21.5 – Canada)* and *US – Softwood Lumber (Article 21.5 – Canada)* is useful in examining which measures challenged by a complainant properly fall within the scope of an Article 21.5 proceeding. A number of considerations are at play in such an analysis. First, because of the necessary link with the original dispute and given that adopted panels and Appellate Body reports constitute a final resolution of the dispute between the parties[647], there are inherent limits on the claims that may be submitted to an Article 21.5 panel.[648] Yet, it is equally clear that "these limits should not allow circumvention by Members by allowing them to comply through one measure, while, at the same time, negating compliance through another".[649] We also recall that Article 21.5 proceedings cover not only a Member's actions to implement DSB recommendations and rulings, but also its omissions – *i.e.*, its failure to take actions to do so. Finally, Article 3.3 of the DSU provides that one of the objectives of the WTO dispute settlement process is the "prompt settlement" of disputes.[650] These considerations, in our view, favour the resolution of claims before an

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the Appellate Body was whether export credit guarantees granted to exports of pig meat and poultry meat were "measures taken to comply". The panel considered that the subsidies granted to each commodity were separate measures and considered that the subsidies granted to exports of pig meat and poultry meat fell within its terms of reference because of their "close relationship" to the declared measure taken to comply. The Appellate Body adopted a different approach and concluded that the amended export credit guarantee programme was a single measure. Further, the *US – Upland Cotton (Article 21.5 – Brazil)* panel also determined that certain payments made under programmes challenged in the original dispute, but made in a subsequent period, fell within the scope of its review. The panel found support for its finding in this respect in prior panel and Appellate Body reports where it was found that measures taken to comply include "measures that have a particularly close relationship to the declared measures taken to comply and to the recommendations and rulings of the DSB". Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 9.80, citing Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*. The Appellate Body upheld the panel's conclusion, but again for different reasons. See Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 233-249.

[646] The Report of the Appellate Body in *US – Upland Cotton (Article 21.5 – Brazil)* was circulated after the main submissions from the parties had been received, and before the issuance of our Interim Report. We note however that the parties made submissions to the Panel after the issuance of the Appellate Body Report in that case, in the form of comments on each other's Comments on Answers to Panel Questions and further comments on these comments. In the context of such comments, the United States submitted its view that:

> "In the recent Appellate Body Report in *US – Upland Cotton 21.5*, the Appellate Body reversed the panel's reasoning that was based on the very approach advocated by the EC in this proceeding. That Appellate Body report makes clear that there is no 'closely related' test. Appellate Body Report, United States – Subsidies on Upland Cotton – Recourse by Brazil to Article 21.5 of the DSU, WT/DS267/AB/RW, circulated 2 June 2008, para. 205."

US letter to the Panel of 11 June 2008, footnote 1. We disagree with the US assertion in this respect. In *US – Upland Cotton (Article 21.5 – Brazil)*, the Appellate Body distinguished between the case at hand in *Cotton* and a situation in which it considered the "*Lumber*" jurisprudence would apply; it did not suggest that "there is no 'closely related' test".

[647] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia* ("*US – Shrimp (Article 21.5 – Malaysia)*"), WT/DS58/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6481, para. 97; Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 93.

[648] See Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, footnote 110, Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 210.

[649] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 71.

[650] See *inter alia* Panel Report, *US – Softwood Lumber IV (Article 21.5 – Canada)* para. 4.48. That panel indicated that given the overlap in effect of the Final Determination, Section 129 determination and the First Assessment Review, it was

> "very conscious that if we exclude the pass-through analysis in the First Assessment Review from these proceedings, Canada and the United States will still dispute the same issue, *i.e.*, pass-through of subsidy benefit, in respect of the same import entries, as they did in the original proceedings concerning the Final Determination. In our view, this would be wholly

Article 21.5 panel where the contested measures are closely connected with the measures at issue in the original dispute or with the steps taken by the Member to implement the DSB's recommendations and ruling.[651]

Application of a nexus-based test in the context of trade remedy disputes

8.98 The facts and issues in *US – Softwood Lumber IV (Article 21.5 – Canada)* and in the dispute before us present a number of similarities; for this reason, we have carefully considered the panel's application and the Appellate Body's evaluation of that application of a nexus-based test in that dispute. That said, as the Appellate Body recognized in *US – Softwood Lumber IV (Article 21.5 – Canada)*, the application of such a test will necessarily be case-specific and depend on the factual circumstances of each dispute. Thus, although the parties and some of the third parties have extensively argued how, in their view, the facts before us resemble or differ from those in *US – Softwood Lumber IV (Article 21.5 – Canada)*, and although we refer to the reasoning of the panel and the Appellate Body in that dispute on occasion, we do not regard that decision as setting forth a precise set of generally-applicable rules establishing when certain measures, *e.g.*, administrative reviews, are sufficiently "closely connected" with original investigations to fall with the purview of an Article 21.5 panel. Nor do we consider that the approach we adopt below would be necessarily applicable in different contexts and under other factual circumstances.

8.99 We now examine, whether, in light of the facts before us, the subsequent reviews challenged by the European Communities are so closely connected to the measures at issue in the original dispute and to the DSB's recommendations and rulings as to warrant that we take them into consideration in assessing the US implementation of the DSB's recommendations and rulings. To do so, we first

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> inconsistent with the object and purpose of the DSU which, as noted above, is to ensure the prompt settlement of disputes".

See also Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 151:

> "Furthermore, we recall that the aim of Article 21.5 of the DSU is to promote the prompt compliance with DSB recommendations and rulings and the consistency of 'measures taken to comply' with the covered agreements by making it unnecessary for a complainant to begin new proceedings and by making efficient use of the original panelists and their relevant experience."

See also Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 212, where after citing this paragraph from *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, the Appellate Body added that, in the case on appeal:

> "having an Article 21.5 panel examine Brazil's claims against export credit guarantees provided under the revised GSM 102 programme to upland cotton and certain other products, while a new panel examines Brazil's claims against export credit guarantees provided under the same programme to pig meat and poultry meat, would not be the most efficient use of WTO dispute settlement procedures."

[651] The Appellate Body expressed similar views in *US – Softwood Lumber IV (Article 21.5 – Canada)* when it indicated that Article 21.5 strikes a balance between competing considerations:

> "On the one hand, it seeks to promote the prompt resolution of disputes, to avoid a complaining Member having to initiate dispute settlement proceedings afresh when an original measure found to be inconsistent has not been brought into conformity with the recommendations and rulings of the DSB, and to make efficient use of the original panel and its relevant experience. On the other hand, the applicable time-limits are shorter than those in original proceedings, and there are limitations on the types of claims that may be raised in Article 21.5 proceedings. This confirms that the scope of Article 21.5 proceedings logically must be narrower than the scope of original dispute settlement proceedings. This balance should be borne in mind in interpreting Article 21.5 and, in particular, in determining the measures that may be evaluated in proceedings pursuant to that provision."

Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 72.

examine the links, in terms of their *nature* and of their *effects*, that exist in general between, on the one hand, the subsequent reviews challenged by the European Communities and, on the other hand, the measures at issue in the original dispute and the recommendations and rulings of the DSB. Next, we consider the links, in terms of the *timing* of the determinations at issue, to the US implementation of the DSB's recommendations and rulings. Finally, we apply these principles to each of the subsequent reviews challenged by the European Communities to determine whether each review falls within our terms of reference.

8.100 We note at the outset that the European Communities asks that we "not mechanistically" apply the distinction between "as such" and "as applied" findings.[652] By this, we understand the European Communities to mean that we should disregard the fact that only "as applied" findings resulted from the original dispute with respect to administrative reviews; in other words, that all the subsequent administrative reviews are before us because they involve the use of zeroing.[653] Conversely, the United States submits that accepting the EC argument that the subsequent reviews fall within our terms of reference would convert the ruling of the Appellate Body with respect to administrative reviews into an "as such" finding. We observe in this respect that the findings of the Appellate Body regarding the administrative reviews at issue in the original dispute were "as applied" findings, that the European Communities itself had made a distinction, in the original dispute, between its "as applied" and its "as such" claims, and that in any case, the US obligation to implement with respect to administrative reviews flows from these findings of the Appellate Body, and these findings only. There is indeed, as the United States notes, a risk that by the application of a nexus-based analysis, a compliance panel would in effect broaden the scope of the DSB's recommendations and rulings adopting the findings made in the original dispute. We have, in conducting our analysis, paid particular attention to the fact that the findings with respect to zeroing in the original dispute concerned the use of zeroing in the specific original investigations and administrative reviews at issue in that case, and not the US zeroing methodology "as such".[654] Proceeding in this manner does not

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[652] EC Opening Statement, para. 40. The European Communities seeks support in a statement by the *US – Upland Cotton (Article 21.5 – Brazil)* panel (para. 9.51). We do not consider that, read in context, the statement of the *US – Upland Cotton (Article 21.5 – Brazil)* panel relied on by the European Communities supports its call for a relaxation of the distinction between "as such" and "as applied" findings with respect to administrative reviews. We understand the statement cited by the European Communities as standing for the proposition that in the specific context of "as applied" adverse effect claims under Article 5 of the *SCM Agreement*, the analysis of payments granted under a programme logically implies at least some examination of the programme under which the payments are made. See also the Appellate Body's *obiter dictum* in its report in the same case, para. 234: "We have some difficulty accepting the notion that a subsidy programme and the payments provided under that programme can be assessed separately." In other words, we do not consider that the European Communities' argument is supported by the statement of the *US – Upland Cotton (Article 21.5 – Brazil)* panel on which it relies.

[653] See EC Answer to Panel Question 3:

> "In our present case, we have a similar situation [as in *US – Upland Cotton (Article 21.5 – Brazil)*]. Even if the Appellate Body in the original dispute was unable to complete the analysis on the methodology 'as such', there were a whole series of findings of instances of application of that methodology. Thus, the analysis made by the Panel and the Appellate Body in the original dispute of the 15 original investigations and the 16 administrative reviews 'as applied' also took into consideration the *essence* of the problem in question: the zeroing methodology, *i.e.*, a computer code, whether in the methodology or in cases of its application to a particular set of transactions. This is the same methodology that the United States has repeatedly applied in the subsequent reviews listed in the Annex to the Panel Request." (emphasis original).

[654] We note that the EC claims are, in any case, more limited than suggested by the United States. The European Communities makes claims with respect to determinations adopted under the same AD order as the measures at issue in the original dispute (*i.e.*, with respect to the same product from the same country), and not with respect to all administrative reviews conducted by the United States.

amount to applying the "as such" vs. "as applied" distinction mechanistically, it only reflects the nature of the findings made in the original dispute.

Nature and effects

8.101 We note that administrative reviews, sunset reviews and other types of reviews such as new shipper reviews or changed circumstances reviews are conducted in the ordinary course of the application of antidumping and countervailing duty laws by Members operating retrospective duty assessment systems. Similarly, Members operating prospective duty assessment systems routinely conduct sunset and other types of reviews, as well as refund proceedings. For an administrative review or sunset review to be considered to have a "close connection" with the DSB's recommendations concerning a measure at issue in the original proceeding, the mere fact that the Member made a determination in a review involving the same products and countries as the AD measure that was found to be WTO-inconsistent in the original dispute cannot be sufficient. It is obvious that not every determination made in the context of a given AD proceeding – which can span several years, if not decades – is subject to review by an Article 21.5 panel for the mere reason that another, previous, determination made in the same proceeding was found to be WTO-inconsistent in an original WTO dispute at an earlier point in time. It is only where a specific aspect of the "subsequent" determination is closely related to the violation found in the original dispute, and affects the Member's implementation of the DSB's recommendations and rulings in respect of that violation, that that specific aspect of the subsequent determination may, under certain circumstances, be subject to review in the context of a compliance proceeding. Here, our analysis is limited to the question of whether the use of zeroing in the calculation of margins of dumping in the subsequent reviews bears a sufficiently close nexus or close connection to the findings of the panel and Appellate Body in the original dispute so as to warrant our consideration of that precise aspect of the subsequent reviews. No other aspect of the subsequent reviews is before us.

8.102 We recall that in *US – Softwood Lumber IV (Article 21.5 – Canada)*, the panel and the Appellate Body found that close links existed, in terms of the nature and effects, between the three measures at issue – the original determination found to be WTO-inconsistent in the original proceeding, the Section 129 determination made by the United States to implement the DSB's recommendations and rulings, and the results of the first administrative review. All three were CVD proceedings conducted by the USDOC, concerning the same product, from the same country, and all three involved the calculation of the rate of subsidization; further the same, new "pass-through" methodology applied by the USDOC to implement the DSB's recommendations in the Section 129 determination was also used in the first administrative review. The panel and the Appellate Body also took account of the effects of the publication of the results of the first administrative review, in particular, the fact that the cash deposit rate established in the Section 129 determination was replaced by that calculated in the first administrative review.[655]

8.103 In general terms, the successive determinations of different types are made in the context of a single trade remedy proceeding, involving the imposition and assessment of anti-dumping duties on imports of a particular subject product, from the same country. They all concern the imposition and collection of anti-dumping duties under a particular anti-dumping order. In this sense, these determinations form part of a continuum of events and measures that are all inextricably linked; indeed, this continuum is largely determined by the provisions of the *Anti-Dumping Agreement*.

[655] The Appellate Body also observed that imports of softwood lumber from Canada entered during the period 22 May 2002 to 31 March 2003 were, first subject to the cash deposit rate determined in the original determination, and subsequently, to the final duty liability determined in the first administrative review. Appellate Body Report, *US – Softwood Lumber (Article 21.5 – Canada)*, para. 83.

8.104 As in *US – Softwood Lumber*, in the case before us there also exists a close nexus between the subsequent reviews and the measures at issue in the original dispute and the DSB's recommendations and rulings in respect thereof in terms of their nature and effects.[656] First, the measures at issue either provide a legal basis for the application of anti-dumping duties and calculate future cash deposit rates for individual exporters (original investigations), establish the amount of AD liability for individual importers and the future cash deposit rates for individual exporters (administrative reviews), or establish a new legal basis for the imposition of anti-dumping duties (sunset reviews). In each context, the issue of "zeroing" arises either in the calculation of dumping margins, the amount of duty liability, or the reliance on dumping margins in the context of sunset reviews. This is the only aspect of the subsequent reviews that is challenged by the European Communities; it is also the precise issue that was challenged in the original dispute, and which was the subject of the DSB rulings and recommendations.

8.105 The United States submits, in this respect, that the legal bases for the findings of the panel and Appellate Body regarding original investigations and administrative reviews in the original dispute differed. The original panel found that the use of "model zeroing" in the original investigations at issue, and the US "zeroing methodology" as it relates to original investigations, were inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*, while the Appellate Body found that the use of "simple zeroing" in the administrative reviews at issue was inconsistent with Articles 9.3 of the *Anti-Dumping Agreement* and VI:2 of the GATT 1994. The United States notes that, by contrast, in *US – Softwood Lumber (Article 21.5 – Canada)*, the legal basis for the obligation to conduct a "pass-through" analysis in a countervailing duty proceeding did not vary depending on whether the issue arose in an investigation or an assessment review.[657] While the United States is correct in this respect, it overlooks a fundamental aspect of the findings of the original panel and of the Appellate Body.

8.106 The original panel relied on the Appellate Body's conclusion, in *EC – Bed Linen* and *US – Softwood Lumber V*, that when a margin of dumping is calculated on the basis of multiple averaging by model type, the margin of dumping for the product in question must reflect the results of all such comparisons, including weighted-average export prices that are above the normal value for individual models.[658] The Appellate Body, in *EC – Bed Linen*, had found that Article 2.4.2 requires that

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[656] We recall that the present exercise is one in which the Panel assesses whether measures which are *different* from the measures at issue in the original dispute should fall within the scope of this proceeding. Perfect identity of the measures is therefore not required, nor even expected. Of more relevance, in our view, are the effects of a measure (in terms of their impact on the Member's implementation of the DSB's recommendations and rulings). We note that, in *Australia – Leather II (Article 21.5 – US)*, the measures did not have the same legal form (loan vs. grant), and that in *Australia – Salmon (Article 21.5 – Canada)*, they were not adopted by the same decision-maker or even the same level of government. *US – Softwood Lumber (Article 21.5 – Canada)* also stands for the proposition that the different nature of original investigations and administrative reviews does not prevent finding that the latter may fall within the scope of an Article 21.5 proceeding in respect of an original dispute that concerned the former. In *Lumber*, the Appellate Body rejected US arguments with respect to the different nature of original investigations and administrative reviews by noting, first, that municipal law classifications are not determinative in WTO dispute settlement proceedings (the United States had pointed to the different legal bases in United States law for original investigations and assessment review); and, second, that the *SCM Agreement*'s recognition that original CVD investigations are proceedings distinct from duty assessment reviews did not answer the question of whether the Panel was entitled to examine the USDOC's pass-through analysis in the first administrative review. Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 82.

[657] In either case, the obligation arose from Articles 10 and 32.1 of the *SCM Agreement*, and Article VI:3 of the GATT 1994. See US Answer to Panel Question 13.

[658] Panel Report, *US – Zeroing (EC)*, paras. 7.27 (referring to Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* ("*EC – Bed Linen* "), WT/DS141/AB/R, adopted 12 March 2001, DSR 2001:V, 2049, paras. 46-66, and Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada* ("*US – Softwood Lumber V* "), WT/DS264/AB/R, adopted 31 August 2004, DSR 2004:V, 1875, paras. 76-117) and 7.31.

"margins of dumping" be established with respect to the product under investigation as a whole, on the basis of a comparison including *all* comparable export transactions. The Appellate Body similarly concluded in *US – Softwood Lumber V* that "dumping" and "margins of dumping" can only be established for the product under investigation as a whole. It reached that conclusion on the basis of, *inter alia*, Article VI:1 of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement (noting that both provisions refer to the dumping of "product(s)"). The Appellate Body thus reasoned that the result of all comparisons at the sub-group level must be included in calculating a margin of dumping for the product as a whole. The panel and the Appellate Body, in the original dispute in the present case, recognized the same basic obligation deriving from the definition of "dumping" and "margin of dumping" under Article 2 of the *Anti-Dumping Agreement* – namely, that the margin of dumping, under that provision, must be calculated for the "product as a whole", and consequently, that "if the margin of dumping is calculated on the basis of multiple comparisons made at an intermediate stage, it is only on the basis of aggregating all these intermediate results that an investigating authority can establish the margins of dumping for the product as a whole".[659] Thus, while the panel and the Appellate Body's findings of inconsistency were made under different legal provisions, they were premised on the same fundamental obligation under the *Anti-Dumping Agreement*, following from the definition of the term "margin of dumping" under the Agreement.

8.107 The original dispute concerned 15 original investigation determinations and 16 administrative review determinations, whereas the subsequent reviews are of two types – administrative reviews and sunset reviews.[660] There are four different relationships between the measures at issue in the original dispute and the subsequent reviews at issue:

(a) In some cases, the measure at issue in the original dispute was an original investigation and the subsequent review challenged is an administrative review;

(b) In others, the measure at issue in the original dispute was an original investigation and the subsequent review challenged is a sunset review;

(c) In yet other cases, both the measure at issue in the original dispute and the subsequent review challenged are administrative reviews;

(d) Finally, in some cases, the measure at issue in the original dispute is an administrative review and the subsequent review challenged is a sunset review.

Administrative reviews subsequent to original determinations or earlier administrative reviews (a and c)

8.108 We first examine the situations in which an original investigation was found to be WTO-inconsistent in the original dispute. Original investigations have two functions. First, they serve to

[659] Appellate Body Report, *US – Zeroing (EC)*, para. 132; see also Panel Report, *US – Zeroing (EC)*, para. 7.27 *ff*. To be more precise, the Appellate Body considered that under Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, the amount of the assessed anti-dumping duties may not exceed the margin of dumping as established "for the product as a whole" and found that the USDOC's use of zeroing in administrative reviews had resulted in the collection of duties in an amount greater than the margin of dumping established "for the product as a whole".

[660] Two of the subsequent reviews are changed circumstances reviews (May 2003 changed circumstances review in case 24, December 2003 changed circumstances review in case 17). For the reasons discussed in para. 8.119 below, with respect to the "temporal" link between these measures and the DSB's recommendations and rulings, the Panel concludes that these measures do no fall within the scope of this proceeding. In any case, because the sole effect of these reviews is to change the company whose exports are subject to the anti-dumping duties, they would be of limited relevance to our assessment of the US implementation of the DSB's recommendations and rulings.

determine the existence of dumping, leading to issuance of an anti-dumping order providing the legal basis for the imposition of anti-dumping duties.[661] Second, they establish the cash deposit rate for future entries of the subject product from each exporter. Of these two functions, the establishment of a cash deposit rate is more closely connected with administrative reviews. This is because cash deposits at the rate established in the original investigation serve as security for the collection of anti-dumping duties; the amount of the final anti-dumping liability is established in the administrative review.[662] The administrative review also establishes a new cash deposit rate for each exporter, which supersedes the previous cash deposit rate.[663] Thus, the use by the USDOC of zeroing in the calculation of margins of dumping in the context of a "subsequent" administrative review potentially negates action taken by the United States in the form of a Section 129 determination recalculating the margin of dumping from the original investigation in order to implement the DSB's recommendations in respect of that original investigation, as it (i) allows for the assessment of anti-dumping duties at a rate that is based on zeroing, inconsistent with the provisions of the *Anti-Dumping Agreement*, despite alleged implementing action to eliminate such zeroing, and (ii) replaces the rate established in the original investigation (and any new rate established as a result of the implementation of the DSB recommendations and rulings) with a new cash deposit rate calculated with zeroing.[664]

8.109 Likewise, successive administrative reviews in the same anti-dumping proceeding bear a close relationship with each other as each new review performs a final assessment of duties secured by cash deposits at the rate established in the previous review and replaces that cash deposit rate with a newly-calculated one. The fact that a subsequent administrative review may not relate to the same period and the same export transactions as the administrative review at issue in the original dispute or the fact that the exporters concerned may, in some cases, vary does not, in our view, preclude a conclusion that the two measures are closely related.[665] In *US – Softwood Lumber (Article 21.5 – Canada)*, the subsequent administrative review had the effect of undermining the US implementing action (the Section 129 determination); no such implementing action exists in the case before us. Rather, the United States asserts that it did not have to take any action to implement the DSB's recommendations and rulings because the administrative reviews that were the subject of these recommendations and rulings were no longer in effect as they had been superseded by subsequent administrative reviews.[666] We find this US assertion significant. It tends to confirm the close

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[661] Of course, an anti-dumping order can only be issued if the necessary elements of injury and causal link are also established, but we are not here concerned with those issues.

[662] Where no administrative review is requested, the cash deposit rate established in the original investigation becomes the assessment rate.

[663] The European Communities and some of the third parties have indicated, in response to a question from the Panel, that they considered both "functions" performed by administrative reviews to bear the same "close nexus" to an original investigation" See EC Answer to Panel Question 13 and Japan's, Korea's, and Norway's Answer to Panel Question 5 to the third parties.

[664] We note that the *US – Softwood Lumber IV (Article 21.5 – Canada)* panel found that:

> "even though the period of investigation of the Final Determination and Section 129 Determination may differ from the period of review of the First Assessment Review, and even though the latter was initiated before the DSB adopted any rulings or recommendations regarding this matter, there is in fact considerable overlap in the effect of these various measures. Since the pass-through analysis in the First Assessment Review could, therefore, have an impact on, and possibly undermine, any implementation of the DSB rulings and recommendations regarding pass-through by the Section 129 Determination, we consider that the pass-through analysis in the First Assessment Review should also fall within the scope of these DSU Article 21.5 proceedings."

Panel Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 4.41.

[665] Nor does it affect our conclusion with respect to the close relationship between the measures where the original measure is an original investigation and the subsequent review is an administrative review.

[666] See *inter alia*, US First Written Submission, paras. 91-102 and Exhibit US-17 (containing a list of administrative review determinations which the United States considers superseded the measures challenged in the original dispute).

relationship that exists between subsequent administrative reviews, and supports our view that subsequent administrative reviews may affect the overall US implementation of the DSB's recommendations and rulings in respect of prior administrative reviews.[667] As a result, we consider that the use of zeroing in a "subsequent" administrative review affects the US implementation of the DSB's recommendations with respect to the use of zeroing in the administrative reviews at issue in the original dispute or circumvents the US obligation to implement these recommendations.

Sunset reviews subsequent to original determinations and earlier administrative reviews (b and d)

8.110 The other function of original investigations, as mentioned above, is that they establish the legal basis for the imposition of antidumping duties. Here, there is a close relationship with subsequent sunset reviews. Sunset review determinations provide a new legal basis for the imposition of anti-dumping duties, based on a different determination, *i.e.*, likelihood of continuation or recurrence – rather than existence of – dumping (and injury). Without an affirmative sunset review determination, an anti-dumping measure lapses at the end of five years. The European Communities argues that the USDOC improperly relied on margins of dumping calculated with the use of zeroing (in prior original investigations or administrative reviews) in the context of subsequent sunset reviews conducted in the same proceeding as measures found to be WTO-inconsistent in the original dispute. Assuming that we were to agree with the EC substantive claims in this respect[668], it would follow that those "subsequent" sunset reviews which relied on "zeroed" dumping margins affect the US implementation of the DSB recommendations with respect to the original investigations and administrative reviews at issue in the original dispute by prolonging the original anti-dumping order or the results of the administrative reviews challenged in the original dispute and, thus, the imposition and collection of duties based on zeroing.

Temporal relationship

8.111 Finally, we turn to the last element of our analysis, the consideration of the temporal relationship between these measures and the DSB's recommendations and rulings and the actions taken by the United States to comply with these recommendations and rulings, if any. We also address, in this section of our analysis, the US arguments with respect to the fact that subsequent reviews were not adopted "in view" of the DSB's recommendations and rulings.

8.112 The United States notes that in *US – Softwood Lumber (Article 21.5 – Canada)* on which the European Communities relies, the Appellate Body found significant both the timing of the measure, which was taken after the adoption of the DSB's recommendations and rulings and very close in time to the "official" measure taken to comply, as well as the fact that the responding Member acknowledged that the determination had been made "in view of" the recommendations and rulings of the DSB. The United States argues that, even accepting that determinations made "in view of" recommendations and rulings can be brought within the terms of reference of an Article 21.5

[667] See also the Panel Report in *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 4.41, where the panel took into consideration the fact that "the prospective effect of the Section 129 Determination was superseded by the prospective effect of the First Assessment Review, once the latter took effect"; and Appellate Body Report, *US – Softwood Lumber (Article 21.5 – Canada)*, para. 85, where the Appellate Body noted that the First Assessment Review directly affected the Section 129 determination because the cash deposit rate resulting from that Determination was "updated", or "superseded", by the cash deposit rate resulting from the First Assessment Review.

[668] The European Communities claims that the sunset review determinations are inconsistent with, *inter alia*, Article 11.3 of the *Anti-Dumping Agreement*. We consider that only where the determination in a sunset review effectively relied on the dumping margins calculated with zeroing does there exist a sufficiently close relationship to the original measures to warrant its consideration by this Panel. As this issue is intrinsically related to the substance of the European Communities' claims, it is examined below.

proceeding does not mean that the subsequent reviews in this case fall within our terms of reference. First, some of the "subsequent" reviews were decided prior to the adoption of the DSB's recommendations and rulings. Second, the USDOC's determinations in those reviews that were made after the adoption of the DSB's recommendations and rulings were not made "in view" of them. Further, the United States also asks the Panel to distinguish the findings of the panels in *Australia Salmon (Article 21.5 – Canada)* and *Australia Leather II (Article 21.5 – US)*. The United States argues that in these two cases, the additional "measure taken to comply" was the result of a deliberate choice on the part of the authorities. In contrast, the United States submits that assessment reviews are required by the *Anti-Dumping Agreement*, when requested and that administrative reviews occur on a schedule that is established without regard to dispute settlement proceedings. Thus, the subsequent reviews were not actions *taken* by the United States to avoid any scrutiny of the measures found to be inconsistent with the DSB recommendations and rulings.[669]

8.113 The European Communities, and some of the third parties, Japan, Korea and Norway, argue that the "timing" is not dispositive of the question of whether the subsequent reviews are "closely connected with" the measures at issue in the original proceeding.[670] The European Communities also argues that the USDOC had time to take account of the DSB's recommendation and rulings in subsequent anti-dumping proceedings but instead chose to take actions directly contrary to its obligations arising therefrom (*i.e.*, the United States continued taking positive acts providing for the final payment of duties or retention of cash deposits based on zeroing).[671]

8.114 The subsequent reviews brought before us can be divided into two broad categories: the determinations that were made before the date of the adoption of the DSB's recommendations and rulings, and those made after that date.

8.115 One would expect, as a matter of logic, that a measure taken before the adoption of the DSB's recommendations and rulings could rarely, if ever, be found to be a measure taken "to comply" with such recommendations and rulings.[672] As a result, it would normally follow that only those subsequent reviews that were decided after such adoption could be taken into consideration as part of a compliance panel's examination of the implementation of DSB recommendations and rulings. [673]

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[669] US Answer to Panel Question 10.

[670] See *e.g.*, EC Answer to Panel Question 20, and Japan's, Korea's and Norway's Answers to Panel Question 3 to the third parties.

[671] EC Answer to Panel Question 9.

[672] We recall the Appellate Body's indication that "[a]s a whole, Article 21 deals with events subsequent to the DSB's adoption of recommendations and rulings in a particular dispute." Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 70.

[673] The European Communities and Japan, in particular, have sought to justify the inclusion of measures pre-dating the adoption of the DSB's recommendations and rulings, and going as far back as the initial consultations in some cases. (See EC Answer to Panel Question 20, in which the European Communities argues that "it should not matter whether the measure subject to the compliance proceeding was taken before or after the adopted DSB report, or at least, this criterion should not be definitive to exclude certain measures from the scope of Article 21.5 DSU proceedings.") The European Communities also argues that under WTO jurisprudence, a measure that essentially replaces an earlier measure remains within the terms of reference of an original panel. (EC First Written Submission, para. 61, citing to Panel Report, *Dominican Republic – Import and Sales of Cigarettes*, paras. 7.11-7.21). Japan makes similar arguments, and relies on prior WTO panel and Appellate Body decisions under Article 6.2 of the DSU, in which panels and Appellate Body have considered that measures adopted after consultations or during the course of an original proceeding were within the panel's jurisdiction because they were, *in substance*, the same measures as those included in the consultations or panel request. (Japan's Third Party Submission, paras. 65 *ff.*) We do not understand Japan to argue that the prior panel and Appellate Body reports it refers to are directly applicable in this case, but only that they should inform the Panel's application of the nexus based test applied in, *inter alia*, *US – Softwood Lumber IV (Article 21.5 – Canada)*. We simply note that the cases relied upon by the European Communities and Japan all concern original proceedings, and that, in many of the cases referred to, the panel and/or the Appellate Body explicitly

The European Communities has not convinced us that a different conclusion is warranted in the present dispute.

8.116 Conversely, measures adopted following the adoption of the DSB's recommendations may have a close link with the DSB's recommendations and rulings and with the steps, if any, taken by the implementing Member to achieve compliance with the recommendations and rulings, and therefore warrant inclusion in the scope of an Article 21.5 proceeding.[674] In our view, the application of a nexus-based test should primarily aim at bringing within the scope of the compliance dispute measures that potentially circumvent implementation or undermine measures officially taken to comply.

Application to the facts of this case

8.117 We now proceed to apply the general principles articulated above in order to determine whether the subsequent reviews challenged by the European Communities properly fall within our terms of reference.

8.118 With respect to the nature and effects of the subsequent reviews, we consider that the subsequent administrative reviews involving the calculation of a margin of dumping based on zeroing and subsequent sunset reviews in which the USDOC relies on margins of dumping calculated with the use of zeroing potentially fall within the scope of this compliance proceeding. We reach this preliminary conclusion on the basis of :

(a) the close nexus that exists in terms of their nature between the subsequent reviews and the measures at issue in the original measure;

(b) the fact that the subsequent reviews potentially affect or undermine the steps otherwise taken – or the steps that should have been taken – by the United States to comply with the recommendations and rulings of the DSB, notably in the form of Section 129 determinations.

8.119 With respect to the temporal element of our analysis[675], we consider, for the reasons stated above, and even though they may have the sufficient nexus in terms of nature and effects, that none of

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indicated that they reached their finding in view of the fact that the amending measure did not affect the substance of the original measure. In any case, we consider the panel and Appellate Body decisions cited by the parties (*Chile – Price Band*, *Dominican Republic – Cigarettes*, *EC – Chicken Cuts*, *Brazil – Aircraft*, Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear* ("*Argentina – Footwear (EC)*"), WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, 515), to be of little relevance in deciding the degree of the temporal relationship between the subsequent measures challenged by the European Communities and the DSB's recommendations and rulings.

[674] Provided, of course, that they otherwise bear the sufficient nexus with the measures at issue in the original dispute and/or the DSB's recommendations and rulings.

[675] We recall the timeline of the original dispute:

Original panel request:	5 February 2004
Revised panel request:	19 February 2004
Establishment of the Panel:	19 March 2004
Issuance of Panel Report (to parties):	28 September 2005
Circulation of Panel Report (to Members):	31 October 2005
Issuance of AB Report:	18 April 2006
Adoption by the DSB:	9 May 2006

the subsequent reviews challenged by the European Communities that were decided before the adoption of the DSB's recommendations and rulings[676] fall within our terms of reference.

8.120 We note in this respect that the European Communities includes in its Annex subsequent reviews that were decided prior to the establishment of the original panel. Including such reviews in the scope of this compliance proceeding would mean that the European Communities could, in the context of the Article 21.5 proceeding, revise the scope of the measures challenged in the original dispute; that would in our view be an overly extensive understanding of the flexibilities afforded by Article 21.5 of the DSU. The European Communities has asserted that some of these measures (in particular the 2001-2002 administrative review in case 19 (Pasta from Italy, for exporter PAM), and the 2001-2002 administrative review in case 28 (Stainless steel sheet strip coils from Germany)) were adopted "just before" its revised request for the establishment of a panel in the original dispute (the results in both of these administrative reviews were published on 10 February 2004, *i.e.*, after the initial but before the revised EC panel request in the original dispute. Yet, as the United States points out, other determinations were taken many months, or even years before the EC panel request. The European Communities could have sought to further amend its original request for the establishment of a panel, or could have brought these measures to the attention of the original panel; it did not do so. In our view, that decision of the European Communities has consequences on the scope of the findings made in the original dispute, and precludes our consideration of those measures in this proceeding.

8.121 We consider that each of the subsequent administrative review adopted following the adoption of the DSB's recommendations and rulings bears a sufficiently close nexus with the DSB's recommendations and rulings in the original dispute to warrant its inclusion in the scope of this proceeding.

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[676] The following "subsequent reviews" fall into this category: 2001-2002 administrative review (adopted 22 July 2004) and 2002-2003 administrative review (adopted 11 April 2005) in case 1 (Hot Rolled Steel from the Netherlands); 2003-2004 administrative review (10 August 2005) in case 2 (Stainless Steel Bar from France); 2001-2003 administrative review (14 June 2004) in case 3 (Stainless Steel Bar from Germany); 2001-2003 administrative review (14 June 2004) in case 4 (Stainless Steel Bar from Italy); sunset review (continuation order) (13 August 2004) in case 6 (Stainless Steel Wire Rod from Sweden); 1998-1999 administrative review (21 February 2001), sunset review (continuation order) (August 13, 2004) in case 7 (Stainless Steel Wire Rod from Spain); sunset review (continuation order) (13 August 2004) in case 8 (Stainless Steel Wire Rod from Italy); sunset review (continuation order) (6 December 2005) in case 14 (Certain Cut-to-Length Carbon-Quality Steel Plate from Italy); 2002-2003 administrative review (19 January 2005), 2003-2004 administrative review (7 December 2005) and sunset review (continuation order) (18 July 2005) in case 18 (Stainless Steel Plate in Coils from Belgium); 2001-2002 administrative review in case 19 (Pasta from Italy, for exporter PAM) (10 February 2004, *i.e.*, after the initial but before the corrected EC panel request in the original dispute); 2001-2002 administrative review (27 April 2004) in case 20 (Certain Pasta from Italy, for exporter Pastifi Garofalo); 2001-2002 administrative review (12 December 2003), 2002-2003 administrative review (17 March 2005) and sunset review (continuation order) (4 August 2005) in case 22 (Stainless Steel Strip Coils from Italy); sunset review (continuation order) (22 December 2005) in case 24 (Granular Polytetrafluorethylene from Italy); 2001-2002 administrative review (12 December 2003), 2002-2003 administrative review (11 February 2005) and 2003-2004 administrative review (7 February 2006) in case 26 (Stainless Sheet Strip Coils from France); 2001-2002 administrative review (10 February 2004) (*i.e.*, after the initial but before the revised EC panel request in the original dispute), 2002-2003 administrative review (20 December 2004), 2003-2004 administrative review (13 December 2005) and sunset review continuation order (4 August 2005) in case 28 (Stainless Steel Sheet Strip Coils from Germany); 2001-2002 administrative review (24 July 2003), 2002-2003 administrative review (15 September 2004) and 2003-2004 administrative review (16 September 2005) in case 29 (Ball Bearings from France); 2001-2002 administrative review (16 June 2003), 2002-2003 administrative review (15 September 2004), 2003-2004 administrative review (16 September 2005) in case 30 (Ball Bearings from Italy, exporters SKF and FAG); 2002-2003 administrative review (15 September 2004) and 2003-2004 administrative review (16 September 2005) in case 31 (Ball Bearings from the United Kingdom, with respect to The Barden Corporation UK).

8.122 We note that in certain cases, the United States argues that the determination was not made "in view" of the DSB's recommendations and rulings. In some instance, the United States notes that the determination makes no reference to the issue of zeroing: 2004-2005 administrative review in case 2 (Stainless Steel Bar from France);[677] 2004-2005 administrative review in case 3 (Stainless Steel Bar from Germany);[678] 2004-2005 administrative review in case 24 (Granular Polytetrafluorethylene from Italy)[679], 2004-2005 administrative review in case 6 (Stainless Steel Wire Rod from Sweden);[680] 2005-2006 administrative review in case 5 (Stainless Steel Bar from the United Kingdom) (in this case because no party specifically raised the issue).[681] In other cases, the issue of zeroing is addressed, but the USDOC declines to follow the respondents' invitation to discontinue the use of zeroing because "the United States has not yet gone through the statutorily mandated process of determining how to implement the report [in the original dispute]": 2004-2005 administrative review in cases 29 and 30 (Ball bearings from France, Italy – respondents FAG and SKF)[682] and 2004-2005 administrative review in case 28 (Stainless Steel Sheet Strip Coils from Germany)[683] or in addressing the issue of zeroing in that review, the USDOC stated that the administrative reviews at issue in the original dispute had been superseded and were therefore no longer in effect: 2004-2005 administrative review in case 1 (Hot-Rolled Steel from the Netherlands).[684]

8.123 Accepting the general argument of the United States that the USDOC is not making certain determinations "in view" of the DSB's recommendations where the USDOC declines to implement the DSB's recommendations with respect to administrative reviews could lead to the incongruous result that a measure would evade scrutiny in Article 21.5 proceedings because the implementing Member's authorities specifically indicated their refusal to take into consideration the DSB's recommendations and rulings. In fact, the USDOC's statements in our view supports inclusion of these measures in the scope of this proceeding. With respect to the other situation (where the USDOC makes no reference to zeroing in the determination or the Issues and Decision Memoranda or indicates that the United States has not yet begun the implementation process), we consider that insofar as zeroing was used in the determination, whether or not the issue was specifically raised by an interested party should not prevent us from considering it.

8.124 Turning to the sunset reviews that the European Communities challenges, we consider that the sunset reviews in cases 2, 4 and 5 (Stainless Steel Bar from France, Italy and the United Kingdom)[685] in case 3 (Stainless Steel Bar from Germany)[686], and in case 19[687] all fall within our terms of reference because they bear the required nexus with the DSB's recommendations and

[677] 71 FR 30873, 31 May 2006.

[678] 71 FR 52063, 1 September 2006.

[679] 72 FR 1980, 17 January 2007.

[680] 72 FR 26337, 9 May 2007, Exhibit EC-16 (amended results of administrative review, the original final results were published on 10 April 2007). We note that, as a result of the Section 129 determination, the order was revoked effective 23 April 2007.

[681] 72 FR 15106, 30 March 2007.

[682] 71 FR 54469, 14 July 2006.

[683] 71 FR 74897, 13 December 2006.

[684] 72 FR 3441, 22 June 2007 (amended final results; final results issued on 22 May 2007). Exhibits EC-11 and EC-12.

[685] 72 FR 30772, 4 June 2007.

[686] 72 FR 29970, 30 May 2007.

[687] 72 FR 5266, 5 February 2007. With respect to case 19, the United States argues that interested parties did not raise, and the USDOC made no mention of, the issue of zeroing and that therefore, the determination could not have been made "in view of" the DSB's recommendations and rulings. US Opening Statement, para. 16, US Answer to Panel Question 14. For the reasons set out in para. 8.123, we find this argument unpersuasive. With respect to cases 2, 3, 4 and 5, the Panel understands the United States to consider that the measures cannot be before us because the determinations resulted in the revocation of the order. We address this argument as part of our substantive analysis of the EC claims in respect of these reviews. *Infra*, paras. 8.245 to 8.264.

rulings to warrant their inclusion in the scope of this proceeding. In each of these reviews, the USDOC's likelihood-of-dumping determination was made after the adoption of the DSB's recommendations and rulings. In our view, it is the date of that determination that is the most appropriate point in time to focus upon in the context of sunset reviews. After all, that is the time at which the USDOC determines whether dumping is likely to continue or recur, allegedly on the basis of dumping margins calculated with zeroing. By contrast, the sunset reviews in cases 29, 30 and 31 (Ball bearings from France, Italy, and the United Kingdom)[688] do not, in our view, bear the required "temporal" nexus with the DSB's recommendations and rulings to warrant their inclusion in the scope of this proceeding. In these cases, while the continuation order was issued after the adoption of the reports by the DSB, the USDOC's likelihood-of-dumping determination was issued prior to the adoption of the DSB's recommendations and rulings.

8.125 In addition, the European Communities has referred, in its submissions, to an additional "subsequent review", the 2005-2006 administrative review in case 23/24 (Granular Polytetrafluorethylene from Italy).[689] We note that this administrative review determination was not included in the EC Article 21.5 panel request. We do not consider that the EC Article 21.5 panel request is broad enough to include any subsequent review other than those specifically listed by the European Communities in the Annex thereto. As a consequence, neither the 2005-2006 administrative review in cases 23/24[690] nor any other subsequent review not specifically listed are before us.[691]

(v) Conclusion

8.126 We therefore find that the following subsequent reviews fall within our terms of reference:

(a) Subsequent administrative reviews:

(i) 2004-2005 administrative review (22 June 2007) in case 1 (Hot-Rolled Steel from the Netherlands);

(ii) 2004-2005 administrative review (31 May 2006) in case 2 (Stainless Steel Bar from France);

(iii) 2004-2005 administrative review (1 September 2006) in case 3 (Stainless Steel Bar from Germany);

(iv) 2005-2006 administrative review (preliminary results) (30 March 2007) in case 5 (Stainless Steel Bar from the United Kingdom);

(v) 2004-2005 administrative review (9 May 2007) in case 6 (Stainless Steel Wire Rod from Sweden).

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[688] 71 FR 54469, 15 September 2006 (Notice of continuation of AD order). See Exhibits EC-37 and EC-59 for the Notice and the Issues and Decision Memorandum of the USDOC likelihood-of-dumping determination issued 5 October 2005.

[689] EC First Written Submission, para. 81, Exhibit EC-17.

[690] We note that the determination in this review was issued after the establishment of this compliance panel.

[691] The European Communities requests that we make findings with respect to US actions in relation to "measures challenged in the original dispute (including the measures listed in the Annex to the Panel Request *and any other subsequent review*)". EC First Written Submission, para. 155; *supra*, para. 4.1(c) (emphasis added).

(vi) 2004-2005 administrative review (17 January 2007) in case 24 (Granular Polytetrafluorethylene from Italy);

(vii) 2004-2005 administrative review (13 December 2006) in case 28 (Stainless Steel Sheet Strip Coils from Germany);

(viii) 2004-2005 administrative review in (14 July 2006) case 29 (Ball Bearings from France);

(ix) 2004-2005 administrative review (14 July 2006) in case 30 (Ball Bearings from Italy, with respect to respondents FAG and SKF);

(b) Subsequent sunset reviews:

(i) USDOC final likelihood-of-dumping determination in cases 2, 4 and 5 (4 June 2007);

(ii) USDOC preliminary likelihood-of-dumping determination in case 3 (30 May 2007);

(iii) USDOC final likelihood-of-dumping determination in case 19 (5 February 2007).

8.127 We note however that our conclusion that only these subsequent reviews fall within our terms of reference does not mean that we may not take into consideration *omissions* to implement on the part of the United States as part of our substantive analysis of the EC claims below. In particular, we are of the view that alleged omissions in the form of the continued imposition of cash deposit requirements at rates calculated with zeroing, after the end of the reasonable period of time, should be considered in order to make findings with respect to whether the United States has complied with the recommendations and rulings of the DSB. To conclude otherwise would allow the United States to circumvent its obligation to implement those recommendations and rulings by virtue of the fact that the cash deposit rate originally at issue and found to be inconsistent with US obligations is replaced by a new, potentially similarly-inconsistent, rate calculated in another review. In this sense, and insofar as they continued to apply, we make no distinction between cash deposits requirements established in subsequent administrative reviews decided before and after the adoption of the DSB's recommendations and rulings.

E. EC GENERAL CLAIMS THAT THE UNITED STATES FAILED TO FULLY IMPLEMENT THE DSB'S RECOMMENDATIONS AND RULINGS

1. Introduction

8.128 In this section of our report, we address the general EC claims[692] to the effect that the United States failed to implement the DSB's recommendations and rulings in the original dispute. The European Communities makes specific claims:[693]

(a) with respect to "subsequent" sunset reviews;

[692] The European Communities has referred to these claims as pertaining to "violations with respect to all measures covered in this proceeding". See e.g., EC First Written Submission, heading II.B.

[693] We address below the EC claims that certain of the US measures taken to comply (Section 129 determinations) are inconsistent with the United States' obligations under the covered agreements. See *infra*, section VIII.G.

(b) with respect to actions taken by the United States to collect anti-dumping duties with respect to the measures at issue in the original dispute (including pursuant to subsequent administrative reviews)[694] after the end of the reasonable period of time;

(c) with respect to the fact that no US measures taken to comply existed in the period between the end of the reasonable period of time and the effective date of the Section 129 determinations (23 April and 31 August 2007).

8.129 We consider each of these groups of claims in turn.

2. EC claims with respect to subsequent sunset reviews

(a) Main arguments of the parties

8.130 The **European Communities** submits[695] that the United States has extended the measures challenged in the original dispute pursuant to sunset review proceedings concluded before and after 9 April 2007, and which relied on dumping margins calculated with zeroing. In particular, the USDOC decided to extend the measures challenged in the original dispute because, based on the previous levels of dumping found in original investigations or administrative review determinations and calculated using zeroing, it considered that it was likely that dumping would recur. The European Communities submits that, by relying, in the subsequent sunset review proceedings listed in the Annex to its Article 21.5 panel request, on margins calculated in prior proceedings using zeroing, the United States did not comply with its obligations pursuant to Articles 2.1, 2.4 and 2.4.2 because these margins were not based on a fair comparison and not calculated for the product as a whole and that, as a result, the United States acted in breach of Article 11.3 of the *Anti-Dumping Agreement*.[696]

8.131 The European Communities relies on the Appellate Body Report in *US – Corrosion-Resistant Steel Sunset Review*, in which the Appellate Body found that if a likelihood determination under Article 11.3 is based on a dumping margin calculated using a methodology inconsistent with Article 2.4 of the *Anti-Dumping Agreement*, then this defect also taints the likelihood determination and, thus, the USDOC's likelihood determination could not constitute a proper foundation for the continuation of anti-dumping duties under Article 11.3. Moreover, the Appellate Body has ruled on the inconsistency of the use of zeroing in sunset review proceedings in *US – Zeroing (Japan)*, where it also noted that the USDOC relied on past margins that were calculated during administrative reviews on the basis of "simple zeroing". Having previously concluded that zeroing in administrative review investigations is inconsistent with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement*, the Appellate Body found that the determinations in the sunset reviews at issue were inconsistent with Article 11.3.

8.132 The **United States** argues that the sunset reviews identified in the EC Article 21.5 panel request are not within the terms of reference of this Panel.[697] Further, the United States submits that

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[694] The European Communities regards subsequent administrative reviews as amendments to the measures at issue in the original dispute. See *supra*, paras. 8.38 and 8.61-8.84, *infra* para. 8.146 and *e.g.* EC Opening Statement, para. 46.

[695] EC First Written Submission, paras. 69-75, EC Second Written Submission, paras. 63-65, EC Opening Statement, paras. 44-45. See also Annex B to the EC Answer to Panel Question 6, providing the margin of dumping relied upon in the sunset review, included in the EC Article 21.5 panel request, and providing references to various EC exhibits supporting its claims with respect to sunset reviews.

[696] Further, in its argument that the 16 administrative review investigations challenged in the original dispute have not been superseded, the European Communities submits that the US failure to recalculate the dumping margins without zeroing in all the administrative reviews covered in the original dispute affects the extension of the original orders pursuant to sunset review investigations. EC First Written Submission, para. 97.

[697] US First Written Submission, paras. 51-53, US Second Written Submission, paras. 23-24. See *supra*, sections VIII.D.1(c) and VIII.D.2(c) where the Panel addresses the US arguments that the subsequent

the European Communities has failed to establish that the United States acted inconsistently with its WTO obligations in making those sunset review determinations. The United States considers that the European Communities has failed to present any evidence that the USDOC or the USITC in any way relied upon "the margin likely to prevail" in making their respective likelihood determinations; and that the European Communities has also failed to demonstrate whether the USDOC relied on margins calculated in the 31 determinations at issue in the original dispute in making its likelihood-of-dumping determination. Under US law, the USDOC's determinations in sunset reviews serve two purposes. First, the USDOC determines whether the revocation of the antidumping duty order would likely lead to the continuation or recurrence of dumping. The USDOC then reports to the USITC the margin of dumping that is likely to prevail if the order is revoked. The USITC, in turn, determines whether the revocation of the antidumping duty order would likely lead to a continuation or recurrence of material injury. The USDOC does not, as the European Communities suggests, calculate any new margins of dumping in a sunset review determination. Further, as the panel in *US – Anti-Dumping Measures on Oil Country Tubular Goods* recognized, the USDOC does not rely on the margin reported to the USITC as the margin likely to prevail in making its determination of likelihood of continuation or recurrence of dumping. The Appellate Body did not disturb these findings, and noted that Mexico had provided no evidence that the USITC had relied on or otherwise factored in the margin of dumping likely to prevail that was reported to it by the USDOC.[698]

(b) Main arguments of the third parties

8.133 **Korea** submits that, in conducting a sunset review, the margins and results of the original investigations and administrative reviews are regarded by the USDOC as key factors in reaching a likelihood determination. If applicable margins or results are inflated as a result of the application of zeroing and if the inflated data are then taken into account in a sunset review, such a sunset review also constitutes violation of relevant provisions of the *Anti-Dumping Agreement*, such as Articles 2.1, 2.4, 2.4.2 and 11.3 of the *Anti-Dumping Agreement*. In Korea's view, the sunset reviews of the USDOC cannot be separated from previous anti-dumping proceedings.[699]

8.134 **Norway** submits that the Appellate Body has held that all dumping margins in sunset reviews conducted in accordance with Article 11.3, must conform to the disciplines of Article 2.4. If the margins are calculated using a methodology that is inconsistent with Article 2.4, then this could give rise to an inconsistency not only with Article 2.4, but also with Article 11.3. The Appellate Body has confirmed that this also applies where the investigating authority relies on margins calculated (with the use of zeroing) during periodic reviews. Based on the above, Norway considers that the United States has violated Article 2.1, 2.4, 2.4.2 and 11.3 of the *Anti-Dumping Agreement* by relying on past dumping margins calculated with zeroing, in determining the likelihood of dumping in the sunset review proceedings related to measures challenged in the original dispute.[700]

(c) Evaluation by the Panel

8.135 With respect to subsequent sunset review determinations, the European Communities requests that we make the following finding:

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sunset reviews challenged by the EC are not within our terms of reference and are not "identified" in the EC panel request, as required by Article 6.2 of the DSU.

[698] US Comments on EC Answer to Panel Question 6, referring to Panel Report, *United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico* ("*US – Anti-Dumping Measures on Oil Country Tubular Goods* "), WT/DS282/R, adopted 28 November 2005, as modified by Appellate Body Report, WT/DS282/AB/R, DSR 2005:XXI, 10225, para. 7.83, and Appellate Body Report, *United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, ("*US – Anti-Dumping Measures on Oil Country Tubular Goods*") WT/DS282/AB/R, adopted 28 November 2005, DSR 2005:XX, 10127, para. 180.

[699] Korea's Third Party Submission, paras. 21-22.

[700] Norway's Third Party Submission, paras. 23-27.

"the United States violated Articles 2.1, 2.4, 2.4.2 and 11.3 of the *Anti-Dumping Agreement* when extending the measures contained in the original dispute pursuant to sunset review proceedings relying on margin of duties calculated with zeroing."

8.136 We recall that we have determined that the following sunset review determinations fall within our terms of reference because they potentially affect the US implementation of the DSB's recommendations and rulings:

(a) USDOC final likelihood-of-dumping determination in cases 2, 4 and 5 (4 June 2007);

(b) USDOC preliminary likelihood-of-dumping determination in case 3 (30 May 2007);

(c) USDOC final likelihood-of-dumping determination in case 19 (5 February 2007).

8.137 In the first instance, we note that there is a certain degree of inconsistency in the EC arguments in support of its claims with respect to subsequent sunset review determinations. In its First Written Submission, the European Communities argued that in all the sunset reviews that it challenges, the USDOC relied on past dumping margins in making the determination of likelihood of dumping and that those dumping margins had been calculated in original investigations or administrative reviews using zeroing.[701] In its Answer to Panel Question 6, however, the European Communities submits that "the dumping margins used in all sunset reviews listed in the Annex to the Panel Request were those of the original orders".[702] The European Communities seems, in this later submission, to refer to the margins reported by the USDOC to the USITC as margins of dumping likely to prevail in case the orders were continued. Yet, the Appellate Body reports on which the European Communities relies address the USDOC's reliance on the continued existence of dumping after the issuance of the AD order, *i.e.* basing its decision regarding likelihood-of-dumping on margins calculated in administrative reviews.[703]

8.138 With respect to cases 2, 4 and 5, the European Communities specifically refers to the statement of the USDOC that "[g]iven that dumping has continued at above *de minimis* levels, the Department determines that dumping is likely to continue or recur if the order were revoked".[704] The Issues and Decision Memorandum in these cases indicates clearly that the USDOC relied on both the fact that imports had decreased following issuance of the order, and on the fact that dumping continued after the issuance of the order, with respect to imports from France, Italy, and the United

[701] The European Communities submits that the USDOC has explicitly rejected arguments of exporters that it should take into consideration what the margins would have been had the Department not applied zeroing in calculating them, noting in this respect that it had not modified its calculation methodology in respect of the use of zeroing in administrative reviews. EC First Written Submission, para. 69, referring to Issues and Decision Memorandum for the Sunset Review of the Antidumping Duty Order on Stainless Steel Bar from Germany; Final Results, USDOC (1 October 2007), p. 5 (Exhibit EC-10).

[702] Annex B of EC Answer to Panel Question 6.

[703] See, *inter alia*, Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan* ("*US – Corrosion-Resistant Steel Sunset Review*"), WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, 3, para. 130 and Panel Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan* ("*US – Corrosion-Resistant Steel Sunset Review*"), WT/DS244/R, adopted 9 January 2004, as modified by Appellate Body Report, WTDS244/AB/R, DSR 2004:I, 85, paras. 7.150-7.155; Panel Report, *United States – Measures Relating to Zeroing and Sunset Reviews* ("*US – Zeroing (Japan)*"), WT/DS322/R, adopted 23 January 2007, as modified by Appellate Body Report, WT/DS322/AB/R, paras. 7.255-256 and the panel's comments, reflecting our own, at para. 7.243 and footnote 849.

[704] EC First Written Submission, para. 69, referring to Issues and Decision Memorandum for the Expedited Sunset Reviews of the Antidumping Duty Orders on Stainless Steel Bar from France, Italy, South Korea, and the United Kingdom; Final Results, USDOC (25 May 2007), p. 6 (Exhibit EC-9).

Kingdom.[705] With respect to the USDOC's likelihood-of-dumping determination in case 3, the European Communities included in the Annex to its Panel Request the Preliminary USDOC Determination. As part of its First Written Submission, the European Communities subsequently provided the Panel with the Issues and Decision Memorandum to the USDOC's Final likelihood-of-dumping determination. That Memorandum indicates that the USDOC relied on the fact that imports decreased after the issuance of the order and that dumping occurred at more than a *de minimis* level after the issuance of the order, on the basis of the margins of dumping calculated using zeroing in subsequent administrative reviews.[706] With respect to the USDOC likelihood-of-dumping determination in case 19, the European Communities has not referred us to any specific USDOC language in support of its claims, limiting itself to asserting that the margin of dumping used by the USDOC was that calculated in the original investigation. The Issues and Decision Memorandum submitted to the Panel by the United States however indicates that the USDOC found that dumping was likely to continue or recur if the orders were revoked based on its finding that dumping had continued at above *de minimis* levels since the issuance of the order.[707] It seems clear to us from the Issues and Decision Memoranda in these cases that the findings that dumping had continued at above *de minimis* levels since the issuance of the relevant AD order refer to dumping margins that had been calculated in administrative reviews, using zeroing.

8.139 Even assuming that the European Communities has made a *prima facie* case that the USDOC relied on dumping margins calculated with zeroing in these sunset reviews, however, we cannot make the finding requested by the European Communities. The European Communities has not demonstrated that the USDOC determinations it challenges resulted in the continuation of the underlying AD order as of the time this Panel was established.[708] In fact, in cases 2, 3, 4, and 5, the sunset review proceedings had not been concluded as of that date, and eventually resulted in the revocation of the orders, following a negative likelihood-of-injury determination by the USITC.[709] With respect to case 19, the proceedings had not been concluded, and thus, there was no continuation of the underlying order as of this Panel's establishment.

8.140 Thus, any failures by the United States in these sunset reviews had not yet materialized as at the date of the establishment of this Panel, and thus had no effect on the US implementation of the DSB's recommendations and rulings. As a consequence, we cannot find that the United States has "violated Articles 2.1, 2.4, 2.4.2 and 11.3 of the *Anti-Dumping Agreement* when *extending* the measures contained in the original dispute pursuant to sunset review proceedings relying on margin of duties calculated with zeroing" (emphasis added). We therefore do not consider that the European Communities has demonstrated that the United States failed to comply with the recommendations and rulings of the DSB in the sunset reviews at issue.

8.141 As a result, we do not make any findings in respect of the EC claims of violation under Articles 2.1, 2.4, 2.4.2 and 11.3 of the *Anti-Dumping Agreement* in subsequent sunset review determinations. Nor do we need to make findings with respect to the EC claim that the United States failed to comply with the DSB's recommendations and rulings because the United States relied on

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[705] Issues and Decision Memorandum for the Expedited Sunset Reviews of the Antidumping Duty Orders on Stainless Steel Bar from France, Italy, South Korea, and the United Kingdom; Final Results, USDOC (25 May 2007), p. 6 (Exhibit EC-9).

[706] Exhibit EC-10, p. 5.

[707] Exhibit US-25, p. 5.

[708] Issues and Decision Memorandum from Notice of Final Results of Expedited Sunset Review of the Anti-dumping Orders: Certain Pasta from Italy and Turkey (5 February 2007). As discussed further below, para. 8.226, we consider that we must make our findings with respect to the situation existing on the date of our establishment.

[709] Exhibit US-13, Revocation of Antidumping Duty Orders on Stainless Steel Bar from France, Germany, Italy, South Korea, and the United Kingdom and the Countervailing Duty Order on Stainless Steel Bar from Italy (73 FR 7258), 7 February 2008.

margins of dumping calculated in subsequent administrative reviews in the context of sunset review determinations.[710]

3. EC claims with respect to subsequent administrative reviews and with respect to US actions to collect AD duties calculated with zeroing

(a) Main arguments of the parties

8.142 The **European Communities** submits that the United States has not fully implemented the recommendations made by the DSB in the original dispute. The European Communities claims that, with respect to the original investigations and administrative reviews at issue in the original dispute, the United States continues, after the end of the reasonable period of time, to take positive acts, including new administrative review investigations, assessment instructions and final liquidations, based on zeroing.[711] The European Communities submits that the United States still seeks to liquidate entries concerning measures which were covered by the original dispute, applying the same zeroing methodology which was found inconsistent with the *Anti-Dumping Agreement* and the GATT 1994 by the rulings and recommendations of the DSB. In particular, the European Communities considers that any determination of dumping based on zeroing made after the end of the reasonable period of time in connection with the measures challenged in the original dispute is inconsistent with the DSB's recommendations. Further, the European Communities maintains that any collection or final liquidation of duties based on zeroing with respect to the measures at issue in the original dispute, including the subsequent reviews listed in the Annex to its Panel request taking place after 9 April 2007, is also inconsistent with those recommendations and rulings.[712] The European Communities considers that, with respect to the original investigations and administrative reviews challenged in the original dispute, the United States still continues to collect anti-dumping duties and establish cash deposit rates inflated by zeroing after the end of the reasonable period of time. Indeed, after the end of the reasonable period of time, the United States (i) has issued assessment instructions to collect anti-dumping duties based on zeroing; (ii) has established new cash deposit rates based on zeroing, and (iii) continues proceedings for final liquidation of duties calculated with zeroing with respect to measures which were covered by the original dispute.[713] Since the United States still collects anti-dumping duties calculated with zeroing with respect to measures challenged in the original dispute, the European Communities requests that the Panel find that the measures listed in the Annex to the Panel request are inconsistent with Articles 2.4.2 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 and that the United States remains in violation of these provisions.[714] The claims of the European Communities concern both the original investigations and the administrative reviews covered by the original proceeding.

8.143 <u>With respect to the original investigations</u> at issue in the original dispute, the European Communities asserts that:

(a) the United States has issued assessment instructions to collect duties in subsequent administrative reviews in which simple zeroing was used in calculating the amount of duty to be paid, and the results were obtained **after** 9 April 2007.[715] In addition, the

[710] See below para. 8.198 for the EC claims in this respect; see also the discussion at para. 8.222.

[711] EC First Written Submission, para. 6.

[712] EC First Written Submission, para. 45.

[713] EC First Written Submission, para. 66.

[714] EC First Written Submission, para. 88. The European Communities considers that the issue of the conformity of the use of zeroing with the *Anti-Dumping Agreement* is *res judicata* and that this Panel should therefore not address it. EC First Written Submission, para. 87.

[715] European Communities First Written Submission, para. 78. The European Communities gives the example of case 1 (Hot-Rolled Steel Flat Products from the Netherlands), in which the USDOC instructed the

European Communities claims that the United States has also issued assessment instructions to collect duties after 9 April 2007 in cases where the results were obtained **before** 9 April 2007, after legal proceedings brought by importers against the final assessments made by the USDOC were concluded;[716]

(b) in cases where administrative reviews were not requested, the United States has, after 9 April 2007, issued assessment instructions to collect duties at the rate established in the original investigations covered by the original dispute, in which model zeroing was used;[717]

(c) the United States, after 9 April 2007, has established new cash deposit rates, calculated using simple zeroing in subsequent administrative reviews in connection with the original investigations challenged in the original dispute.[718]

8.144 With respect to the administrative review proceedings covered in the original dispute, the European Communities asserts that the United States has issued assessment instructions to collect anti-dumping duties, and has established new cash deposit rates calculated using simple zeroing, in subsequent administrative reviews where results were obtained after 9 April 2007.[719]

8.145 With respect to both the original investigations and the administrative reviews covered by the original proceedings, the European Communities asserts that the United States, after 9 April 2007, still actively seeks to collect AD duties as a result of modifications of the original measures pursuant to subsequent administrative reviews for which assessment instructions were sent before 9 April 2007 and where "simple zeroing" was used. The US authorities continue proceedings to obtain the final payment of the duties, even where importers have brought legal proceedings against the assessment instructions issued to collect duties calculated with zeroing or have protested the liquidations made by the US authorities. Thus, the European Communities argues that, after 9 April 2007, the United States continues to take positive acts to obtain final payment of duties due or retain cash deposits made which were calculated based on zeroing with respect to those entries that were not finally liquidated before the end of the reasonable period to implement.[720]

8.146 With respect to the above, the European Communities argues that the DSB recommended that the United States bring the measures at issue in the original dispute into conformity, including "any amendments" and "each assessment instructions issued pursuant" to the original orders and/or administrative reviews. The European Communities adds that the modifications made by the United States have not changed the "essence" of the contested measure in the original dispute (use of

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USCBP to collect duties at 2.26 per cent on 22 June 2007, even though the Section 129 determination revoked the original order on 23 April 2007 since, without zeroing, no dumping was found.

[716] See EC First Written Submission, footnote 67.

[717] EC First Written Submission, para. 79. The European Communities gives again the example of case 1 (Hot-Rolled Steel Flat Products from the Netherlands), in which the fifth administrative review, covering imports from 1 November 2005 to 31 October 2006, was rescinded, and the duty resulting from the original investigation was therefore applied. The assessment instructions in that case were issued on 16 April 2007 and the USCBP subsequently instructed the ports to liquidate those entries on 23 April 2007.

[718] EC First Written Submission, para. 80. The European Communities submits that, for instance, in case 6, on 9 May 2007, the USDOC instructed USCBP to collect AD duties at 19.36 per cent, even though the Section 129 determination revoked the original order on 23 April 2007, and in addition, the USDOC notified the USCBP of the revised cash deposit rate for the exporter concerned.

[719] The European Communities gives, as example, that of case 23, in which it alleges that the USDOC imposed duties at a rate of 35.35 per cent on Solvay Solexis, successor of Ausimont SpA, using "simple zeroing" and established the new amount as the new cash deposit rate. EC First Written Submission, para. 73.

[720] EC First Written Submission, para. 82. The European Communities again gives as example that of case 1. See EC First Written Submission, footnote 75.

zeroing in original investigations and administrative reviews), and the products from the countries concerned in the original dispute are still subject to anti-dumping duties imposed pursuant to the use of a WTO-inconsistent methodology.[721]

8.147 The European Communities also submits the United States has failed to revoke the original AD orders *entirely*, as it should have done as a result of the DSB recommendations and rulings, in cases where the original orders were revoked in full or in part. The European Communities alleges that in such cases, there is no longer, as from the date of revocation, any legal basis allowing the United States to collect duties on past entries or submit future entries to a cash deposit rate based on zeroing and that, in such cases, the status of any subsequent administrative review and methodology used to determine dumping margins is irrelevant. As a result, the European Communities considers that any future liquidation of entries subject to a revoked order (including those revoked for reasons other than zeroing), or with respect to an exporter excluded from the scope of the relevant order, would be illegal, since this would amount to taking a positive act, already found to be WTO inconsistent, after the expiry of the implementation period, and since the original measure is void.

8.148 The European Communities further argues that the 16 administrative reviews challenged in the original dispute have not yet been "superseded" by subsequent administrative reviews, since the effects of the originally-challenged administrative reviews still continue today. The European Communities argues that for the 16 administrative reviews to be "superseded", the United States should have stopped them (by not collecting duties calculated with "simple zeroing") and replaced them (by collecting the duties and establishing new cash deposits based on a methodology without zeroing). The United States does neither as (i) it still collects duties established in the administrative reviews contested in the original dispute;[722] and (ii) it has failed to recalculate the dumping margins without zeroing in all the administrative reviews covered in the original dispute and, as a result, still collects the duties and establishes new cash deposit rates based on zeroing.[723]

8.149 The European Communities considers that for the United States to comply with the DSB's recommendations and rulings immediately after the end of the reasonable period of time, the United States should have refrained from taking positive acts providing for the final payment of duties or retention of cash deposits based on zeroing with respect to entries not finally liquidated before the end of the reasonable period, regardless of when those imports where made. The European Communities focuses on the fact that liability to pay AD duties, which the European Communities considers to be the determination of the final amount to be collected and, thus, the obligation to pay duties in that amount, is decided at a later stage than the time of importation under the US system. While the *potential* liability for anti-dumping duties estimated as a result of the original anti-dumping order is created at the time of importation, the specific amount of duties to be collected, and thus, the *final* anti-dumping liability (if any) is *only* established at a later stage, pursuant to administrative review proceedings.[724] The European Communities cannot understand why the

[721] EC First Written Submission, paras. 84-85.

[722] The European Communities gives the example of case 31 (Ball Bearings from the United Kingdom), in which the United States still issues assessment instructions and establishes cash deposits based on the last completed administrative review for NSK Bearing Europe (*i.e.*, the one challenged and found WTO-inconsistent in the original proceedings). EC First Written Submission, paras. 92-98.

[723] The European Communities also submits that the fact that the US has not recalculated the dumping margins in the administrative reviews concerned also affects the extension of the original orders through sunset reviews (the US has relied on the dumping margins found in the administrative reviews covered by the original dispute, and therefore calculated on the basis of zeroing, in order to extend the original AD orders).

[724] EC Second Written Submission, paras. 69-74, EC Opening Statement, paras. 50-51. Referring to the Panel Report in *US – Shrimp (Thailand)*, para. 7.106, the European Communities argues that the United States has admitted this feature of its duty assessment system. The European Communities explains that even if products are, at the time of importation, potentially liable for AD duties, the US system of duty assessment implies that such a responsibility only materialises when the amount of duties due for a particular

United States would not, in a simple accounting exercise, adjust its calculations so as to properly (*i.e.*, without zeroing) reflect the degree of dumping that occurred, if any, having a full opportunity to do so in subsequent reviews of the measures concerned or in the appeals and protests filed by importers against them, and *at least* with effect from the end of the reasonable period of time.[725]

8.150 The European Communities considers that the approach it advocates does not imply retrospective relief.[726] It argues that it is possible for the United States to take positive steps after the end of the reasonable period of time to comply with the DSB's recommendations and rulings in respect of entries which were made before then, without this involving any retrospective relief. The European Communities argues in this respect that the United States has itself recognized that Section 129 (c)(1) permits the USDOC to apply new, WTO-consistent methodologies to entries made *before* the date of implementation of a Section 129 determination.[727]

8.151 The European Communities rejects the US theory that implementation obligations only extend to imports made after the end of the reasonable period of time. It considers that the US description of AD measures as "border measures" is irrelevant since the US system of duty assessment operates on a retrospective basis – when the product is imported no duty is collected at the border and, thus, AD proceedings do not hinder customs clearance[728], and the final amount of duties to be collected in connection to the importation subject to the anti-dumping order is established when the product has been already introduced into the US market.[729] The European Communities argues that the US theory on compliance is insufficient because it allows the United States to keep its WTO-inconsistent measures effectively in place even after the end of the reasonable period of time. The measures challenged in the original dispute are still in place since, until the United States stops taking positive acts to enforce them, their effects persist even after the end of the reasonable period of time. The European Communities also notes that the *US – Shrimp (Thailand)* Panel already rejected the US argument that, if final liability only arises after the completion of an administrative review, there

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period is determined pursuant to administrative review proceedings. But, the European Communities notes, even the amount established by the administrative review proceeding is not final and conclusive: interested parties may challenge the results of administrative reviews in court. Such an appeal may involve the suspension of the issuance of assessment instructions until there is a final ruling on the matter. Once there is a final ruling from the courts, the USDOC sends assessment instructions to the USCBP, which sends liquidation instructions to the ports authorities. However, importers may file a protest against those liquidations with the USCBP. Only when there is a decision from the USCBP on such a protest does the liquidation becomes final and conclusive (*i.e.*, according to the EC, only at that time is the final liability of the importer to pay AD duties established).

[725] EC Second Written Submission, para. 76, EC Opening Statement, para. 51.

[726] The European Communities does not argue that the WTO dispute settlement system provides for retrospective relief. EC Second Written Submission, para. 77.

[727] The European Communities cites to the arguments made by the United States to this effect in the context of the *US – Section 129* dispute. The European Communities also notes that the panel in that case found that "Section 129(c)(1) does not have the effect of precluding the application of methodologies developed in a Section 129 determination in administrative reviews of 'prior unliquidated entries'". See EC Second Written Submission, para. 80, referring to Panel Report, *US – Section 129*, citing para. 6.72. The European Communities argues that it follows a similar approach in Council Regulation No 1515/2001 on measures which may be taken following an adopted DSB report on AD matters; that Regulation provides that "any measure taken under this Regulation will take effect from the date of their entry into force, *unless otherwise specified*, and therefore, do not provide any basis for the reimbursement of the duties collected prior to that date". (emphasis added by the European Communities). See EC Second Written Submission, para. 81.

[728] The European Communities cites to on Article 5.9 of the *Anti-Dumping Agreement*. EC Second Written Submission, para. 83.

[729] The European Communities also notes that in the anti-dumping context under US municipal law, the general rules for distinguishing prospective effect from retrospective effect turns on the date of liquidation, not the date of entry. The European Communities refers the Panel to the decision of the US Court of Appeals for the Federal Circuit in Parkdale International v. United States, 475 F.3d 1375, 1379 (Fed. Cir. 2007) (9 February 2007). EC Answer to Panel Question 33.

would not be "final action" in the sense of Article 17.4 and thus, no WTO challenge would be possible until the completion of an administrative review.[730] The European Communities also disagrees with the US assertion that taking the date of entry as the reference for compliance is in line with the prospective implementation of DSB recommendations and rulings, and is also the only relief available under prospective anti-dumping systems. The European Communities maintains that in both prospective and retrospective systems, after the end of the reasonable period of time, no new measure (or omission) can be taken that is inconsistent with the adopted DSB report, regardless of the date of entry covered by that measure. The European Communities asserts that it is not itself prevented from applying a WTO-consistent methodology to previous entries pursuant to an act or decision taken after the end of the reasonable period of time, and indeed would do so, thereby complying with the DSB's recommendations and rulings in a prospective manner.[731]

8.152 The European Communities submits that the application of the US theory as regards implementation would lead to absurd results, contrary to Article 21 of the DSU, as the United States could continue collecting duties based on zeroing after the end of the reasonable period of time even if the original antidumping order has been *revoked*. Moreover, the European Communities argues, the US interpretation would render its system of duty assessment *untouchable*, as a moving target that escapes AD disciplines, contrary to the purpose and objective of Article 21 of the DSU. Each US administrative review would have to be the subject of a new panel request, and by the time the panel, Appellate Body and implementation procedure were completed, another administrative review would have superseded its results, meaning that a new panel would have to be started against this subsequent review. Finally, the European Communities submits that even if compliance is assessed under the United States' own theory, the United States has not complied with the DSB recommendations and rulings. The United States continues to subject imports made after 9 April 2007 in case 6 (Stainless Steel Wire Rod from Sweden) to the original AD duties based on model zeroing and continues to collect AD duties and to impose cash deposits on imports in case 31 (Ball Bearings from the United Kingdom) made by one company (NSK) at the rate based on simple zeroing in the administrative review challenged in the original dispute.[732]

8.153 The **United States** considers that it has taken the necessary measures to comply with the recommendations and rulings of the DSB. The United States asserts that it has complied with the DSB's recommendations and rulings in two ways. First, with respect to some of the anti-dumping measures challenged in the original dispute, it revoked the anti-dumping duty orders, thereby removing the anti-dumping 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.[733]

8.154 With respect to the <u>original investigations</u> at issue in the original dispute, the United States has recalculated the margins of dumping in these determinations and has, in some cases, revoked the anti-dumping order or excluded certain exporters. Other orders were revoked for reasons other than zeroing before the adoption by the DSB of its recommendations and rulings, and still other orders were revoked subsequently as a result of sunset reviews. Thus, with respect to the 15 determinations made in investigations that were at issue in the original dispute, 9 concern anti-dumping orders that

[730] EC Opening Statement, para. 52 and footnote 28, referring to Panel Report, *US – Shrimp (Thailand)*, para. 7.121.

[731] The European Communities argues that in the European Communities' system, the date of entry is not the only parameter as regards prospective compliance, and the new WTO consistent measure may well apply to prospective entries. The European Communities refers to the recent ruling of the European Court of Justice in *Ikea Wholesale*. See European Communities Opening Statement, para. 56

[732] EC Second Written Submission, para. 67; EC Opening Statement, para. 48.

[733] US Second Written Submission, para. 37.

are now revoked. For all of these, no anti-dumping duties will be assessed on entries made after the effective date of the revocation.

8.155 With respect to the 16 administrative reviews at issue in the original dispute:

(a) In some instances, the United States has revoked the AD order giving rise to the determinations challenged by the European Communities. Under US law, the United States no longer has the authority to collect cash deposits, or assess anti-dumping duties, on products subject to a revoked anti-dumping order which are imported on or after the date of revocation. This is the situation with respect to 4 of the 16 determinations challenged by the European Communities in which the AD orders have been revoked in whole or with respect to certain companies.[734] The United States considers that the elimination of these orders has brought it into compliance with the recommendations and rulings related to those orders.

(b) With respect to the remaining reviews, the United States considers that it has implemented the recommendations and rulings because each of those reviews has been superseded by subsequent administrative reviews. The cash deposit rate established in the challenged determination, which is the only aspect of the administrative review that could, absent US compliance, have continued beyond the expiration of the reasonable period of time, is no longer in effect; to the extent that a cash deposit rate is currently in effect with respect to the same product from the same EU Member State, it is the result of a separate determination of dumping made in a separate administrative review examining distinct facts and different transactions during a subsequent period of time.[735] The United States considers that since the originally challenged reviews were superseded by the date of the EC Article 21.5 panel request (and before the expiry of the reasonable period of time), no further entries are subject to cash deposit rates established in the administrative reviews challenged in the original dispute.[736]

8.156 The United States considers that for the purposes of assessing compliance with rulings and recommendations of the DSB relating to duties, one has to examine the treatment accorded to goods entered on or after the expiration of the reasonable period of time. The United States considers that, as a result, it has no implementation obligation with respect to entries made before 9 April 2007. The United States argues that the European Communities has long held the same position[737], and that this follows logically from the fact that the WTO dispute settlement provides prospective, not

[734] US First Written Submission, paras. 93-95, referring to case 16 (Industrial Nitrocellulose from France, revocation effective 1 August 2003); case 17 (Industrial Nitrocellulose from the United Kingdom, revocation effective 1 July 2003); case 19 (Pasta from Italy, revoked for Ferrara effective 9 February 2005, and for Pallante effective 29 November 2005); and cases 25/26 (Stainless Steel Sheet and Strip in Coils from France, revocation effective 27 July 2004).

[735] See the chart in Exhibit US-17 for a list of the subsequent reviews that the United States submits superseded each of the administrative reviews challenged in the original dispute. See US First Written Submission, footnote 100. The United States, however, admits that the cash deposit rate established in the administrative review of Ball Bearings from the United Kingdom (case 31), which was found to be WTO-inconsistent in the original dispute, still remains in place.

[736] US First Written Submission, paras. 96-97.

[737] The United States notes that the European Communities argued along these lines in the Section 129 dispute (siding with the United States and opposing Canada's arguments) and that the European Communities has taken the same position in the preamble to its Regulation on the Measures that May be Taken by the Community Following a Report Adopted by the WTO Dispute Settlement Body Concerning Anti-Dumping and Anti-Subsidy Matters, and took a similar view when it implemented the DSB recommendations and rulings in *EC – Chicken Cuts*. US First Written Submission, paras. 98-99, Exhibits US-18 and US-19.

retrospective relief. The United States also contends, in this respect, that in a WTO dispute challenging an AD or CVD measure, the measure in question is a "border measure".[738] Accordingly, eliminating a WTO-inconsistent anti-dumping or CVD measure prospectively at the border, including where an administrative review is superseded by a subsequent one, constitutes "withdrawal" of the measure within the meaning of Article 3.7 DSU.

8.157 The United States submits that relief in the WTO dispute settlement system is prospective in nature, with the result that in the context of anti-dumping duties, the recommendations and rulings of the DSB do not serve as the basis for the reimbursement of duties – even EC law recognizes this principle.[739] The United States argues that the texts of the GATT 1994 and the *Anti-Dumping Agreement* confirm that it is the legal regime in existence at the time of importation that determines whether the import is liable for the payment of AD duties, and that determining whether relief is "prospective" or "retroactive" can only be determined by reference to the date of entry.[740] In this regard, the US system is no different from a prospective duty system and would not be made "untouchable" or a "moving target" under the US interpretation. The United States asserts that the result it advocates is consistent with the effect that a finding of inconsistency would have on an anti-dumping measure in a prospective anti-dumping system: if an anti-dumping measure is found to be inconsistent with the *Anti-Dumping 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 implementation. The Member changes the amount of anti-dumping duties to be collected on importations occurring after the end of the reasonable period of time, but need not remedy the effects of the measure on imports that occurred prior to the date of implementation. This is the system to which the WTO Members agreed, and it applies to all Members equally. The EC theory of implementation would discriminate against Members like the United States for having a retrospective duty assessment system. If liability is the relevant point for assessing whether relief must be provided, then Members with prospective systems will have no implementation obligations in respect of entries made prior to the expiry of the reasonable period of time, but Members with retrospective systems will have such obligations in the event that the final liability is calculated after the expiry of the reasonable period of time.[741] The United States also submits that the European Communities seems to have changed its theory during the course of the proceeding, first arguing that the determination of the final liability after importation is particular to retrospective systems, and later implying that it is equally applicable to prospective systems. The United States posits that perhaps the new theory defended by the European Communities reflects its acknowledgement of the fact that, otherwise, using final liability as the basis for establishing implementation would put retrospective systems at a disadvantage. However the European Communities' sudden change of position is not supported by the text of Articles 9.3.1 and 9.3.2, the report of the original panel, or the European Communities' own prior submissions.[742]

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[738] See US First Written Submission paras. 101-102, footnote 107. See also US Second Written Submission, para. 38; the United States concludes that liability for antidumping and countervailing duties attaches at the time of entry.

[739] US Answer to Panel Question 4, US First Written Submission, paras. 99-101, US Closing Statement, para. 4.

[740] US Second Written Submission, paras. 38 *ff*.

[741] US Closing Statement, para. 2.

[742] US Closing Statement, para. 3. In addition, the United States submits that the *Ikea* case does not stand for the proposition that the European Communities provides retrospective relief (refund of duties) in connection with its implementation of DSB recommendations and rulings; in that case, the European Court of Justice expressly rejected the notion of refunding the duties on that basis. Instead, the Court found that that zeroing was inconsistent with the European Communities' Basic anti-dumping Regulation and was a "manifest error of assessment with regard to Community law"; it is on that basis (inconsistency with Community law), not inconsistency with the *Anti-Dumping Agreement*, that the Court ordered the repayment of duties. Thus, while the European Communities may in some circumstances provide refunds under its municipal law, that does not mean that there is any WTO obligation to do so. US Closing Statement, para. 4.

8.158 Finally, the United States submits that the EC arguments raise a fundamental problem. If it were true that, as alleged by the European Communities, liability for AD duties only arose after the completion of an administrative review, this would mean that whenever the USDOC issued a determination in an AD investigation, there would be no "final action" as required by Article 17.4 of *Anti-Dumping Agreement* to challenge. As a consequence, US determinations could only be challenged after an administrative review was completed.

(b) Main arguments of the third parties

8.159 **India** disagrees with the argument of the United States that it has implemented the recommendations and rulings because each of those reviews has been superseded by determinations in subsequent administrative reviews. It submits that even if the original measures may have been reviewed on different occasions, these are continuations of original measures, the results of the previous review still affect interested parties and subsequent, equally critical procedures.[743]

8.160 **Japan** disagrees with the US argument that no further action is required with respect to administrative reviews because the reviews at issue in the original dispute have been superseded by subsequent reviews. Japan notes that, with respect to both of the purposes of a review (establishing a cash deposit rate for future entries and an importer-specific assessment rate to determine duties on past entries), a review continues to operate, and produce legal effects, for some uncertain period of time after the completion of the review.[744] In Japan's view, the decisive issue in deciding whether the United States must modify the WTO-inconsistent periodic reviews is whether these reviews continue to produce legal effects after the end of the reasonable period of time. If a review continues to operate after that date, it must be modified to ensure that it is applied in the future in a WTO-consistent fashion.[745] Bringing a measure into conformity with WTO law under Articles 19.1 and 21.3 of the DSU requires an implementing Member to take action to *withdraw*, *modify or replace* the WTO-inconsistent measures before the end of the reasonable period of time.[746] In this dispute, the importer-specific assessment rates in the contested periodic reviews have not expired, been revoked, modified or replaced in a manner that makes them WTO-consistent and the rates continue to be inflated as a result of the application of simple zeroing. Thus, the amount of duties yet to be collected on the basis of these rates continues to exceed the properly determined margin of dumping, in violation of Article 9.3 *Anti-Dumping Agreement* and Article VI:2 GATT 1994. Japan agrees with the European Communities that where the United States takes action, through USDOC instructions to the USCBP or USCBP payment notices, to collect duties after the end of the reasonable period of time pursuant to the assessment rate of a WTO-inconsistent review, it must bring the measure into conformity before proceeding to duty collection as in that event, the review continues to be operational after the end of the reasonable period of time because it provides the United States with a legal basis for the actions taken by the USDOC and USCBP after that date to collect duties.[747] Japan considers that there is

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[743] India's Opening Statement, para. 3.

[744] Japan notes that, in the case of the cash deposit rate, it continues to operate until a further periodic review occurs, which can be at least 12 months and, in some circumstances, much longer. In the case of the importer-specific assessment rate, it continues to be legally operational until definitive duties are collected on the basis of that rate, which can be a period of several years after the review is completed. See Japan's Third Party Submission, paras. 78-82.

[745] Japan's Opening Statement, para. 38.

[746] Japan's Third Party Submission, paras. 84-93. In Japan view, *inaction* by a Member to bring its measure into conformity is justified only where the measure at issue is *no longer* legally *operational after the end of the implementation period*.

[747] Japan's Third Party Submission, paras. 94-100; Japan's Opening Statement, paras. 38-42. Japan also notes a contrast between the action taken by the USDOC in cases where the final results of a periodic review are contrary to US law, on the one hand, and to WTO law, on the other hand: if the final results of a periodic review are found to be inconsistent with US law, they must be revised *before* the USDOC and USCBP takes any

nothing retrospective about the interpretation that it, or the European Communities, advances. The key date for judging the prospective character of a remedy is the end of the reasonable period of time and any actions taken by the implementing Member after that date pursuant to the measure at issue are prospective in character when viewed from the perspective of the end of the reasonable period of time; this applies to USDOC instructions or USCBP payment notices issued after the end of the reasonable period of time. The date of importation is not pertinent in judging the prospective character of the US actions after the end of the reasonable period of time.[748] Japan submits in this respect that the covered agreements impose obligations on a *Member's conduct* and that, at the time of entry, the United States does not take action to collect definitive duties; that action is taken *subsequently* pursuant to a periodic review.[749] If the date of entry, and not the end of the reasonable period of time, were decisive, WTO remedies could *never* discipline any US actions to collect definitive anti-dumping duties, even actions occurring long after the end of the reasonable period of time pursuant to a WTO-inconsistent review. The US argument that its implementation obligations apply solely to new entries that occur on or after the end of the RPT produces absurd consequences that nullify the disciplines in Article 9.3 of the *Anti-Dumping Agreement*.[750] The United States has omitted to take any action to bring the periodic reviews into conformity with WTO law, and ensure that the importer-specific assessment rate provides a WTO-consistent basis for duty collection after the end of the reasonable period of time.[751]

8.161 Japan also disagrees with the US argument under Article 17.4 of the *Anti-Dumping Agreement*. The fact that final liability is determined in a periodic review does not mean that the measures resulting from other types of anti-dumping proceedings – investigations, new shipper reviews, changed circumstances reviews and sunset reviews – are not "final action" for purposes of Article 17.4. The panel in *US – 1916 Act (Japan)* explained that this provision addresses challenges to "actions taken by anti-dumping authorities", as opposed to laws, regulations and administrative procedures covered by Article 18.4 of the Agreement, which may also be challenged even though not expressly referenced in Article 17.4. Further, the *US – Shrimp (Thailand)* panel found that Article 17.4 does not require that definitive anti-dumping duties must have been levied before consultations may be requested. Thus, the words "final action" do not limit the measures that may be challenged to those collecting the definitive amount of anti-dumping duties determined to be due in a periodic review; instead, the panel found that "final action" refers to measures whose purpose is "to levy definitive anti-dumping duties".[752]

8.162 **Korea** considers that, regarding the 16 administrative reviews challenged in the original dispute, the United States has effectively ignored the recommendations of the Appellate Body. In Korea's view, the US argument that each administrative review is superseded by a subsequent review, and that it is not required to do anything to implement since the administrative reviews challenged in the original dispute do not exist anymore, completely misconstrues the operating mechanism of an administrative review and seriously threatens to undermine the basic purpose of a WTO dispute

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further action to collect duties on the basis of the periodic review. Japan refers to 19 U.S.C. § 1516a(c)(3). See Japan's Third Party Submission, paras. 99-100.

[748] Japan also submits that in the *US – Section 129* dispute, the United States admitted that under US law, a mechanism exists for the USDOC to assess in WTO-consistent fashion, on the basis of adverse DSU recommendations and rulings, the amount of definitive duties due on entries that occurred prior to the expiry of the reasonable period of time that were not liquidated by that date. See Japan's Third Party Submission, note 77.

[749] In response to the US arguments, Japan argues that the "legal regime that applies to an import at the time of importation is merely provisional, as at that time, the importing Member does not definitively establish any right to collect a specific amount of anti-dumping duties; instead, when a periodic review occurs, that right is established much later in the procedure under Article 9.3." Japan's Opening Statement, paras. 22-25.

[750] Japan's Third Party Submission, paras. 101-111, Japan's Opening Statement, paras. 33-37.

[751] Japan's Third Party Submission, para. 111.

[752] Japan's Answer to Panel Question 21 to the third parties.

settlement procedure.[753] In Korea's view, the completion of a new administrative review does not mean that the previous review was terminated: unlike other instances where a measure is terminated, an administrative review does not simply disappear when a new, subsequent review is under way or completed. The results of the previous review still affect interested parties and subsequent, equally critical, procedures. An administrative review found to be WTO-inconsistent thus requires adequate implementation irrespective of the existence or completion of a subsequent review or reviews. Korea considers that, in fact, as a measure, an administrative review can only be terminated when the underlying order is terminated, either through a sunset review, a changed circumstances review or for some other reason.[754] Furthermore, the US position would have as a consequence that no Member could successfully challenge an administrative review or, even if the complaining Member were successful, it could not hope for an effective remedy. With respect to the US argument that the effects of the Section 129 determinations apply only to entries made on or after April 9, 2007, Korea submits that what was challenged and found to be WTO-inconsistent in the original dispute was a measure called "zeroing." In Koreas' view, the entry date of the product should not matter; what matters is whether a challenged measure which was found to be WTO-inconsistent is still maintained after the reasonable period of time has lapsed. In this case, the USDOC continues to apply the zeroing methodology for certain original investigations and administrative reviews even after that date. This should be dispositive and the Panel should find for the European Communities on this issue.[755] Furthermore, what the European Communities seeks in this proceeding is a prospective remedy. All the European Communities points out is that the United States continues to fail to eliminate the zeroing practice at issue after the end of the reasonable period of time. This constitutes a request for a prospective remedy.[756]

8.163 **Norway** considers that the US argument that under the EC theory of implementation, there would be no "final action" to challenge under Article 17.4 of the *Anti-Dumping Agreement* until an administrative review is concluded is based on a misunderstanding of Article 17.4. "Final action" in that Article is used to distinguish provisional measures under Article 7. Thus, the argument of the United States is irrelevant.[757]

(c) Evaluation by the Panel

(i) Temporal aspect of the obligation to implement DSB recommendations and rulings with respect to AD measures in the case of a Member operating a retrospective duty assessment system

8.164 We first turn our attention to the question of the temporal aspect of a Member's obligation to implement DSB recommendations and rulings concerning anti-dumping measures where the Member concerned operates a retrospective anti-dumping duty assessment system.[758]

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[753] Korea's Third Party Submission, paras. 5-6, Korea's Opening Statement, para. 4.
[754] Korea's Third Party Submission, para. 7-10, Korea's Opening Statement, paras. 5-6.
[755] Korea's Third Party Submission, para. 14-20, Korea's Opening Statement, paras. 7-11.
[756] Korea's Opening Statement, para. 13.
[757] Norway's Answers to Panel Questions 20 and 21 to the third parties.
[758] No WTO panel has addressed this precise question before, although the issue arose in *US – Section 129(c)(1) URAA*. In that dispute, Canada challenged the WTO-consistency of Section 129(c)(1) of the US Uruguay Round Agreements Act, arguing that it had the effect of requiring the USDOC to apply Section 129 determinations only with respect to imports entered on or after the date of effectiveness of a Section 129 determination, and not to prior unliquidated entries. The panel in that dispute, however, considered that it needed not decide that precise question, as it found that Canada had failed to establish that Section 129(c)(1) actually required the United States to act in the manner alleged by Canada. See Panel Report, *United States – Section 129(c)(1) of the Uruguay Round Agreements Act* ("*US – Section 129(c)(1) URAA*"), WT/DS221/R, adopted 30 August 2002, DSR 2002:VII, 2581, para. 6.77. The United States notes that the EC arguments

8.165 The disagreement between the parties concerns the relevant date as of which a Member's obligation to implement DSB recommendations and rulings attaches to particular decisions and actions of that Member. The United States considers that its implementation obligation in an anti-dumping dispute is dependent on the date of importation ("entry") of products subject to the AD duty, and only extends to imports made after the expiry of the reasonable period of time. The European Communities, as well as Korea and Japan, consider the relevant date to be that of the action taken by the responding Member. For these Members, as of the expiry of the reasonable period of time, the implementing Member cannot take any positive act, be it a dumping determination, *e.g.* in an administrative review or some other action, *e.g.*, an instruction to collect anti-dumping duties, to provide for the final payment of duties or retention of cash deposits calculated inconsistently with the *Anti-Dumping Agreement* with respect to entries not finally liquidated as of the expiry of the reasonable period of time.[759] In practical terms, the disagreement between the parties revolves around two questions: (i) whether administrative review determinations made after the expiry of the reasonable period of time, but concerning imports made before that date, must be consistent with the DSB recommendations and rulings, and (ii) whether actions after the end of the reasonable period of time to liquidate entries and definitively collect duties with respect to imports made before that date must be consistent with the DSB's recommendations and rulings, even though the calculation of the amount of duties owing, in an administrative review, may have been made before the end of the reasonable period of time.

8.166 Thus, the disagreement between the parties relates only to the "assessment" and collection of anti-dumping duties. We do not understand the parties to be in disagreement that a cash deposit rate established in an administrative review successfully challenged in the original dispute and which continues to be in effect after the end of the reasonable period of time is subject to the Member's obligation to implement, *i.e.*, that any such cash deposit rate must be consistent with the Member's obligations under the Agreement, that is, it cannot derive from a margin of dumping calculation in which zeroing was used.

8.167 Neither party argues that the obligation to implement DSB recommendations and rulings should have retrospective effects. Both parties consider that the position they advocate is consistent with the principle that the DSU only provides for prospective remedies. Rather, the parties disagree on what a prospective implementation of DSB recommendations and rulings in an anti-dumping dispute entails in the context of a Member operating a retrospective duty assessment system. The United States in particular considers that the position advocated by the European Communities would amount to the imposition of a retrospective remedy, contrary to the dispositions of the DSU.

8.168 We do not consider that, to resolve the question before us, we need to address whether the DSU provides only for prospective, as opposed to retrospective, remedies, as the parties do not disagree on this question. We simply note that there is support in previous panel and Appellate Body decisions for the proposition that the DSU only provides for prospective remedies[760] and, take that

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before us are at odds with the position it defended as a third party before the *US – Section 129(c)(1) URAA* panel. See US First Written Submission, para. 98 and Exhibit US-18.

[759] As explained in the summary of its arguments, the European Communities considers that where liquidation is delayed by litigation in the US courts, any action to collect or liquidate duties after the expiry of the reasonable period of time is likewise subject to the US obligation to act in conformity with the *Anti-Dumping Agreement* and the DSB's recommendations and rulings.

[760] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, footnote 494; Panel Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities* ("*US – Countervailing Measures on Certain EC Products*"), WT/DS212/R, adopted 8 January 2003, as modified by Appellate Body Report, WT/DS212/AB/R, DSR 2003:I, 73, para. 6.106; Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by Ecuador* ("*EC – Bananas III (Article 21.5 – Ecuador)*"), WT/DS27/RW/ECU, adopted 6 May 1999, DSR 1999:II, 803, para. 6.105.

proposition as the starting point of our analysis. And while we need not definitively decide what is understood by a "prospective remedy" under the DSU (*a fortiori* since the concept is not reflected *expressis verbis* in the text of the DSU),[761] we consider that the concept of non-retroactivity in international law recognized in Article 28 of the *Vienna Convention on the Law of Treaties* sheds some light on the application of such a principle of "non-retroactivity". Article 28 of the *Vienna Convention* provides as follows:

> *"Article 28: Non-retroactivity of treaties*
>
> Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."[762]

8.169 By analogy, this would suggest that a retrospective remedy would consist in the application of the obligation to bring measures into conformity where those measures relate to an act or a fact "which took place" or a "situation which ceased to exist" before the date of expiry of the reasonable period of time. The same concept would be captured in the idea of not requiring a Member to "undo" past acts.[763] Of course, if the act (or measure) continues to produce effects, it may have to be amended.

Whether the US obligation to implement extends to administrative reviews covering imports made before the end of the reasonable period of time

8.170 As a starting point to our analysis, we recall that the covered agreements, and the *Anti-Dumping Agreement* in particular, discipline measures adopted by a Member or actions taken by such Member. In the case of a dispute under the *Anti-Dumping Agreement*, those actions and measures

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[761] That said, we do consider that the principle finds expression in, *e.g.*, Article 3.7 of the DSU ("… the first objective of the dispute settlement is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements") and 19 of the DSU ("Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement.")

[762] We note that the United States does not consider Article 28 to be relevant to the question of what a "prospective remedy" means. See US Answer to Panel Question 32. Japan and Norway are of a similar view. Japan's Answers to Panel Questions 15, 17 and 18 to the third parties. Norway's Answer to Panel Question 18 to the third parties. The European Communities indicates that:

> "although [Article 28] may provide some guidance in respect of the meaning of the concept of retroactivity in public international law, it addresses the temporal application of treaties, not of DSB's recommendations... In any event, any contextual support that might be gleaned from Article 28 of the VCLT would support the European Communities, insofar as that provisions makes it clear that any acts or omission post-dating the entry into force of the new treaty would be governed by the terms of that treaty".

European Communities Answer to Panel Question 32. Korea considers that the end of the reasonable period of time could be considered to be similar to the entry into force of a treaty. Korea's Answer to Panel Question 18 to the third parties. Like the *Brazil – Aircraft (Article 21.5 – Canada)* panel, we consider that "[a]lthough Article 28 addresses the temporal application of treaties, and not of DSB recommendations, it nevertheless provides some guidance in respect of the meaning of the concept of retroactivity in public international law". Panel Report, *Brazil – Export Financing Programme for Aircraft – Recourse by Canada to Article 21.5 of the DSU* ("*Brazil – Aircraft (Article 21.5 – Canada)* ") WT/DS46/RW, adopted 4 August 2000, as modified by Appellate Body Report, WT/DS46/AB/RW, DSR 2000:IX, 4093, footnote 22. In any case, our findings do not depend on the precise interpretation of the concept of non-retroactive remedies.

[763] See also Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)* para 14.38 (indicating that requiring a Member to take action with respect to acts which took place before the end of the reasonable period of time would constitute a retroactive remedy).

necessarily concern the imposition of anti-dumping measures against imports from another Member.[764] Thus, one would normally assume that a Member is required to bring its actions into conformity with the *Anti-Dumping Agreement* by the end of the reasonable period of time, at the latest, which would suggest that any determination, *e.g.* in an assessment review, made after the end of the reasonable period of time must be consistent with the *Anti-Dumping Agreement*.

8.171 The United States submits that anti-dumping duties (and countervailing duties) are different in this respect because they are border measures, *i.e.*, they are applied at the national border to counteract the dumping or subsidization of goods.[765] For the United States, eliminating a WTO-inconsistent anti-dumping or countervailing duty measure prospectively at the border, including by superseding one measure with another, constitutes "withdrawal" of the measure within the meaning of Article 3.7 of the DSU. From this fact (and from various provisions of the *Anti-Dumping Agreement* which we discuss below), the United States draws the inference that, for anti-dumping duties, the relevant legal regime is that which applies to the products and is in existence at the time of importation, and that it is this legal regime that determines whether an import is "liable" for anti-dumping duties. We understand the United States to argue that since the legal regime applicable to the subject imports was determined at the time of their importation, a Member is not required to change that legal regime as a result of its obligation to implement the DSB's recommendations and rulings and that requiring it to do so would amount to a retrospective remedy.

8.172 The United States also invokes a number of provisions of the *Anti-Dumping Agreement* and of the GATT 1994 in support of its argument that the relevant time to determine implementation is that of the importation. First, the United States brings to our attention the use of the term "levy" in Article VI:2 of the GATT 1994; it also submits that Article VI:6(a) GATT 1994 "reflects the fact that the levying of a duty generally takes place in connection with 'the importation of any product", but notes that the *Ad Note* to paragraphs 2 and 3 of 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 United States argues, the cash deposits serve as a place-holder for the liability which is incurred at the time of entry. Second, the United States submits that a number of provisions of the *Anti-Dumping Agreement* demonstrate that whether relief is "prospective" or "retrospective" can only be determined by reference to the date of importation. The United States refers to Article 10.1 of the *Anti-Dumping Agreement*, which states that provisional measures and anti-dumping duties shall only be applied to "products which enter for consumption after the time" when the provisional or final determination enters into force, subject to certain exceptions, and notes that this limitation applies even though the dumping activity that forms the basis for the dumping and injury findings necessarily occurs prior to the time that the determination enters into force. Similarly, the United States submits, Article 8.6 of the *Anti-Dumping Agreement* states that if an exporter violates an undertaking, duties may be assessed on products "entered for consumption not more than 90 days before the application of ... provisional measures, except that any such retroactive assessment shall not apply to imports entered before the violation of the undertaking." Finally, the United States notes that Article 10.6 states that when certain criteria are met, "[a] definitive anti-dumping duty may be levied on products which were entered for consumption not more than 90 days prior to the date of application of provisional measures" and that under Article 10.8, "[n]o duties shall be levied retroactively pursuant to paragraph 6 on products entered for consumption prior to the date of initiation of the investigation." The United States reads these provisions as indicating that, whenever the *Anti-Dumping Agreement*

[764] Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico* ("*Guatemala – Cement I*"), WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, 3767, para. 79.
[765] US First Written Submission, para. 102; US Second Written Submission, para. 37.

specifies an applicable date for an action of for anti-dumping duty liability, the scope of applicability is based on entries occurring on or after that date.[766]

8.173 In our view, the US arguments disregard the fundamental fact that, in a retrospective duty assessment system, the duties applicable to specific imports of a product are not determined at the time of entry, but rather, are determined at a later date. In a retrospective system, the actual amount of any anti-dumping duty liability is only determined at a later point in time, when an assessment review is conducted, or when it has been determined that such a review will not be conducted, and therefore, that the duties will be assessed at the cash deposit rate that applied at the time of importation.[767] Article 9.3.1 indicates that, in a retrospective duty assessment system, the "*determination of the final* [anti-dumping] *liability*" is made in the context of an assessment review, *retrospectively*.[768] Article 9.3 and paragraph 1 thereof thus make it clear that, in a retrospective assessment system, the final anti-dumping duty liability determination is only made at the time of the duty assessment proceeding provided for under Article 9.3.1.

8.174 In our view, it follows that the relevant date for implementation of DSB recommendations and rulings concerning anti-dumping duties by a Member operating a retrospective duty assessment system is the date of the final determination of liability for anti-dumping duties, *i.e.*, the date of the final determination in the administrative review proceeding or the date on which the right to request such a review has lapsed.[769] As a result, any definitive duty determination made after the end of the reasonable period of time must be consistent with the provisions of the *Anti-Dumping Agreement* and with the DSB's recommendations and rulings. To conclude otherwise would mean that a Member is effectively allowed, after the end of the reasonable period of time, to determine the amount of anti-dumping duties with respect to certain imports in contravention of the provisions of the *Anti-Dumping Agreement*. We find no support in either the *Anti-Dumping Agreement* or the DSU for such a proposition.

8.175 Our conclusion does not imply the imposition of a retrospective remedy; on the contrary, the obligation to cease performing WTO-inconsistent acts as of the end of the reasonable of time is, in our view, eminently prospective in nature.[770] Further, we recall that in the instant case, the recommendations and rulings of the DSB in the original dispute concerned the calculation of margins of dumping in the original investigations and administrative reviews challenged. The panel and Appellate Body found the use of zeroing in the calculation of margins of dumping in those measures

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[766] US Second Written Submission, paras. 41-43.

[767] In the US system, this happens when the time to request an administrative review has lapsed. The United States does not contest this basic feature of its duty assessment system. In fact, the United States argues that because of this unique feature, and because the implementation obligations must be similar for Members operating a retrospective system and a definitive system, the position defended by the European Communities and Japan would impose greater obligations on retrospective systems than prospective systems, with no textual justification for the disparate treatment. See US Answer to Panel Questions 28 and 40.

[768] See also footnote 22 to the *Anti-Dumping Agreement*:

> "When the amount of the anti-dumping duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding under subparagraph 3.1 of Article 9 that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty."

[769] Where an administrative review proceeding is initiated but later rescinded, the relevant date is that of the rescission of the proceeding. Further, we note that by "final determination" we do not refer to the date on which the "Final Results" are signed by the relevant USDOC official, but rather, the effective date (normally the date of publication in the Federal Register) of the determination of final anti-dumping liability in the administrative review process (*i.e.*, the date of publication of the final results of the administrative review or, where applicable, the date of publication of the amended results of the administrative review).

[770] Panel Report, *Brazil – Aircraft (Article 21.5 – Canada)*, para. 6.15; Panel Report, *India – Measures Affecting the Automotive Sector* ("*India – Autos*"), WT/DS146/R, WT/DS175/R and Corr.1, adopted 5 April 2002, DSR 2002:V, 1827, para. 6.58.

to be inconsistent with Articles 2.4.2 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994. Our finding has essentially the effect of requiring the United States to cease using zeroing in the calculation of margins of dumping in the measures that were at issue in the original dispute and the other, subsequent, determinations which we have determined fall under our terms of reference, where the margin of dumping, and the anti-dumping duty liability is determined after the end of the reasonable period of time.[771] To implement the DSB's recommendations and rulings, the United States was at least obligated, after 9 April 2007, to cease using the "zeroing" methodology in the calculation of anti-dumping duties, not only with respect to imports entered after the end of the reasonable period of time, but also in the context of decisions involving the calculation of dumping margins made after the end of the reasonable period of time with respect to imports entered before that date. The fact that the imports concerned pre-date the expiry of the reasonable period of time does not excuse the United States acting inconsistently with the provisions of the *Anti-Dumping Agreement* after the end of the reasonable period of time.

8.176 As a result, we disagree with the US view that it is the legal regime in existence at the time of importation that determines whether an import is "liable" for anti-dumping duties. The legal regime that was in place at the time of the importation of the products at issue in that review is not dispositive as to whether duties are due, and if so, in what amount. The legal regime in place at the time of importation is, at most, a provisional one as concerns the final anti-dumping duty liability incurred by the imports. As a result, our conclusion does not imply that the United States is required to "undo" or modify a legal situation which occurred, or was fixed, in the past.

8.177 Our reasoning above is consistent with views expressed by the panels and the Appellate Body in *US – Shrimp (Thailand)* and *US – Customs Bond Directive*. These disputes concerned the consistency with the *Anti-Dumping Agreement* and the *Ad Note* to paragraphs 2 and 3 of Article VI of GATT 1994[772] of additional security collected with respect to certain imports subject to an AD order and consequent cash deposits. The panels found that such additional security was subject to the temporal scope of the *Ad Note*.[773]

8.178 On appeal, the Appellate Body upheld the panels' ultimate findings with respect to the temporal scope of the *Ad Note*, finding that the *Ad Note* authorizes the imposition of security requirements during the period following the imposition of a US anti-dumping order.[774] While the Appellate Body did not share the panels' reasoning on the issue of the legal status of cash deposits as a security[775], it agreed with the panels that, under the US duty assessment system, the final

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[771] We recall our finding, in section VIII.D.2(c)(iv) above, that the dumping margin calculation in subsequent administrative review determinations is closely connected with the margin of dumping calculations in prior administrative review determinations and/or the original investigation, and that this warrants a consideration of the USDOC's dumping margin calculations in the subsequent review in the context of this proceeding.

[772] Para. 1 of the *Ad Note* provides that:

> "As in many other cases in customs administration, a contracting party may require reasonable security (bond or cash deposit) for the payment of anti-dumping or countervailing duty pending final determination of the facts in any case of suspected dumping or subsidization."

[773] See Panel Report, *US – Shrimp (Thailand)*, para. 7.99 and Panel Report, *United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties* ("*US – Customs Bond Directive*"), WT/DS345/R, adopted 1 August 2008, as modified by Appellate Body Report, WT/DS343/AB/R, WT/DS345/AB/R, para. 7.78.

[774] Appellate Body Report, *United States – Measures Relating to Shrimp from Thailand / United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties*("*US – Shrimp (Thailand) / US – Customs Bond Directive*"), WT/DS343/AB/R, WT/DS345/AB/R, adopted 1 August 2008, para. 243.

[775] See Appellate Body Report, *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 226. The Appellate Body considered that it was not necessary for the panels to decide on the legal characterization of US

determination of the amount of anti-dumping duties due is made at the time of the assessment review or, where no assessment review is requested, at the time where it is determined that duties will be assessed on the basis of the cash deposits collected at the cash deposit rate:

> "*In the retrospective duty assessment system followed by the United States, the factual determination of the amounts of anti-dumping duties payable by the importers is not complete until an assessment review has been conducted*. A factual determination of the amount of anti-dumping duties payable occurs even if an assessment review does not take place. If no interested party requests an assessment review, the USDOC will instruct United States Customs to assess anti-dumping duties and liquidate the import entries at the cash deposit rate required upon import entry. This cash deposit rate is determined for each exporter or producer individually investigated, and is established on the basis of its transactions over the period covered by the original investigation or the latest assessment review, as the case may be. *Thus, even in the event that no assessment review has been requested, the final determination of the facts includes a determination regarding amounts of anti-dumping duties finally payable*, as the USDOC has to instruct United States Customs to liquidate the import entries on the basis of the cash deposit rates."[776]

> "Under the United States' retrospective duty assessment system, the *magnitude* of dumping, or, in other words, the amount of final liability for payment of anti-dumping duties, is determined only in an assessment review."[777]

8.179 Further, the Appellate Body went on to note:

> "where no assessment review is requested, the USDOC instructs the United States Customs to liquidate the import entries on the basis of the cash deposit rate of the original anti-dumping duty order or the cash deposit rate assessed for the exporter in the most recent assessment review. Whether or not an assessment review will be requested (and whether the final liability will be assessed at the previous cash deposit rate or according to the current data) is not known *ex ante*. Thus, even in the event that no assessment review is requested, until liquidation of the import entries, there is some uncertainty regarding the magnitude of dumping."[778]

8.180 Whether cash deposits are "duties" or a form of security, a question which is not before us, and which we therefore do not address, the fact remains that in a retrospective duty assessment system, the final determination of the amount of duty due, based on a calculation of the margin of dumping for the imports subject to an administrative review, only occurs at the time of the final determination in that review. As a consequence, in our view, where the DSB makes recommendations and rulings concerning the calculation of the margin of dumping, the determinations in subsequent assessment reviews decided after the end of the reasonable period of time, and involving the same products from the same countries, must be consistent with those recommendations and rulings, regardless of whether the imports in question were made before or after the end of the reasonable period of time.

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cash deposits as duties governed by Article 9 in order to interpret the *Ad Note* and decide the dispute before them. As a result, the Appellate Body declared of no legal effect the interpretation developed by the panels that US cash deposits are not anti-dumping duties governed by Article 9. See Appellate Body Report, *US – Shrimp (Thailand) / US – Customs Bond Directive*, paras. 235, 240-242.

[776] Appellate Body Report, *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 222. (emphasis added)

[777] Appellate Body Report, *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 226.

[778] Appellate Body Report, *US – Shrimp (Thailand) / US – Customs Bond Directive*, footnote 268.

8.181 The United States argues that the EC argument that the AD duty liability only materializes when the amount of duties due for a particular period is determined pursuant to an administrative review proceeding leads to the absurd result that there would be no "final action" in the sense of Article 17.4 of the *Anti-Dumping Agreement*, and therefore, no measure for an aggrieved Member to challenge, until an assessment review is conducted.[779] It does not, in our view follow from the EC argument or from our conclusion above that there is no "final action ... to levy definitive anti-dumping duties". As the European Communities notes[780], a similar argument by Thailand was considered and rejected by the *US – Shrimp (Thailand)* panel. The panel noted that Article 17.4 refers to "final action ... by the administering authorities ... to levy definitive anti-dumping duties". Thus, the panel found, Article 17.4 does not state that definitive anti-dumping duties *must have been levied*; rather, it merely requires that final action to levy definitive anti-dumping duties must have been taken. The panel considered that, in this context, the word "to" should be interpreted adverbially, to express purpose. Accordingly, the panel considered that the imposition of an anti-dumping order by the United States constitutes "final action ... *to* levy of definitive anti-dumping duties", in the sense that the order puts in place a mechanism providing for the levying of definitive anti-dumping duties, even though the amount of those duties – if any – is not calculated until some time in the future. In the *US – Shrimp (Thailand)* panel's view, if the drafters of Article 17.4 had meant that Members must wait until definitive anti-dumping duties were actually levied before initiating dispute settlement proceedings, the relevant phrase in Article 17.4 would have read "if definitive anti-dumping duties have been levied, or price undertakings accepted".[781] We agree with the *US – Shrimp (Thailand)* panel's interpretation of Article 17.4. In our view, the use of the term "final action …to levy definitive anti-dumping duties" in that Article is to be contrasted with the concept of the final determination of the anti-dumping liability, on which the EC arguments rely.[782]

8.182 Finally, the parties make a number of arguments with respect to the effect the finding advocated by the European Communities would have in terms of the equality of treatment afforded to Members operating a retrospective duty assessment system and those operating a prospective assessment system or a prospective normal value system. In particular, the United States argues that the position advocated by the European Communities would mean that a DSB recommendation with respect to anti-dumping duties has a different impact for the Member concerned, depending on whether it operates a retrospective or a prospective duty assessment system. A Member operating a prospective duty assessment system would not have to reimburse duties collected in excess of a rate consistent with the *Anti-Dumping Agreement*, on imports made before the expiration of the reasonable period of time, but a Member operating a retrospective duty assessment system would have to forgo the collection of such duties since the duties are only "collected" at a later point in time.[783] The

[779] US Second Written Submission, para. 47 and US Answer to Panel Question 41.

[780] EC Answer to Panel Question 36.

[781] Panel Report, *US – Shrimp (Thailand)*, para. 7.121.

[782] EC Answer to Panel Question 41, Japan's Answers to Panel Questions 20 and 21 to the third parties.

[783] See, *inter alia*, US Comments on EC Answer to Panel Questions 37 and 38. The US notes that even if it is assumed, as the European Communities argues, that a Member operating a prospective duty assessment system would be obligated to act consistently with the DSB's recommendations and rulings in a refund proceeding concerning imports before the end of the reasonable period of time, a discrepancy would still persist as the Member operating the prospective system would be under no obligation to provide a refund in the absence of a request to that effect whereas a Member operating a retrospective duty assessment system would be obligated to release cash deposits if a recalculation to implement resulted in a determination of liability less than the amount of the original cash deposit. The US also notes that in a retrospective system, an importer or exporter may request a review by right, while in a prospective system, no such right exists. A review may only be requested by importers, and that request must be "duly supported by evidence". The United States also argues that notwithstanding the European Communities' argument to the contrary, EC law provides that a change in the anti-dumping dumping margin based on implementation of a WTO dispute report does not provide a basis for requesting a refund on duties predating the end of the reasonable period of time. US Comment on EC Answer to Panel Questions 37 and 38.

United States submits that a proper interpretation of a Member's implementation obligations requires that all systems of duty assessment be treated equally unless the Agreement expressly provides otherwise, and that nothing in Article 9.3 suggests that the existence of a mechanism for final assessment in a retrospective system imposes increased implementation obligations for Members with such systems as compared to Members operating a prospective duty assessment system.[784]

8.183 The European Communities considers that the extent of the "level playing field" between Members operating different duty assessment systems is that in no system can the amount of duty finally collected exceed the margin of dumping calculated in conformity with Article 2. Indeed, the European Communities argues that a Member operating a prospective duty assessment system would, after the end of the reasonable period of time, be under the obligation to conduct any refund proceeding under Article 9.3.2 in conformity with the recommendations and rulings of the DSB, irrespective of the date of importation.[785]

8.184 We note the statement of the Appellate Body, in *US – Zeroing (Japan)*, that:

> "*The Anti-Dumping Agreement is neutral as between different systems for levy and collection of anti-dumping duties.* The Agreement lays down the 'margin of dumping' as the ceiling for collection of duties regardless of the duty assessment system adopted by a WTO Member, and provides for a refund if the ceiling is exceeded. It is therefore incorrect to say that the *Anti-Dumping Agreement* favours one system, or places another system at a disadvantage."[786] (emphasis added)

8.185 The recognition of the existence of different systems under the *Anti-Dumping Agreement* necessarily implies that, in interpreting the *Agreement*, the treaty interpreter must take into consideration the existence of such different systems. It also means that a proper interpretation of the Agreement cannot negate the existence of one of the permissible systems of duty assessment or render its operation impossible. Yet, while we think that the interpreter should be mindful of the Appellate Body's indication that the *Anti-Dumping Agreement* does not disadvantage Members operating either duty collection system, it may simply be unavoidable that the same legal provisions of the *Anti-Dumping Agreement* or – as is the case in this dispute – of the DSU, have different consequences as a result of the different characteristics of each system. In other words, it should not come as a surprise that the application of the same legal principles to different legal situations can result in different

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[784] See, *e.g.* US Answers to Panel Questions 28, 30, 34, US Comments on EC Answer to Panel Question 24.

[785] EC Answer to Panel Questions 28 and 30, EC Comments on US Answer to Panel Questions 32, 34 and 40. The Panel understands Korea to agree with the European Communities. See Korea's Answer to Panel Question 16(a) to the third parties. See also Norway's Answer to Panel Question 16 to the third parties, where it indicates that it considers that, due to the specific requirement regarding refunds in Article 9.3, an importer has the right to request a refund based on the corrected calculations under the domestic legal system of the Member imposing the measure. Japan also considers that the amount of anti-dumping duties collected at the time of importation is not final for purposes of WTO under a prospective system and that the same principles would apply in case a refund procedure under Article 9.3.2 were found to be WTO-inconsistent, as long as the entries covered have not been liquidated by the end of the reasonable period of time. Japan's Answers to Panel Questions 11, 14 and 16 to the third parties; Japan's Opening Statement, para. 42.

[786] Appellate Body Report, *US – Zeroing (Japan)*, para. 163; cited with approval in Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico* ("*US – Stainless Steel (Mexico)*"), WT/DS344/AB/R, adopted 20 May 2008, para. 121. See also, the comment of the Appellate Body in *US – Shrimp (Thailand) / US – Customs Bond Directive* that "In our view, this finding is neutral as between prospective and retrospective duty assessment systems, because the determination of the final liability for payment of duty takes place in a retrospective system in assessment reviews subsequent to the imposition of the anti-dumping duty order." Appellate Body Report, *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 227.

implications.[787] In the instant case, any different impact in terms of a Member's obligation to implement DSB recommendations and rulings could merely be a result of the characteristics of the system under consideration, *i.e.*, that the duty liability is only determined when duties are "assessed" in the context of an assessment review. That one or the other of the duty assessment systems gives rise to certain advantages and disadvantages does not, in our view, mean that the recognition of these systems in the *Anti-Dumping Agreement* is brought into question, or that the *Anti-Dumping Agreement* favours one system, or places another system at a disadvantage.[788] Given the reality that prospective and retrospective duty assessment systems use different approaches in determining anti-dumping liability under the *Anti-Dumping Agreement*, it would not be surprising that the mechanisms for implementation would differ between a Member operating a retrospective duty assessment system and a Member operating a prospective duty assessment system.[789]

Whether the US obligation to implement extends to the liquidation of duties

8.186 As indicated above, the EC claims are not limited to subsequent administrative reviews concluded after the end of the reasonable period of time. The European Communities argues that any action of the United States to collect duties after the end of the reasonable period of time must be consistent with the DSB's recommendations and rulings, even when the final collection of duties is delayed, for instance by judicial proceedings. In other words, the European Communities fixes the outer limit to the US obligation to implement as applying to any entries that were not liquidated as of the end of the reasonable period of time. In the EC view, any liquidation before the end of the reasonable period of time need not be consistent with the DSB's recommendations and rulings whereas any liquidation after the end of the reasonable period of time must be consistent with the US obligations under the *Anti-Dumping Agreement* and the DSB's recommendations and rulings. Thus, the European Communities also challenges US actions to collect anti-dumping duties based on zeroing after the end of the reasonable period of time, but where the administrative review was concluded before the end of the reasonable period of time.

8.187 The European Communities argues that the amount established in a US administrative review is not final and conclusive. Following an administrative review determination, the USDOC issues assessment instructions to the USCBP, which then issues liquidation instructions to local customs authorities ("port authorities") to liquidate the import entries at the rate established by the USDOC. Local authorities then proceed to the actual liquidation of the entries, by issuing payment notices or refunds to the importer(s) concerned. But the European Communities submits that interested parties

[787] We add, however, that the *interpretation* of the provisions of a covered agreement should not vary depending on how a Member qualifies or organizes its duty collection system; it simply results from the different characteristics of the system that the consequences of the ensuing legal obligations (*i.e.*, the application of the obligation to the factual circumstances at hand) may differ.

[788] That said, while the question of the obligation to implement of a Member operating a prospective duty assessment system is not before this panel, the European Communities indicated that in its view, in a case presenting similar circumstances to those before us, any refund procedure conducted under Article 9.3.2, decided after the end of the reasonable period of time, but with respect to imports made before that date, would need to be consistent with the disciplines of the *Anti-Dumping Agreement* and recommendations and rulings of the DSB. EC Answers to Panel Questions 28 and 30. This is consistent with our view that a determination of the amount of final anti-dumping duty liability made after the end of the reasonable period of time must be consistent with the implementing Member's obligations under the *Anti-Dumping Agreement* and with any rulings of the DSB.

[789] As noted above, footnote 783, the United States also argues that in a retrospective duty assessment system, an importer or an exporter may request a review by right, while in a prospective system, a review may only be requested by importers in a request duly supported by evidence. We observe, however, that the Agreement does not specify which party may request an assessment review under Article 9.3.1 – the difference on which the United States relies is an aspect of the domestic law of Members. For this reason, we find this US argument to be unavailing.

can challenge administrative review determinations before US courts, which challenge may involve the suspension of the issuance of assessment instructions until a final court ruling on the matter; further, once assessment instructions have been issued to the USCBP, importers may file a protest against liquidation before the USCBP. Thus, the European Communities submits, only where there is a decision from the USCBP, or the period to file a protest has elapsed, does the liquidation become final and conclusive.[790] The European Communities submits that the *Anti-Dumping Agreement* recognizes and takes into account judicial review proceedings in the imposition and collection of anti-dumping duties, for instance in footnote 20 to Article 9.3.1. Therefore, the European Communities considers that judicial review proceedings are part of the context in which anti-dumping measures are adopted and maintained in place.[791]

8.188 The United States rejects the European Communities' position. As indicated above, the United States considers that the relevant date to assess implementation is not that of the final liquidation of entries, but that of the importation of the products subject to anti-dumping duties. Further, the United States notes that the concept of "liquidation" is not universal and not found in the *Anti-Dumping Agreement*, but rather is an element of the US system.[792] Nothing in the *Anti-Dumping Agreement* or the DSU suggests that the status of entries as "liquidated" or "unliquidated" is germane to a Member's implementation obligations. Further, the United States considers that the same issue does not arise under a prospective systems since there is no distinction between potential and final liability in such systems.[793]

8.189 The United States also submits that there is no support in the *Anti-Dumping Agreement* for the proposition that judicial review proceedings should be taken into account in assessing a Member's implementation of DSB recommendations and rulings, and that where judicial review is to be taken into consideration in the *Anti-Dumping Agreement*, there are express provisions to that effect, for instance in footnote 20, which recognizes that the observance of the time periods set out in the *Anti-Dumping Agreement* may not be possible because of judicial review.[794] The United States further submits that if the DSB's recommendations and rulings called for compliance with respect to determinations made prior to the end of the reasonable period of time, but subject to pending judicial review, this would create an incentive for private parties to make requests for judicial review for the sole purpose of delaying finality in the hope that a favourable ruling could be obtained through WTO dispute settlement.[795]

8.190 Japan essentially agrees with the European Communities. Japan considers that in a case where there are outstanding unliquidated entries on imports on which cash deposits were made in the amount set out in the administrative review challenged in the original dispute, the Member must revise the importer-specific assessment rate to ensure that the definitive duties collected on unliquidated entries are fully consistent with the Member's WTO obligations.[796] It considers that the United States was required to bring the reviews at issue in the original dispute into conformity with WTO law because it will take action pursuant to the WTO-inconsistent importer-specific assessment

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[790] See, *inter alia*, EC First Written Submission, para. 82; EC Second Written Submission, paras. 73-75, 79-84.

[791] EC Answer to Panel Question 25.

[792] US Answer to Panel Question 24 and US Comments on EC Answer to Panel Question 24; US Answer to Panel Question 34.

[793] US Answer to Panel Question 24 and US Comments on EC Answer to Panel Question 24. We addressed the US arguments based on the requirement that the different duty assessment systems receive equal treatment under the *Anti-Dumping Agreement* above, at para. 8.185.

[794] US Comments on EC Answer to Panel Question 25.

[795] US Comments on EC Answer to Panel Question 25.

[796] Japan's Answer to Panel Question 11(c) to the third parties; see also Japan's Third Party Submission, paras. 95-101.

rates established in these reviews to collect anti-dumping duties on unliquidated entries.[797] Thus, for Japan, what is relevant is that after the end of the reasonable period of time, the United States will take action pursuant to a measure found to be WTO-inconsistent. Japan also submits that US periodic reviews continue to produce legal effects because, *inter alia*, under US law, the enforcement of the final results of the reviews is suspended pending the outcome of domestic judicial review proceedings. Yet, Japan explains, the Panel is not asked to take into account the judicial review proceedings as a substantive element of its examination of the EC claims regarding the US non-compliance; rather, the existence of these procedures is merely a background fact that explains why the importer-specific assessment rates in the periodic reviews in question will be applied after the end of the reasonable period of time.[798] Korea also supports the EC position.[799]

8.191 In our view, the date that is relevant for the US implementation of the DSB's recommendations and rulings is, as we have found above, that of the final determination of duty liability, and not that of the actual liquidation of the duties.[800] In essence, the European Communities asks the Panel to take into consideration delays in the actual collection of anti-dumping duties that are the consequence of judicial proceedings challenging the final duty liability determination. Yet, we recall that the EC claims in the original dispute, and the findings of the panel and the Appellate Body, concerned the calculation of margins of dumping. We have already determined that, under the US system, the final amount of duty is determined at the time of the assessment review conducted pursuant to Article 9.3. The EC theory of implementation would lead to the undesirable result that the implementing Member may have to recalculate final duty liability calculations which were concluded before the end of the reasonable period of time, for the simple reason that the actual collection of duties was suspended, even where the court proceedings were unsuccessful in challenging the final duty liability determination. We also note that in response to a panel question on an unrelated issue (the US argument under Article 17.4 *Anti-Dumping Agreement*), the European Communities submitted that:

> "the USDOC's duty assessments in the context of administrative review proceedings is the final action taken by the US authorities for the purpose of determining the duty rates applicable to entries within the period of review and, thus, levying duties in the sense of Article 17.4 of the Anti-Dumping Agreement. Then, liquidation will be final and conclusive depending of the actions taken by importers under US municipal law. Thus, the final action to levy duties in the sense of Article 17.4 of the Anti-Dumping

[797] Japan's Answer to Panel Question 12 to the third parties, Japan's Third Party Submission, paras. 78-84, 95-99 and 111-112, Japan's Opening Statement, paras. 38-42.

[798] Japan's Answer to Panel Question 12 to the third parties. Japan also notes that footnote 20 recognizes that, due to domestic court proceedings, Members may permissibly take action pursuant to a periodic review long after the completion of that review.

[799] See Korea's Answer to Panel Question 11 to the third parties: "Korea notes that if there are still outstanding unliquidated entries on imports after the expiration of the RPT, the administrative review at issue is still in operation and has not been revoked yet." See also Korea's Answer to Panel Question 12 to the third parties: "a pending judicial review proceeding with respect to an anti-dumping measure could indicate that the measure has not been finally disposed yet even in the domestic jurisdiction of the Member. So, if a judicial action has suspended the liquidation of entries, even if assessment instruction has already been issued for them, the entries should be considered to be pending, which is then subject to the implementation obligation of the implementing Member after the expiration of the RPT."

[800] The concept of "liquidation" of duties is not one which is found in the *Anti-Dumping Agreement*. We use this term here to refer to the conclusion of the administrative action of collecting duties by either providing a refund where the assessed amount of duty is inferior to the cash deposits provided, or where an invoice is sent where insufficient cash deposits were provided, or the information to the importer that the cash deposits provided correspond to the amount of duties to be collected.

> Agreement must be the action taken by the competent government authorities, regardless of the actions taken by private parties."[801]

8.192 It is significant, in our view, that the European Communities itself recognizes that the administrative review proceeding is the final action undertaken by the US authorities to determine the duty liability applicable to particular imports, and that where liquidation is delayed after that determination, it is due to actions on the part of private parties. We do not consider that the US obligation to implement should depend on the date at which the US authorities collect duties where the amount of the duties to be collected was finalized at the time of the administrative review proceedings. Merely that the act of the US authorities in collecting the duties is delayed by the actions of private parties does not change our views in this regard. The issue that is before us concerns the temporal aspect of the US obligation to implement the DSB's recommendations and rulings, in other words, to which actions of the United States this obligation to implement extends. In our view, the US obligation to implement should not, once the determination of the amount of anti-dumping liability has been made, depend on when the actual collection of the duty takes place.

8.193 Also, were we to agree with the European Communities, it would mean that duties that are liquidated at any point in time following the assessment of amount of the final liability – sometimes several years afterwards – would require the United States authorities to revisit the final assessment of duties previously performed in the context of the administrative review, for the sole reason that implementation of the US determination (via actual liquidation) was delayed, in some cases because of legal challenges having nothing to do with the issue of zeroing.[802]

(ii) Application to the facts of this dispute

8.194 In essence, the European Communities makes three groups of claims.

8.195 First, the European Communities makes claims with respect to the collection of anti-dumping duties after the end of the reasonable period of time. We understand these legal claims to correspond to the following requests for findings presented by the European Communities:

(a) the United States has not complied with the DSB's recommendations in the original proceeding, since it continues to collect anti-dumping duties and establish new cash deposit rates based on zeroing with respect to the original investigations and administrative reviews challenged in the original dispute;

(b) the United States remains in violation of Articles 2.4.2 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, since it still collects anti-dumping duties calculated with zeroing with respect to measures challenged in the original dispute (including the measures listed in the Annex to the Panel Request and any other subsequent measures);

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[801] EC Answer to Panel Question 34.

[802] In addition, with respect to footnote 20, we note that this footnote indicates that observance of the 12 (in some cases 18) months time limit set out for the completion of the assessment review and the 90-day limit for the issuance of refunds in Article 9.3.1 may be impossible because of judicial review proceedings. To the extent that footnote 20 has any relevance to the issue before us, we would note that it does not suggest that a "determination of the final liability for payment of anti-dumping duties" is not finalized pending judicial review; rather, it indicates that, in certain cases, it may be impossible to arrive at that determination in the prescribed time limit because of judicial review proceedings or that the implementation of that determination may be delayed for similar reasons. Thus, footnote 20 does not, in our view, bring into question the fact that final anti-dumping duty liability determination is, under Article 9.3.1, made at the time of the assessment review.

8.196 We analyze these EC claims with respect to the collection of anti-dumping duties after the end of the reasonable period of time by distinguishing between:

(a) US actions to collect (liquidate) anti-dumping duties after 9 April 2007, pursuant to the original investigations at issue in the original dispute or to subsequent administrative reviews made before the end of the reasonable period of time;

(b) US assessment of duties and establishment of new cash deposit rates using zeroing pursuant to determinations in subsequent administrative reviews concluded after 9 April 2007;

(c) US maintenance of cash deposit rates established in the measures at issue in the original dispute.

8.197 Second, the European Communities makes legal claims and requests for findings to the effect that the United States has not complied with the DSB's recommendations in the original proceeding, since it has failed to fully revoke the original investigation orders contested in the original dispute.

8.198 Third, the European Communities claims that the United States has not complied with the DSB's recommendations in the original proceeding, since the 16 administrative review investigations covered in the original dispute have not been superseded, *i.e.*, the United States still collects duties based on the dumping margins found in those proceedings with zeroing, and the United States has also relied on those margins for the determination of likelihood of recurrence of dumping in sunset review proceedings.

EC claims concerning liquidation of entries after the end of the reasonable period of time pursuant to determinations of final liability made before that date

8.199 We recall that while we have determined that the US obligation to implement applies to administrative review determinations made after 9 April 2007, we have found that the US obligation to implement does not extend to US actions to collect (liquidate) duties pursuant to determinations made before the end of the reasonable period of time. It follows that US actions to collect anti-dumping duties after the end of the reasonable period of time pursuant to final determinations of anti-dumping liability before the end of the reasonable period of time do not constitute a failure to comply with the DSB's recommendations and rulings.

8.200 As a result, insofar as the EC claims concern the collection of anti-dumping duties, *i.e.*, "liquidation", after the end of the reasonable period of time pursuant to anti-dumping duty liability determinations made before the end of the reasonable period of time, we reject them.[803]

[803] In response to a question from the panel, the European Communities provided some information to the panel on the amount of unliquidated duties at different points in time, as well as information whether there were ongoing judicial proceedings with respect to duties associated with entries covered by each of the subsequent review included in the Annex to the EC Article 21.5 panel request at these different points in times. Annex A to the EC Answer to Panel Question 5. The parties subsequently provided the Panel with their views on whether certain litigation proceedings were still ongoing, whether certain entries remained "unliquidated", and, related to this, whether the scope of protests of USCBP decisions is limited to challenging decisions made by USCBP, as opposed to the duty assessment performed by the USDOC. See European Communities letter of 11 June 2008, commenting on the US Comments on EC Answers to Panel Questions, US letter of 11 June 2008 commenting on the EC Comments on US Answers to Panel Questions, US letter of 13 June commenting on the EC letter of 11 June, EC letter of 24 June 2008 commenting on the US letter of 13 June 2008. The information contained in Annex A and the parties' comments concerned primarily the question of whether certain duties remain "unliquidated" and the scope of current challenges. Given that we have concluded that the "liquidation"

Consequently, we find that the European Communities has not established that the United States has failed to comply with the DSB's recommendations in the original proceeding by virtue of the fact that it has continued and continues to collect anti-dumping duties with respect to the original investigations and administrative reviews challenged in the original dispute for that reason. We also find that the European Communities has not established that the United States remains in violation of Articles 2.4.2 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 because of US actions to liquidate anti-dumping duties calculated with zeroing pursuant to final duty assessment determinations made before the end of the reasonable period of time, including pursuant to subsequent reviews listed in the Annex to the EC Article 21.5 request for the establishment of a Panel.

EC claims concerning assessment instructions and cash deposit rates

8.201 We now turn to the claims and requests for findings of the European Communities concerning the allegation that the United States has failed to comply with the DSB's recommendations in the original dispute because the United States has established (and establishes) new cash deposits rates and has issued (and issues) new assessment instructions based on zeroing with respect to the original investigations and administrative reviews challenged in the original dispute, and remains in violation of Articles 2.4.2 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 since it still collects anti-dumping duties calculated with zeroing with respect to measures challenged in the original dispute, including the measures listed in the Annex to the EC request for the establishment of a panel.

8.202 The European Communities has referred to US actions (duty assessment and cash deposit requirement) in cases 1 and 6 as examples of specific US failure to implement the DSB's recommendations and rulings with respect to the original investigations at issue in the original dispute, and in case 31 with respect to the administrative reviews at issue in the original dispute. In the absence of specific reference to and arguments by the European Communities concerning other instances in which the United States allegedly acted in the manner challenged by the European Communities, we limit our examination and conclusions to the specific arguments made by the European Communities, *i.e.* to these three cases.[804] In fact, we simply do not have before us any substantive arguments or supporting materials in relation to any other cases which would have allowed us to make any additional substantive findings.

Case 1 (Hot Rolled Carbon Steel from the Netherlands)

8.203 With respect to case 1, the European Communities claims that the United States has (i) issued assessment instructions to collect anti-dumping duties in subsequent administrative reviews in which simple zeroing was used and the results of such reviews were obtained after 9 April 2007, and (ii) issued assessment instructions to collect duties at the rate established in the original investigation challenged in the original dispute as no administrative review was requested or the administrative review was rescinded.

8.204 With respect to the first claim concerning assessment instructions issued after 9 April 2007 in the context of a subsequent administrative review, the European Communities submits that, on

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of duties after the end of the reasonable period of time does not constitute a failure to implement the DSB's recommendations and rulings, we need not examine any further the parties' arguments in this respect.

[804] Further, we recall that the European Communities claims that the United States issued assessment instructions and established new cash deposit rates with respect to one of the *administrative review* proceedings at issue in the original dispute; these arguments of the European Communities concern the 2005-2006 administrative review in case 23/24 (Granular Polytetrafluorethylene from Italy) (EC First Written Submission, para. 81 and Exhibit EC-17, Notice of Final Results of administrative review, 72 FR 65939, 26 November 2007). We have already determined that this subsequent review does not fall within our terms of reference. See *supra*, para. 8.125.

22 June 2007, *i.e.*, after the expiry of the reasonable period of time, the USDOC issued the final results of the 2004-2005 administrative review covering imports in the period 1 November 2004 to 31 October 2005 and instructed the USCBP to collect duties at 2.26 per cent.[805] The European Communities also notes that the Section 129 determination with respect to case 1 revoked the original order on 23 April 2007 since, without zeroing, no dumping was found.

8.205 With respect to the second claim, the European Communities submits that the fifth administrative review in that case, covering imports from 1 November 2005 to 31 October 2006, was rescinded and the duty rate resulting from the original investigation, in which zeroing was used, was applied. The administrative review was rescinded on 30 March 2007 and the assessment instructions issued on 16 April 2007; the USCBP subsequently instructed the ports of entry to liquidate the relevant entries on 23 April 2007.[806]

8.206 The United States has limited itself to indicating that, in its view, it has complied with the DSB's recommendations and rulings by recalculating, without zeroing, the margin of dumping in the Section 129 determination and, as a result, revoked the order, effective 23 April 2007. Moreover, the United States indicates that as a result of a subsequent sunset review, the anti-dumping order was actually revoked effective 29 November 2006[807] and that all cash deposits made on imports occurring on or after that date are not subject to any final assessment of duties. Thus, the United States submits, the EC claims concern a measure that is no longer in effect.[808]

8.207 The EC claims do not, as the United States submits, concern a measure that is no longer in effect. The European Communities challenges an administrative review determination made after the end of the reasonable period of time and a decision to assess duties at a rate based on zeroing, following the rescission of an administrative review proceeding. Neither of these measures was revoked as a result of the revocation of the order pursuant to the Section 129 determination or the sunset review determination mentioned by the United States.

8.208 We have already determined that the 2004-2005 administrative review in case 1 falls within our terms of reference.[809] The United States has not contested that the USDOC used zeroing in the calculation of the margin of dumping for the sole respondent, Corus, and indeed, the Issues and Decision Memorandum for that administrative review determination makes it clear that the USDOC used zeroing in calculating Corus' margin of dumping.[810] For the reasons discussed by the Appellate

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[805] EC First Written Submission, paras. 78-79 and corresponding footnotes, EC Second Written Submission, para. 67. The Amended Final Results of the administrative review determination were published on 22 June 2007 at 72 FR 34441 (Exhibit EC-11), the Final Results of the administrative review were published at 72 FR 28676, 22 May 2007; the Issues and Decision Memorandum for the final results was also submitted by the European Communities as Exhibit EC-12. The Final Results and Amended Final Results indicate that the AD order having been revoked in that case, effective 23 April 2007, no new cash deposit instructions were to be provided.

[806] The notice of rescission of the 2004-2005 administrative review, effective 30 March 2007, published at 72 FR 15105 (30 March 2007), is found at Exhibit EC-13. The USDOC assessments instructions to the USCBP were issued on 16 April 2007 and were provided by the European Communities as Exhibit EC-14. The USCBP instructions to the ports, dated 23 April 2007, were submitted by the European Communities as Exhibit EC-15.

[807] Final Results of the Sunset Review of Antidumping Duty Order and Revocation of the Order, Certain Hot–Rolled Carbon Steel Flat Products from the Netherlands, 72 FR 35220 (27 June 2007), Exhibit US-14.

[808] US First Written Submission, para. 66. See also, US Opening Statement, para 21. We also recall that the US submits that the final assessment was the result of determinations distinct from the determination made in the original investigation and that this subsequent determination is not within the scope of this proceeding, an argument of the United States which we have rejected. US First Written Submission, para 68.

[809] See *supra*, para. 8.126.

[810] Exhibit EC-12, pp. 12-14.

Body in paragraphs 123-135 of its Report in the original dispute, we find that the United States acted inconsistently with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 in its determinations in this administrative review and in issuing the consequent assessment instructions. As a result, we also find that the United States has failed to comply with the DSB's recommendations and rulings to bring the original investigation in case 1 into conformity with the covered agreements.

8.209 With respect to the EC claims concerning imports in the 2005-2006 period, we note that the USDOC issued its notice of rescission of the administrative review prior to the expiry of the reasonable period of time, on 30 March 2007. Consistent with our findings above, we therefore consider that the determination of final anti-dumping duty liability with respect to the imports covered by the assessment instructions challenged by the European Communities was made prior to the end of the reasonable period of time, with the result that they do not constitute a failure on the part of the United States to implement the recommendations of the DSB. We therefore find that the United States has not failed to comply with the DSB's rulings and recommendations to bring the original investigation in case 1 into conformity with its obligations under the covered agreements by virtue of these assessment instructions.

Case 6 (Stainless Steel Wire Rod from Sweden)

8.210 The European Communities provides case 6 as an example of the United States having, after 9 April 2007, established cash deposit requirements based on zeroing on imports of products from countries at issue in the original dispute. Specifically, the European Communities submits that in this case, on 9 May 2007 the USDOC instructed the USCBP to collect anti-dumping duties at 19.36 per cent (even though the Section 129 determination revoked the original order effective 23 April 2007), and notified the USCBP of the revised cash deposit rate for the exporter concerned. According to the notice, this new cash deposit is "effective upon publication of these amended final results of review. This cash deposit requirement shall remain in effect until further notice".[811]

8.211 The United States submits that the EC statement of facts is in error: the USDOC did, as alleged by the European Communities, publish the amended final results of the 2004-2005 administrative review on 9 May 2007 and, in those amended final results, stated that it would notify USCBP of the revised cash deposit resulting from the review, that the cash deposit rate would be effective as of the date of publication, and that "the cash deposit requirement shall remain in effect until further notice." However, on 10 May 2007, Commerce provided "further notice" by issuing instructions to USCBP informing it of the revocation resulting from the Section 129 determination; these instructions informed USCBP that any cash deposits paid on imports of wire rod from Sweden made on or after 23 April 2007, were to be refunded and all imports made on or after 23 April 2007 would not be subject to the final assessment of anti-dumping duties.[812] Thus, the United States argues, as a result of the revocation of the anti-dumping duty order, the USDOC did not issue new cash deposit instructions to USCBP based on the determination made in the 2004-05 administrative review and the EC claim concerns a measure that has been revoked.[813]

8.212 We have already determined that the 2004-2005 administrative review in case 6 falls within our terms of reference.[814] Given the evidence provided by the United States that no cash deposit was

[811] European Communities First Written Submission, para. 80. The Amended Final Results of the 2004-2005 administrative review, covering imports from 1 September 2004 to 31 August 2005, were submitted by the European Communities as Exhibit EC-16 (72 FR 26337, 9 May 2007). The final results were published on 10 April 2007 (72 FR 17834).

[812] US First Written Submission, para. 72. See also Exhibit US-15 Instructions to US Customs and Border Protection, Revocation of Antidumping Duty Order on Stainless Steel, Wire Rod from Sweden Pursuant to Final Results in Section 129 determination (10 May 2007).

[813] US First Written Submission, paras. 70-73.

[814] See *supra*, para. 8.126

imposed on imports covered by the anti-dumping order in this case following the 2004-2005 administrative review, and the absence of rebuttal of this evidence by the European Communities, we find that the European Communities has failed to establish that the United States failed to comply with the DSB's recommendations and rulings by virtue of having imposed new cash deposit requirements with respect to case 6.

8.213 With respect to the assessment of duties pursuant to the 2004-2005 administrative review, the United States has not contested that it used zeroing in the calculation of the margin of dumping for Fagersta (the sole exporter concerned by the review). We therefore find, for the reasons discussed by the Appellate Body in paragraphs 123-135 of its Report in the original dispute, that the United States acted inconsistently with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 in this administrative review determination and the assessment instructions issued pursuant to that determination. As a result, we also find that the United States has failed to comply with the DSB rulings and recommendations to bring the original investigation in case 6 into conformity with the covered agreements.[815]

Case 31 (Ball Bearings from the UK)

8.214 The European Communities makes arguments with respect to case 31 as part of its claim that the administrative reviews challenged in the original dispute have not been superseded by subsequent reviews since the effects of the administrative reviews challenged in the original proceeding still continue today, and that for the 16 administrative reviews to be "superseded", the United States should have stopped them, by not collecting duties calculated using zeroing, and should have replaced them by collecting the duties and establishing new cash deposits based on a methodology without zeroing. Since this claim concerns a cash deposit rate applicable after the end of the reasonable period of time, and which continues to apply as of the date of our establishment, and assessment instructions issued after the end of the reasonable period of time, we examine it in this section of our report.

8.215 With respect to cash deposits, specifically, the European Communities argues that the United States still collects duties established in the administrative reviews at issue in the original dispute.[816] The United States admits that the cash deposit rate for NSK established in the administrative review challenged in the original dispute, which concerned covered imports entered from 1 May 2000 through 30 April 2001, remains in effect.[817]

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[815] In addition, while the arguments of the European Communities in this respect are not clear, the European Communities seems to make a claim in respect of the cash deposit requirements that applied after the end of the reasonable period of time (9 April 2007) until the revocation of the measure pursuant to the Section 129 determination in that case (23 April 2007). See EC Second Written Submission, para. 67, and Opening Statement, para. 48, where the European Communities argues that the United States "has recognized that imports of stainless steel wire rod from Sweden (Case 6 in the Annex to the Panel Request) after 9 April 2007 are subject to the original anti-dumping duties based on model zeroing". The Panel considers that it must assess the existence of measures taken to comply as of the date of its establishment. See *infra*, para. 8.226. Consequently, to the extent that the European Communities is making a claim with respect to the fact that cash deposits requirements applied to imports in case 6 between 9 and 23 April 2007, we decline to make a finding on such a claim.

[816] EC First Written Submission, para. 95, EC Second Written Submission, para. 67.

[817] See US Answer to Panel Question 35:

Question: "US: Does the US concede that it has not implemented the DSB's recommendations and ruling with respect to case 31 (the administrative review determination in respect of NSK's imports)? The Panel recalls that the EC alleges that the cash deposit rate applicable to NSK's entries is still the one that was calculated in the administrative review challenged in the original dispute.

8.216 Given this admission of the United States, the Panel finds that the United States has failed to comply with the DSB recommendations and rulings to bring its measure into conformity with the covered agreements, as it has continued to apply to imports of NSK the cash deposit rate established in an administrative review determination found to be inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 in the original dispute.

8.217 While the European Communities argues that the USDOC continues to assess duties at that cash deposit rate after the end of the reasonable period of time, the European Communities has not directed us to any specific duty assessment determination after the end of the reasonable period of time. Given the lack of identification of a precise US action in this respect, we refrain from making a specific finding with respect to any duty assessment with respect to imports of NSK under case 31 after the end of the reasonable period of time.

8.218 We do not understand the European Communities to seek a specific finding on the continued application of cash deposits established on the basis of "zeroed" margins of dumping after the end of the reasonable period of time, other than with respect to case 31. We note that the EC claims and arguments in this respect have not been a model of clarity. Nonetheless, we consider it appropriate to add that the continued imposition of cash deposit requirements at rates calculated in the administrative reviews at issue in the original dispute or in subsequent administrative review would constitute a failure (omission) on the part of the United States to implement the DSB's recommendations and rulings, because of the use of zeroing in calculating the margin of dumping.[818] In fact, we do not understand the United States to dispute the proposition that the application of cash deposits pursuant to the measures at issue in the original dispute constitutes a failure to implement the DSB's recommendations and rulings. We understand the United States to limit its arguments in this respect to the fact that any cash deposit requirement applied as of the end of the reasonable period of time results from another determination, *i.e.*, one of the subsequent reviews.[819] Yet, in our view, in order to comply with the recommendations and rulings of the DSB, the United States had to ensure that any cash deposit rate applied after the end of the reasonable period of time in relation to one of the measures at issue in the original dispute was not one that derived from a margin of dumping calculated with zeroing, even where that cash deposit was established as a result of a subsequent review, and not a measure at issue in the original dispute. Concluding otherwise would mean that the United States is allowed to circumvent its obligation to bring its measures and action into conformity with those recommendations and rulings by the mere replacement of the cash deposits established in the measures challenged in the original dispute by subsequent ones established in administrative reviews in which zeroing was again used.[820]

Answer: "Yes. The cash deposit rate for imports of merchandise manufactured or exported by NSK established by Commerce in its determination from the May 1, 2000 through April 30, 2001 administrative review of Ball Bearings from the United Kingdom remains in effect. This was one of the determinations challenged by the EC in the original dispute."

[818] We have already determined that US omissions to implement, and specifically, cash deposit rates applied after the end of the reasonable period of time may be considered as part of our analysis of the US implementation of the DSB recommendations and rulings. See *supra* para. 8.127.

[819] With the exception of the cash deposit requirement in respect of NSK's imports in case 31: with respect to that case, the US admits that the cash deposit rate established as a result of the administrative review challenged in the original dispute still applies.

[820] We recall that we have indicated above that a Member must, to implement the DSB's recommendations and rulings, ensure that actions it undertakes after the end of the reasonable period of time are consistent with its obligations under the DSB. The continuing requirement to provide cash deposits constitutes, in our view, such an action.

EC claims that the United States has failed to comply with the DSB's recommendations in the original dispute because it has failed to fully revoke the original investigation orders contested in the original dispute and EC claims that the administrative reviews at issue in the original dispute have not been superseded

8.219 The European Communities claims that the United States has failed to fully revoke the original anti-dumping orders at issue in the original dispute. The EC claim in this respect is essentially that, due to the revocation of some AD orders and the exclusion of some exporters from other orders following the adoption of the Section 129 determinations, there is no longer any legal basis allowing the United States to collect duties on past entries or to submit future entries to a cash deposit rate based on zeroing. The European Communities considers that any future liquidation of prior entries subject to a now-revoked order, including orders revoked for reasons other than zeroing, or with respect to an exporter now excluded from the scope of the relevant order would be illegal since this would amount to the taking of a positive act, already found to be WTO-inconsistent, after the end of the reasonable period of time.[821]

8.220 To the extent that the European Communities is claiming that the United States was, after 23 April 2007, precluded from liquidating duties collected pursuant to the margins of dumping calculated in the measures at issue in the original dispute, this claim is, in our view, subsumed in the EC claim concerning US actions to collect ("liquidate") duties after the end of the reasonable period of time. We have already rejected the EC claim in this respect.[822] Further, to the extent that the European Communities is claiming that the United States is precluded, as of the date of the revocation of the orders, from making any final anti-dumping duty liability determination in subsequent administrative reviews, we consider that this claim is subsumed in the claim of the European Communities which we have addressed above in paragraphs 8.201-8.218. Indeed, the European Communities has not provided any evidence of US actions other than that addressed in our consideration of the EC claims in these paragraphs.

8.221 Insofar as the EC request for findings concerns cash deposit requirements that applied after the end of the reasonable period of time, but prior to the revocation of the relevant order, as indicated below, we do not consider that we need to make findings with respect to measures that were no longer in place as of the date of the establishment of this Panel.[823] In fact, we consider that this request for a finding by the European Communities is not a separate "claim", but rather an additional argument in support of the EC general claim that the United States has failed to implement the DSB's recommendations and rulings with respect to the collection of duties calculated with zeroing after the end of the reasonable period of time. As a result, we decline to make any findings in respect of this argument of the European Communities.

8.222 Likewise, we consider it unnecessary to make specific findings on whether the United States has failed to comply with the DSB's recommendations in the original proceeding "since the 16 administrative review investigations covered in the original dispute have not been superseded." We understand the European Communities to challenge, as part of this request for finding, the fact

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[821] EC First Written Submission, para. 91. See also EC Opening Statement, para. 49:
"Second, [the US theory of implementation] is insufficient because it allows the United States to keep its so-declared WTO inconsistent measures effectively in place even after the end of the reasonable period of time. Indeed, in simple terms, what the United States argues in this case is that it can collect duties based on zeroing after the end of the reasonable period of time even if the original anti-dumping order has been revoked precisely because, absent zeroing, no dumping was found. ... In this respect, the measures challenged in the original dispute are still in place since, until the United States stops taking positive acts to enforce them, their effects persist even after the end of the reasonable period. ..."

[822] *Supra*, para. 8.206.

[823] See *infra*, para. 8.226.

that certain aspects of the measures at issue in the original dispute remain in place, unaffected by the DSB's recommendations and rulings in the original dispute. We recall that we have found above that with respect to the assessment of duties, any final determination of the amount due made after the end of the reasonable period of time must be made in accordance with the DSB's recommendations and rulings, and therefore that the use of zeroing in the calculation of margins of dumping in assessment reviews after the end of the reasonable period of time constitutes a failure on the part of the United States to implement the recommendations and rulings of the DSB.[824] We have also addressed the EC claims concerning the maintenance of cash deposits established in the measures at issue in the original dispute.[825] Since we have addressed all of the EC claims that concern specific instances where the United States has failed to implement, we do not need to make the finding requested by the European Communities.

F. REQUEST FOR FINDINGS REGARDING THE NON-EXISTENCE OF MEASURES TAKEN TO COMPLY BETWEEN 9 APRIL AND 23 APRIL/31 AUGUST 2007

1. Main arguments of the parties

8.223 The **European Communities** makes a claim in relation to the fact that the measures the United States asserts it took to comply, the Section 129 determinations, only entered into force on 23 April and (in the case of the Section 129 determination in case 11), 31 August 2007, *i.e.*, after the expiration of the reasonable period of time on 9 April 2007.[826] The European Communities claims that, by failing to put into effect the measures taken to comply between 9 April and 23 April/31 August 2007, the United States acted inconsistently with Articles 21.3 and 21.3(b) of the DSU and requests that the Panel make an explicit finding to this effect. The European Communities argues that while the substantive obligation to comply with particular provisions of the WTO Agreements derives from the DSB's recommendations and rulings, Article 21.3 of the DSU brings in a temporal element, *i.e.*, when the losing Member has to comply *at the latest*.[827] The European Communities notes that a similar finding of non-compliance in past periods was made by the panel in *Australia – Salmon (Article 21.5 – Canada)*. The European Communities also distinguishes *US – Upland Cotton (Article 21.5 – Brazil)*, noting that in that case, the panel declined to make a finding on the fact that the United States did not take any measures to comply with the adverse effects ruling and recommendations of the DSB *by the end of the reasonable period of time*. The European Communities therefore considers that its request in the present case is different in nature from the one made by Brazil in *Cotton*. The European Communities asserts as one reason for requesting such a finding the possibility that it would have implications for interested parties under US municipal law, arguing that since there are entries which have not yet been liquidated, a finding of the Panel in this respect may lead the relevant US authorities to stop proceedings for the collection of duties.[828] Further, the European Communities indicates that following the US theory on compliance, a finding that no measures taken to comply existed during the period between 9 April and 23 April/31 August 2007 could imply that the United States should apply the results of its Section 129 determinations, at least, to entries made on or after 9 April 2007 (which is not the case, since the Section 129 determinations apply to entries made on or after 23 April/31 August 2007). The

[824] *Supra*, paras. 8.201 to 8.213

[825] *Supra*, paras. 8.214 to 8.218.

[826] European Communities First Written Submission, paras. 99-106; EC Opening Statement, paras. 59-63.

[827] EC Second Written Submission, paras. 93-101; EC Opening Statement, paras. 59-63.

[828] The European Communities submits that the US delay in compliance allows it to still collect duties with respect to a period of time where compliance should have been achieved. See EC Opening Statement, para. 58.

European Communities adds, however, that it is not up to the Panel to enter into the analysis of the effects of its report in the municipal law or administrative practices of WTO Members.[829]

8.224 The **United States** argues that Article 21.3 of the DSU does not impose an obligation on the Members concerned, but rather provides that Member with the right to a reasonable period of time should immediate compliance be impracticable, and that Article 21.3(b) simply identifies the reasonable period of time.[830] Thus, the United States considers that the European Communities has failed to provide a textual basis for its Article 21.3 claim. The United States notes that Article 21.3 does not, as the European Communities argues, require WTO Members to comply *immediately* with the recommendations of adopted DSB reports. Rather, 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 within which to comply.[831] The United States also argues that the panel report in *Australia – Salmon (Article 21.5 – Canada)* does not support the EC position since, in that case, the panel simply concluded that the measures taken to comply did not exist at the end of the reasonable period of time and made no finding that Australia had breached Article 21.3 or any of its subparagraphs as a result. The United States finds further support for its position in the report of the *US – Upland Cotton (Article 21.5 – Brazil)* panel. This panel explained that a finding such as the one requested by the European Communities would be of little relevance to the effective resolution of disputes. Finally, the United States considers that the European Communities would have to substantiate its assertions about the operation of US municipal law with evidence and that, further, as the European Communities appears to have realized itself, it would be inappropriate for the Panel to engage in such an inquiry in the context of this dispute.

2. Evaluation by the Panel

8.225 The EC request raises the questions of whether it is within our mandate and, assuming it is within our mandate, whether it would be appropriate, for us to make findings not only with respect to the US implementation of the DSB recommendations and rulings as of the date of the establishment of this Panel, but also during the period of time that preceded the entry into force of the US measures taken to comply.[832]

8.226 It is not clear to us that Article 21.3, including subparagraph (b) thereof, provides a legal basis for the finding requested by the European Communities. But even if it were assumed that it does, we consider that it is neither necessary, nor appropriate, as a matter of judicial economy, for us to make the finding requested by the European Communities. Article 21.5 does not specify with respect to what date the assessment of the "existence or consistency ... of measures taken to comply" is to be conducted. Yet, several compliance panels (*US – Upland Cotton (Article 21.5 – Brazil)*, *EC – Bed Linen (Article 21.5 – India)*), have determined that the relevant date is that of the establishment of the compliance panel.[833] We agree with this approach, even though we recognize that one panel

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[829] The European Communities submits that the US delay in compliance allows it to still collect duties with respect to a period of time where compliance should have been achieved. See EC Opening Statement, para. 58.

[830] US First Written Submission, paras. 103-107.

[831] US Second Written Submission, paras. 70-71.

[832] The European Communities specifies that it is not seeking a finding that no US measure taken to comply existed *at the end of the reasonable period of time*; rather the European Communities seeks a finding on the absence of any US measure taken to comply *during a period of time* from 9 April (the date on which the reasonable period of time ended) to 23 April/31 August 2007 (the dates on which the US Section 129 determinations came into effect).

[833] *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 9.64-9.71, *EC – Bed Linen (Article 21.5 – India)*, para. 6.28; see also Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia* ("*US – Shrimp (Article 21.5 – Malaysia)* "), WT/DS58/RW, adopted 21 November 2001, upheld by Appellate Body Report, WT/DS58/AB/RW, DSR 2001:XIII, 6529,

(*Australia – Salmon (Article 21.5 – Canada))* considered it appropriate to also make findings with respect to the situation that prevailed until the entry into force of the measures taken to comply.[834]

8.227 In any case, it is not in dispute that the factual situation, non-existence of the US measures taken to comply, and more specifically, of the Section 129 determinations, that forms the basis of the EC claim had ceased to exist at the time of the establishment of this Panel. As a result, like the *US - Upland Cotton (Article 21.5 – Brazil)* panel, we consider that making the finding requested by the European Communities would be of little relevance to the effective resolution of the dispute between the parties, and without practical implications as to the obligations of the United States.[835] We note, in respect of the latter, that the European Communities seeks to justify its request by indicating that the finding it seeks may have implications under US law. The mandate of this Panel flows from its establishment under the provisions of the DSU, which concern the resolution of disputes concerning the consistency of Members' measures with the covered agreements. We do not consider that it would be appropriate for us to make findings that are otherwise not necessary to the resolution of the dispute which is before us on the basis that they may have implications in the national legal system of the responding Member. Nor do we consider it appropriate to take such potential effects into account in discharging our duties under the DSU. Indeed, the European Communities itself seems to have realized that it would be inappropriate for a WTO panel to engage in an analysis of such effects.[836] We therefore decline to make the finding requested by the European Communities.

G. EC CLAIMS OF VIOLATIONS CONCERNING CERTAIN SECTION 129 DETERMINATIONS

8.228 In this section of our report, we examine the EC claims concerning certain of the measures taken by the United States to comply – the Section 129 determinations in cases 2,[837] 3,[838] 4,[839] 5[840] and 11.[841] The European Communities considers that the Section 129 determinations in these cases are inconsistent with various provisions of the *Anti-Dumping Agreement* and of the GATT 1994.

1. EC claims with respect to the Section 129 determination in case 11 (Stainless Steel Sheet and Strip in Coils from Italy)

(a) Main arguments of the parties

8.229 The **European Communities** submits that the United States committed, and then failed to remove, an obvious calculation error in its Section 129 determination in case 11.[842] The Section 129 determination in that case concerned one manufacturer/exporter of the subject product, ThyssenKrupp Acciai Speciali Terni S.p.A. and ThyssenKrupp AST USA (collectively "TKAST").[843] The European

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paras. 5.12-5.13. The requests for findings examined (and rejected) by the *Bed Linen* and *Cotton* panels were made under Article 21.5 of the DSU.

[834] Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.30. In fact, while the European Communities relies on the findings of this panel in support of its claim, we note that the *Salmon* panel made its findings under Articles 21.5 and 22.6 of the DSU, not Article 21.3. See Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, paras. 7.30 and 8.1(i).

[835] Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 9.67.

[836] EC Answer to Panel Question 42.

[837] Stainless Steel Bar from France.

[838] Stainless Steel Bar from Germany.

[839] Stainless Steel Bar from Italy.

[840] Stainless Steel Bar from the United Kingdom.

[841] Stainless Steel Sheet and Strip in Coils from Italy.

[842] EC First Written Submission, paras. 112-123.

[843] See Exhibits EC-6, EC-7 and EC-8 for, respectively, the Notice of Section 129 determination of 26 September 2007, the general Issues and Decision Memoranda for the various Section 129 determinations of 9 April 2007 (postponing the USDOC's decision with respect to case 11), and the Issues and Decision

Communities submits that in the original investigation, the USDOC incorrectly calculated the average unit value of 84 TKAST US sales, to which the USDOC applied a "facts available" rate. The European Communities submits that the USDOC, in its calculation, erroneously inverted the fraction: it divided the total volume of the sales by their total value, instead of dividing the total value by the total volume. This error artificially inflated the unit value, and therefore, the amount of dumping found. The European Communities argues that despite realising this obvious error, the USDOC failed to correct it in the Section 129 determination, but rather considered that any alleged clerical or computational error unrelated to the implementation of the USTR instructions was outside the scope of the Section 129 proceeding. The European Communities notes that, without zeroing, the original duty imposed by the USDOC was reduced from 11.23 per cent to 2.11 per cent. Had the USDOC eliminated the calculation error, the European Communities alleges that the margin would have been negative, and thus, the United States would have had to revoke the measure.[844]

8.230 The European Communities claims that the error renders the Section 129 determination in case 11 inconsistent with Article 2 of the *Anti-Dumping Agreement*, as it affected the overall determination of the dumping margin, and with Article 6.8 and Annex II of the *Anti-Dumping Agreement* because the United States, by making the error, failed to correctly apply the facts available. Further, the European Communities claims that the failure to revoke the measure is inconsistent with Article 5.8 of the *Anti-Dumping Agreement* and that the United States violated Articles 11.1 and 11.2 of the *Anti-Dumping Agreement* by keeping the duties in force, and Articles 9.3 of the *Anti-Dumping Agreement* and VI:2 of the GATT 1994 since, because of the error, the amount of anti-dumping duty exceeds the margin of dumping.

8.231 The European Communities considers that the calculation error can be challenged in this proceeding because it was actually committed in the Section 129 proceeding, as in that proceeding, the United States repeated exactly the calculation error that had been made in the original determination.[845] Further, the European Communities considers that it is not possible to separate one of the elements of the calculation of the dumping margin from the rest of the calculation of the dumping margin in the Section 129 determination. In contrast to *EC – Bed Linen (Article 21.5 – India)*, both the error and the zeroing methodology affect the calculation of the dumping margin, which the United States had to "bring into conformity with its obligations".[846] Even if it were assumed that the error is not part of the "measure taken to comply", the European Communities submits that it would fall under the scope of the proceeding as having a "particularly close

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Memorandum in the Section 129 determination in case 11, published on 20 August 2007. TKAST's case brief in the Section 129 proceedings before the USDOC is found in Exhibit EC-22, and the Notice of Final Determination and Notice of Amended Final Determination in the original investigations are, respectively, found in Exhibits US-23 and US-24.

[844] The European Communities adds that since the measure remains in force, it is subject to further amendments through new administrative reviews where the duty rates will be increased automatically if the United States continues applying simple zeroing in future administrative reviews.

[845] EC Second Written Submission, paras. 104-122; see also EC Opening Statement, paras. 65-76. The European Communities recalls that Article 21.5 panels are to review the totality of claims relating to the consistency of "measures taken to comply" with the covered agreements, with the exception of claims that were raised in the original proceeding and rejected by the panel and/or the Appellate Body (*res judicata*). See also EC Opening Statement, para. 69, where the European Communities argues that the fact that the USDOC decided, at the last moment, to disregard the claim on the clerical error and stated so in its decision shows that the error (and particularly the decision to fail to correct it) was part of the measure taken to comply.

[846] EC Opening Statement, paras. 71-73. See also EC Answer to Panel Question 46, in which the European Communities argues that, in the present case, the use of the wrong set of data by the USDOC has an impact on the re-determination of dumping. In that Reply, the European Communities also notes a statement made by the *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC*) panel and argues that, in the present case, the data sets for the purpose of carrying out a new dumping margin determination in the Section 129 determinations concerned are part of the measure taken to comply.

relationship to the declared 'measure taken to comply'" or having a sufficiently close nexus to the measure taken to comply because it was part of the calculation exercise to determine the new amount of dumping in the Section 129 determination, and that it artificially inflated the unit value, and therefore the dumping margin.

8.232 The European Communities clarifies that it is not arguing that all allegations of errors in original determinations need to be revisited in a Section 129 proceeding, but that the error at issue is a blatant, simple arithmetical one, and therefore should have been addressed. The European Communities considers that the USDOC could not remain passive and refuse to correct its mistake.[847] The USDOC should, in this particular case, haven taken into account all claims of errors, and had enough time to do so: the Section 129 determination was delayed for four months because the USDOC was examining the claims brought by the different interested parties (TKAST, as well as US producers); the USDOC decided to do so even if the scope of the Section 129 determination was, allegedly limited to recalculating the margins of dumping by applying a methodology without zeroing. Thus, the European Communities argues, the examination of the claims concerning errors made by the USDOC in the calculation of the new margin of dumping was part of the Section 129 determination. It also notes that the United States has taken into account and corrected errors in other Section 129 proceedings and therefore could have corrected the error but refused to do so in this case.

8.233 The **United States**[848] argues that the EC claim falls outside the Panel's terms of reference because the European Communities could have made that claim in the original proceeding but failed to do so and that, as a result, the DSB made no findings with respect to the alleged error and only made findings with respect to zeroing. The United States considers that the calculation error issue is entirely separate from the zeroing issue. The United States clarifies that the USDOC did not actually commit the error in the Section 129 proceeding, it only reran its computer programme so that zeroing was not applied.[849] The USDOC made no other change to the data or the programme in recalculating the margins of dumping. The United States considers that the error alleged by the European Communities is "separable" from the rest of the Section 129 determination. Relying on the Appellate Body report in *EC – Bed Linen (Article 21.5 – India)*, the United States recalls that an unchanged aspect of the original measure is not part of the measure taken to comply; the mere fact that a particular analysis is incorporated into a redetermination does not render that analysis part of the measure taken to comply.[850] In this case, the alleged error had nothing to do with the recommendations and rulings in this dispute, which were limited to the use of zeroing.[851] The United States also considers that the EC alternative argument alleging a close connection or nexus, is inapposite as there is not, in this case, a third measure, such as there was in *US – Softwood Lumber IV (Article 21.5 – Canada)*.

8.234 The United States also argues that the European Communities has failed to present a *prima facie* case of violation in respect of its claim. Essentially, the United States argues that the European Communities limits itself to identifying and citing the provision it relies upon, and states that the calculation error breaches the provision, without making any legal arguments. Further, the

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[847] The European Communities relies on the Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan* ("*US – Cotton Yarn*"), WT/DS192/AB/R, adopted 5 November 2001, DSR 2001:XII, 6027, para. 73 and Panel Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* ("*US – Carbon Steel*"), WT/DS213/R and Corr.1, adopted 19 December 2002, as modified by Appellate Body Report, WT/DS213/AB/R, DSR 2002:IX, 3833, para. 8.118 for the proposition that investigating authorities cannot remain passive in the face of shortcomings in evidence submitted to them. See EC First Written Submission, para. 116 and EC Second Written Submission, para. 120

[848] US First Written Submission, paras. 74 *ff*.

[849] US Second Written Submission, paras. 53-63.

[850] See US Answer to Panel Question 46.

[851] US First Written Submission, para. 77; US Answer to Panel Question 46.

United States argues that the European Communities has not demonstrated that if all claims of error (including those made by the petitioners in the Section 129 proceeding) were taken into account, the margin would have been negative or less than *de minimis*. Indeed, the United States considers that, depending on which errors would have been corrected in the Section 129 determination, it is possible that the resulting margin would have been higher than the 2.11 per cent margin calculated in the Section 129 determination.

8.235 The United States submits[852] that *US – Carbon Steel*, on which the European Communities relies, concerned the question of whether an investigating authority is required to consider relevant factual evidence already on the record before it. The issue in the present dispute is different, and concerns whether a compliance proceeding is the appropriate venue to advance a claim that could have been brought in the original proceeding. The United States argues that the need for finality of proceedings and for equitable treatment of all parties formed the basis for the USDOC's decision not to correct any of the errors alleged in relation to the original investigation and that the Appellate Body has recognized the need for investigating authorities to establish procedures "in the interest of the orderly administration" of the proceedings, including setting and enforcing deadlines.[853] The United States notes that during the Section 129 proceeding, both TKAST and the US producers (petitioners) argued that the USDOC should correct alleged errors. The USDOC rejected all requests – by both exporters or petitioners – to correct clerical errors and therefore consistently and even-handedly confined its Section 129 proceedings to complying with the DSB recommendations and rulings. Finally, the United States considers that the test proposed by the European communities – that "obvious mistakes" should be treated differently from other allegations of error in a Section 129 determinations – is not found in the *Anti-Dumping Agreement* or the DSU, and would create more problems that is solves. And it is irrelevant whether the USDOC may, in other Section 129 proceedings, have corrected errors.

(b) Main arguments of the third parties

8.236 **Korea** considers that there clearly seems to be a clerical error in the Section 129 determination in case 11. Further, Korea submits that although an instruction from the USTR may not have included a reference to the effect that the USDOC should ensure that there does not exist any clerical error in the course of the new calculation, it should be axiomatic that such a reference is always implied in all such instructions.[854]

(c) Evaluation by the Panel

8.237 The first question we must resolve is whether the EC claim with respect to the alleged calculation error in the Section 129 determination in case 11 falls within our terms of reference.

8.238 We note in this respect that there is no dispute between the parties that the European Communities did not make any claims with respect to the alleged calculation error in the context of the original dispute.[855] The European Communities indicates that it did not make any such claim in

[852] US First Written Submission, para. 85.

[853] The United States refers to the Appellate Body Report in *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* ("*US – Hot Rolled Steel*"), WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697, para. 73, and the Appellate Body Report in *US – Oil Country Tubular Goods Sunset Reviews*, para. 241.

[854] Korea's Answer to Panel Question 22 to the third parties.

[855] The parties agree that TKAST raised the issue of the calculation error in the context of the Section 129 proceeding before the USDOC, but disagree to some extent as to whether and when the alleged error was raised in the context of proceedings before the US authorities. The European Communities submits that TKAST raised the calculation issue in the context of the original investigation, in the course of requesting amendments to the original investigation determination to correct for ministerial errors. See EC Answer to Panel

the original proceeding because according to its own calculations, the margin of dumping for TKAST would be reduced to zero once it was recalculated without zeroing.

8.239 We consider that the EC claim with respect to the alleged calculation error constitutes a *new* claim with respect to an *unchanged* aspect of the original measure, the determination in the original investigation, which the European Communities *could have made, but did not make, in the original dispute*. For this reason, we conclude that the European Communities is precluded from raising this claim in this Article 21.5 proceeding.

8.240 Our reasoning finds support in previous panel and Appellate Body decisions, in particular the panel report in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*. The panel in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)* considered a claim by the European Communities that the United States should have re-conducted its likelihood-of-injury determination in the context of a sunset review re-determination in which the USDOC made a new likelihood-of-dumping determination. The panel concluded that this claim concerned an aspect of the measure that was not a measure taken to comply.[856] But, of relevance to our analysis, the panel added that even if it were to consider that the aspect of the measure in question were an aspect of the measures taken to comply, it would nevertheless still have concluded that the EC claim was not within its mandate.[857] The panel noted that the EC claim concerned aspects of the original measure that were unchanged and were not challenged in the original proceedings. It reasoned that the purpose of an Article 21.5 proceeding is to provide an expeditious procedure to establish whether a Member has properly implemented the DSB recommendations and rulings and that admitting such a new claim would mean providing the European Communities with a second chance to raise a claim that it had failed to raise in the original proceeding.[858] It added that:

> "Moreover, the Panel is concerned that allowing a new claim on the likelihood-of-injury in the current proceedings may jeopardize the principles of fundamental fairness and due process. In our view, it would be unfair to expose the United States to the possibility of a finding of violation on an aspect of the original measure that the United States was entitled to assume was consistent with its obligations under the relevant agreement given the absence of a finding of violation in the original report.

Question 45. The United States considers that the European Communities fails to identify where the USDOC "refused to correct the error" in the amended original investigation determination. The United States also questions whether the error challenged in the context of the original investigation "was connected" to the error alleged by the European Communities in the present proceeding. Finally, the United States adds that TKAST challenged the alleged error before the United States Court of International Trade ("CIT"), and that the CIT rejected TKAST's claim. See US Comments on EC Answer to Panel Question 45. We also note that, as indicated in the summary of the parties' arguments, in the context of the prolonged proceeding for case 11 in the Section 129 proceeding, TKAST also raised a handful of other alleged errors, and the domestic producers also raised errors or other issues which they considered the USDOC should take into account if it were to entertain TKAST's request for revision. The USDOC declined to consider any of these allegations of error. See Exhibit EC-8, p. 4. We do not consider, however, that whether the alleged error was raised by TKAST in the course of proceedings before the USDOC or the CIT is relevant to our conclusion in this case.

[856] Panel Report, *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, paras. 7.31 and 7.72.

[857] Panel Report, *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, para. 7.73.

[858] Panel Report, *US – Countervailing Measures on Certain EC Product (Article 21.5 – EC)*, para. 7.74. We note that the panel seemed to draw an analogy with Appellate Body decisions to the effect that a party cannot cure the failure to include a claim in the panel request by raising the claim in subsequent submissions or statements. We consider the requirement to include a claim in the panel request, contained in Article 6.2 of the DSU, to be distinct from the issue of the constraints or limits on the claims that can be raised under Article 21.5 of the DSU; as a result, we do not consider prior panel and Appellate Body decisions on Article 6.2 of the DSU to be particularly relevant to the question before us.

> In sum, permitting the European Communities to introduce a new claim on an aspect of the original measure that was never challenged and remained unchanged raises serious issues regarding the United States' due process rights. On balance, the utility of an Article 21.5 proceeding should not override the basic due process rights of the parties to a dispute."[859]

8.241 The *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)* panel reached this conclusion after reviewing prior Appellate Body decisions with respect to the scope of measures that can be challenged and the claims that can be made in an Article 21.5 proceeding. The panel explained that while prior Appellate Body jurisprudence seemed to indicate that a party is not precluded from raising claims that it did not raise in the original proceedings, provided that these claims concern the measures taken to comply and are included in the Panel request[860], the Appellate Body's reasoning for the inclusion of new claims in the scope of Article 21.5 proceedings in these past decisions was that "the 'measure taken to comply' may be *inconsistent* with WTO obligations *in ways different* from the original measure". By contrast, the question before that panel – and the question before us – is whether this conclusion should also apply to *new* claims where the measure taken to comply is unchanged from the original measure and thus, allegedly inconsistent with WTO obligations in ways *identical to* (not *different from*) the original measure.[861]

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[859] Panel Report, *US – Countervailing Measures on Certain EC Products, (Article 21.5 – EC)* paras. 7.75-7.76.

[860] The panel reviewed the Appellate Body decisions in *Canada – Aircraft (Article 21.5 – Brazil)*, *US – FSC (Article 21.5 – EC)* (Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, 55) and *EC – Bed Linen (Article 21.5 – India)*. This analysis led the panel to conclude that an Article 21.5 panel can consider a new claim on an aspect of the measure taken to comply that constitutes a new or revised element of the original measure, which claim could not have been raised in the original proceedings (this was the case in *Canada – Aircraft (Article 21.5 – Brazil)* and *US – FSC (Article 21.5 – EC)*). On the other hand, the panel noted, an Article 21.5 panel cannot consider the same claim on an aspect of the measure taken to comply that is an unchanged element of the original measure and was already challenged in the original proceeding and dismissed in an adopted report (*EC – Bed Linen (Article 21.5 – India)* and *US Shrimp (Article 21.5 – Malaysia)*). The panel noted, however, that none of these reports explicitly address a situation in which new claims are raised which refer to aspects of the original measure that were not changed by the responding Member during the implementation, although, allegedly, they should have been changed. Panel Report, *US – Countervailing Measures on Certain EC Products, (Article 21.5 – EC)*, paras. 7.64-7.65.

[861] Panel Report, *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)* paras. 7.55-7.56. This same panel considered that another "new" claim of the European Communities was properly before it. The claim concerned the evidence considered by the USDOC in its revised likelihood-of-subsidization analysis: in its Section 129 determination, the USDOC changed the basis for its affirmative likelihood-of-subsidization finding, and the panel found that even though the USDOC's treatment of evidence in the Section 129 determination might appear to be unchanged compared to the original sunset reviews, the USDOC had modified the basis for its determination and that, as a result, the relative importance of the evidence in question had changed. The panel thus considered that this second "new" claim concerned an aspect of the measure taken to comply *that had changed vis-à-vis* the original measure and concluded that the European Communities could not have meaningfully raised the treatment of evidence in the original proceeding. The panel also noted that Article 21.5 proceedings aim to ensure the effective resolution of disputes by providing the complaining Member with an expeditious procedure to challenge the implementation of the DSB recommendations and rulings and that it could therefore consider new claims "arising from the implementation." Further, the panel considered that permitting the new claim did not unduly deprive the United States of its due process rights as the United States had itself introduced the issue of treatment of evidence by revising the entire likelihood-of-subsidization determination and by changing the legal basis of its determination. As a result, the United States could have anticipated a claim on the USDOC's treatment of evidence. Panel Report, *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, paras. 7.69-7.70.

8.242 We agree with the *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)* panel that the scope of Article 21.5 of the DSU is not so broad as to allow a complaining party to make claims that it could have made, but did not make, in the original proceeding, with respect to aspects of the original measure at issue that were incorporated, but remained unchanged, in the measure taken to comply. We find further support for this proposition in the following statement of the Appellate Body in *US – Upland Cotton (Article 21.5 – Brazil)*: "A complaining Member ordinarily would not be allowed to raise claims in an Article 21.5 proceeding that it could have pursued in the original proceedings, but did not."[862]

8.243 Of course, the calculation of TKAST's margin of dumping in the Section 129 determination, and the use of zeroing in this calculation, is closely linked to the issue of the set of data used to calculate the dumping margin. Yet, we consider that the calculation error alleged by the European Communities concerns an aspect of the Section 129 determination in case 11 that is unchanged from the original determination.[863] Further, the alleged error is distinct from any of the claims made by the European Communities in the original dispute, which related only to the issue of the use of zeroing by the USDOC in calculating the margin of dumping; the error is not a consequence of the use of zeroing in the original dispute, and the recalculation of the margin of dumping without zeroing did not lead to or affect the alleged error, or even affect its significance in the overall WTO-consistency of the calculation of the margin of dumping. In this sense, we consider that the claims of the European Communities relate to a part of the Section 129 determination that has remained unchanged from the original measure, and that that part can be "separated" from the remainder of the Section 129 determination for the purpose of this proceeding.[864]

8.244 Thus, we find that the European Communities could have raised the alleged calculation error in the original dispute and that, having failed to do so, the United States was not obligated to amend its original measure in this respect. We therefore find that the EC claim with respect to the alleged error in the calculation of TKAST's dumping margin is not one which the European Communities could properly make in the context of this Article 21.5 proceeding.[865] As a result, we find that the EC claims in respect of the Section 129 determination in case 11 are not properly before us, and we therefore make no findings on the substance of the EC claims in this respect.

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[862] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 211.

[863] The European Communities relies on the fact that the USDOC *repeated* the error in the Section 129 determination; also, while its arguments in this respect are not very clear, the European Communities seems to argue that the error became part of the Section 129 determination because the USDOC postponed its determination in case 11 because of the allegations of error by TKAST. We are not convinced by this argument of the European Communities – however it is presented, the alleged calculation error was committed in the original determination, and the same alleged error was simply reproduced in the Section 129 determination as a result of the USDOC having simply re-run the data through a modified computer programme that eliminated zeroing but was otherwise unchanged.

[864] As a consequence of our analysis that the alleged error concerns an unchanged aspect of the original measure, we do not consider that we need to examine further the parties' argument as to whether the calculation error is part of the measure taken to comply; we also need not decide whether the alleged calculation error should be found to be part of that measure on the basis of the *close nexus* argument put forward by the European Communities.

[865] We might well have reached a different conclusion had the European Communities brought a claim against the alleged calculation error in the original dispute and had the original panel or the Appellate Body decided to exercise judicial economy with respect to such a claim. But that is not the case before us. It is clear to us that the European Communities made a conscious choice not to raise the alleged error in the original dispute and, in our view, that choice has consequences in this compliance proceeding.

2. EC claims with respect to the Section 129 determinations in cases 2, 3, 4 and 5 (Stainless Steel Bar from France, Germany, Italy and the United Kingdom)

(a) Introduction and authority of the Panel to address claims with respect to revoked measures

8.245 The European Communities makes two groups of claims with respect to the Section 129 determinations in cases 2, 3, 4 and 5. The first group of claims concerns the issue of whether, as a result of the recalculation of the margins of dumping in these Section 129 determinations, and the resulting exclusion of certain exporters, the United States should have revisited the injury determination in the original determination in these cases. The second group of claims by the European Communities concerns the new "all others" rates established as a result of the Section 129 determinations in cases 2, 4 and 5.

8.246 The United States argues that both groups of claims concern measures that have been revoked and that the Panel should therefore decline to rule on them.[866] The United States indicates that the anti-dumping orders covering Stainless Steel Bar from France, Italy, Germany and the United Kingdom were revoked, effective 7 March 2007, as a result of sunset reviews later adopted in these cases and that, therefore, it no longer maintains anti-dumping duties on products subject to these orders.[867]

8.247 The European Communities[868] asks us to make findings on its claims notwithstanding the fact that the AD orders at issue have been revoked. The European Communities submits that several panels have in the past considered that the fact that a challenged measure is no longer in effect does not necessarily prevent a Panel from assessing its conformity with the covered agreements.[869]

8.248 The European Communities had initially argued that the revocation of the anti-dumping orders could not be regarded as definitive as a successful legal challenge to the sunset review at issue could result in a reinstatement of the orders. The United States subsequently informed the Panel that an appeal of the determination that lead to the revocation had been dismissed, meaning that revocation of the orders is now final.[870] The European Communities has submitted that the United States may

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[866] US First Written Submission, paras. 54, 62-64 and Exhibit US-13, Revocation of Antidumping Duty Orders on Stainless Steel Bar From France, Germany, Italy, South Korea, and the United Kingdom and the Countervailing Duty Order on Stainless Steel Bar From Italy (73 FR 7258, 7 February 2008).

[867] The United States indicates that cash deposits on any imports on or after 7 March 2007 will be refunded.

[868] EC Second Written Submission, paras. 125-127, 132-134.

[869] See footnote 97 of the EC Second Written Submission, in which it refers to Panel Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India* ("*US – Wool Shirts and Blouses*") WT/DS33/R, adopted 23 May 1997, upheld by Appellate Body Report, WT/DS33/AB/R, DSR 1997:I, 343, para. 6.2; Panel Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products* ("*Chile – Price Band System*"), WT/DS207/R, adopted 23 October 2002, as modified by Appellate Body Report, WT/DS207AB/R, DSR 2002:VIII, 3127, para. 7.112; Panel Report, *Indonesia – Autos*, para. 14.9; Panel Report, *India – Autos*, para. 7.26 and Appellate Body Report, *Argentina – Textiles and Apparel*, para. 64; and EC Answer to Panel Question 47 in which, in addition, it refers to Panel Report, *Dominican Republic – Cigarettes*, para. 7.343, Panel Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items* ("*Argentina – Textiles and Apparel*"), WT/DS56/R, adopted 22 April 1998, as modified by Appellate Body Report, WT/DS56/AB/R, DSR 1998:III, 1033, paras 6.14-6.15, Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper* ("*Japan – Film*"), WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, 1179, para 10.58, and Panel Report, *United States – Standards for Reformulated and Conventional Gasoline* ("*US – Gasoline*"), WT/DS2/R, adopted 20 May 1996, as modified by Appellate Body Report, WT/DS2/AB/R, DSR 1996:I, 29, para 6.19. While the findings of these panels were made in the context of original disputes, the European Communities considers that they equally apply in the context of an Article 21.5 dispute (EC Answer to Panel Question 47).

[870] US Opening Statement, para. 27, referring to Exhibit US-33.

take similar measures in the future, which would lead to the need for an aggrieved Member to bring a new legal challenge.[871]

8.249 In this case, the Section 129 determinations at issue were still in effect *on the date of the establishment of this Panel*. Only later (in February 2008) were they revoked, with retroactive effect to March 2007. As the measures were in existence on the date of our establishment, we consider that they fall within our terms of reference and that we have the authority to make findings on the WTO-consistency of these US measures taken to comply.[872] Of course, any finding of inconsistency with respect to a measure that is no longer in effect will not affect any remaining US obligation to implement the DSB's recommendations and rulings.

8.250 We do not agree with the European Communities that a potential repetition of the alleged inconsistencies with the provisions cited by the European Communities is a relevant consideration that warrants us making findings on the US measures at issue. It is not disputed that the anti-dumping orders have now been definitively revoked. Any future similar inconsistency on the part of the United States with the provisions cited by the European Communities would therefore necessarily arise in the context of another dispute.[873] That said, we consider it appropriate to make findings on the EC claims with respect to the revoked measures challenged by the European Communities. As indicated above, the measures were revoked several months after the establishment of this Panel. We have elsewhere indicated that we would examine the existence and WTO-consistency of US measures taken to comply as of that date. Making the findings requested by the European Communities is consistent with our overall approach in this dispute and, in our view, fulfils the mandate assigned to us by the DSB.

8.251 We now proceed to examine the two groups of EC claims in respect of the Section 129 determinations in cases 2, 3, 4 and 5.

(b) EC claims with respect to "injury" – Section 129 determinations in cases 2, 3, 4 and 5

(i) Main arguments of the parties

8.252 The **European Communities** claims that the United States failed to reassess its findings of injury in light of the new volume of non-dumped imports resulting from the conclusion in the Section 129 determinations in cases 2 to 5 that a number of exporters found to be dumping in the original investigation were not dumping or had *de minimis* margins.[874] In particular, the European

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[871] The European Communities argues that "it is likely that, unless this Panel issues a ruling on these matters, the United States would repeat the same actions". EC Answers to Panel Question 47; see also EC Answer to Panel Question 52 ("unless this Panel issues a *finding* with respect to the measures at issue in this case ... the dispute between the parties will continue and would have to be repeated in the context of other dispute settlement proceedings"). See also EC Opening Statement, para. 79.

[872] The *US – Stainless Steel (Mexico)* panel noted that:

> "There is no specific provision in the DSU that addresses whether a WTO panel may or may not make findings and recommendations on a measure which, while within the panel's terms of reference at the outset of the panel proceedings, subsequently expires. We note, however, that this is not a novel issue in WTO dispute settlement proceedings. This specific issue has arisen in a number of cases, and panels, taking into consideration the particularities of the disputes before them, have used their discretion in deciding whether making findings on an expired measure would be appropriate in each case."

Panel Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico* ("*US – Stainless Steel (Mexico)*"), WT/DS344/R, adopted 20 May 2008, as modified by Appellate Body Report, WT/DS344/AB/R Panel Report, para. 7.48. (footnote omitted)

[873] We recall that the findings of the original panel were that the challenged measures were inconsistent "as applied".

[874] EC First Written Submission, paras. 144-153, EC Opening Statement, para. 82.

Communities argues that the United States disregarded the fact that, after the recalculation of margins without zeroing, on average around 75 per cent of the volume of imports which had been considered to be dumped could no longer be considered as such. The European Communities submits that this is inconsistent with Articles 3.1, 3.2, 3.5, 5.8 of the *Anti-Dumping Agreement* and Article VI:1 of the GATT 1994, arguing that in these cases, the United States, through the Section 129 determinations, maintained anti-dumping duties without establishing (i) whether the remaining amount of dumped imports was causing injury to the domestic injury; and (ii) whether this volume of dumped imports was not negligible. The European Communities submits that a number of WTO panels have found that the term "dumped imports" in Articles 3.1, 3.2 and 3.5 of the *Anti-Dumping Agreement* does not include imports by producers or exporters for which no dumping was found or for which *de minimis* margins were calculated.[875]

8.253 The **United States** submits that the European Communities is precluded from pursuing its claims before this Panel as the European Communities asserted these claims in the original panel proceeding, and the original panel declined to consider them, which resulted in the DSB making no recommendations and rulings with respect to these claims. The United States therefore considers that it was under no obligation to take a measure to comply in respect of the original injury determinations.[876] Further, the original panel did not exercise judicial economy with respect to these claims, but rather found the EC claims unavailing, and that no change to the original injury determination was necessary to effect implementation, stating that it "perceive[d] no need to pronounce on the dependent claims raised by the European Communities" under, *inter alia*, these provisions. Had the original panel believed that the United States was obligated to conduct a new injury analysis in light of revised volumes attributable to non-zeroed margins of dumping, then it would have been necessary for the panel to decide those claims in order to provide additional guidance as to the steps the United States had to undertake. And the United States would then have been on notice that the original panel considered reconsideration of aspects of the injury analysis to be the necessary result of any change in the volume of dumped imports. The United States considers that, like the original panel, this Panel should not rule on these claims since deciding such dependent claims would provide no additional guidance as to the steps the United States would have to take in order to implement the recommendation regarding the violation on which it is dependent.[877] While the European Communities argues that the claims concerns new measures, its claims are not "new"; rather, the European Communities is trying to resuscitate failed claims from the original dispute. The Appellate Body has clarified that adopted reports must been accepted by the parties to a compliance dispute and that compliance panels should decline to revisit original panel and Appellate Body reports that have been adopted and accepted by the parties.[878]

8.254 In any case, the United States submits that irrespective of how one characterizes the findings of the original panel, it disagrees that in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, the Appellate Body indicated that a Member may, before an Article 21.5 panel, repeat a claim with respect to which the original panel exercised judicial economy. In that compliance dispute, the Appellate Body simply observed that the "participants have characterized the original panel's approach as an exercise of judicial economy" and did not itself express a view as to

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[875] The European Communities refers to Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil* ("*Argentina – Poultry Anti-Dumping Duties*"), WT/DS241/R, adopted 19 May 2003, DSR 2003:V, 1727, para.7.303, which itself referred to the findings of the panels in *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* ("*EC – Bed Linen*"), WT/DS141/R, adopted 12 March 2001, as modified by Appellate Body Report, WT/DS141/AB/R, DSR 2001:VI, 2077) and *EC – Bed Linen (Article 21.5 – India)*. See EC First Written Submission, para. 147.

[876] US First Written Submission, para. 64.

[877] The United States also notes that the Appellate Body did not disturb the original panel's treatment of these claims.

[878] US Second Written Submission, paras. 65-69.

whether such a characterization of the original panel's approach was correct.[879] Finally, the United States considers that the European Communities has failed to substantiate its assertions. The EC arguments on injury assume that an "incorrect" volume of dumped imports automatically constitutes a breach of Articles 3.1, 3.2, 3.5, and Article VI:1 of the GATT 1994. Nothing in the text of those provisions suggests that the mere existence of differences in the volume of the dumped imports suffices to prove that the entire injury determination is flawed.[880]

8.255 The **European Communities** responds that its claims with respect to the Section 129 determinations at issue are not "dependent claims" as the United States has characterized them. Rather, they relate to new measures (the Section 129 determinations), against which new claims can be made, and with respect to which the European Communities is asking for a finding from this Panel.[881] Further, the European Communities considers that the United States mischaracterizes the treatment of the EC claims on injury by the original panel. The panel in the original dispute did not reject the EC claims. Rather, the panel exercised judicial economy since the EC claims were consequential of the violation in calculating the dumping margin. This was explicitly acknowledged by the Appellate Body. The fact that the panel in the original dispute considered that resolving these claims would not provide guidance in terms of implementation does not mean that the United States was under no obligation to conduct its injury analysis anew. Panels are not obliged to address all the aspects of a measure. Nor can panels foresee how the Member concerned is going to implement the ruling and recommendation and, thus, cannot foresee all possible new violations which might arise in connection with measures taken to comply. To the contrary, the obligation to bring the measure found WTO-inconsistent into conformity relates to the Member concerned, which is obliged to do everything which is necessary for the measure taken to comply to be consistent with the covered agreements as a whole.[882] The Appellate Body, in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, held that a claim relating to an aspect of a measure on which the panel in the original proceeding had exercised judicial economy was properly within the scope of Article 21.5 of the DSU.[883] Therefore, the European Communities argues that the claim in the present case is also properly before this Panel.[884]

(ii) Evaluation by the Panel

Whether the EC claims are properly before us

8.256 The United States asks that we decline to examine the EC claims because the European Communities "raised these claims in the original proceeding, and the original panel affirmatively declined to make findings on them" and the Appellate Body noted the panel's action and did not disturb it.[885] The US arguments rely on the principle, recognized by the Appellate Body in, *inter alia*, *EC – Bed Linen (Article 21.5 – India)* that the findings of an original panel rejecting certain claims, including because the claimant failed to make a *prima facie* case, and that are not reversed on appeal are *res judicata*.[886] However, contrary to the US arguments, this principle does not apply in

[879] US Answers to Panel Questions 51-52, US Comments on EC Answer to Panel Question 51.
[880] US Answer to Panel Question 52.
[881] EC Second Written Submission, para. 134.
[882] EC Comments on US Answer to Panel Question 51.
[883] The European Communities adds that the *US – Upland Cotton (Article 21.5 – Brazil)* panel agreed with its reading of the Appellate Body findings in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)* (Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina* ("*US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*"), WT/DS268/AB/RW, adopted 11 May 2007). EC Answer to Panel Question 51.
[884] EC Opening Statement, paras. 84-85, EC Answer to Panel Question 51.
[885] US Opening Statement, para. 26.
[886] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 93.

the present case. The original panel declined to make findings with respect to the EC "injury" claims in the following terms:

> "The Panel also perceives no need to pronounce on the dependent claims raised by the European Communities under Articles 1; 3.1, 3.2 and 3.5; 5.8; 9.3; and 18.4 of the *Anti-Dumping Agreement*, Articles VI:1 and VI:2 of the GATT 1994 and Article XVI: 4 of the WTO Agreement. Deciding 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."[887]

In the footnote to this paragraph, the panel added:

> "Our decision not to make findings on dependent claims is consistent with the approach followed in recent panel reports, including, for example, Panel Report, *US – Softwood Lumber V*, para. 7.378; Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.369; Panel Report, *US – Softwood Lumber VI*, para. 8.4"[888]

8.257 There is no doubt in our mind that the original panel exercised *judicial economy* with respect to the EC claims concerning "injury". This is also how the Appellate Body interpreted the original panel's treatment of the EC claims.[889] In fact, the original panel's treatment of the EC claims seems to be a straightforward instance of a panel exercising judicial economy, that is, declining to address certain claims because the measure at issue has already been found to be inconsistent with other provisions of the covered agreements. Here, as we understand it, the original panel considered that the measures at issue (specific original investigation determinations) were inconsistent with the covered agreements as a result of inconsistency with Article 2.4.2 and that any additional violation of, *inter alia*, paras. 3.1, 3.2, 3.5 and 5.8 of the *Anti-Dumping Agreement* would be a result of the

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[887] Panel Report, *US – Zeroing (EC)*, para. 7.34. The United States identified para. 7.109 as the paragraph in which the original panel (according to the United States) made a finding with respect to the EC "injury" claims. In our view, the more relevant paragraph is 7.34, since it is in this paragraph that the panel addressed the EC "as applied" claims with respect to the original investigations at issue in that dispute; paragraph 7.109 relates to the panel's examination of the EC "as such" claims with respect to original investigations. In any case, with the exception of the footnote attached to paragraph 7.34, which is not repeated in paragraph 7.109, both paragraphs are identical. See also para. 8.2 of the report of the original panel:

> "We have also concluded that it is not necessary for us to make findings on the claim of the European Communities that the application of the model zeroing method in the investigations listed in Exhibits EC-1 to EC -15 was inconsistent with Articles 1, 2.4, 3.1,3.2,3.5,5.8,9.3 and 18.4 of the *AD Agreement*, Articles VI:1 and VI:2 of the GATT 1994 and Article XVI:4 of the WTO Agreement, and on the claim of the European Communities that the Standard Zeroing Procedures used by USDOC in original investigations are inconsistent as such with Articles 1, 2.4 3.1, 3.2, 3.5, 5.8, 9.3 and 18.4 of the *AD Agreement*, Articles VI:1 and VI:2 of the GATT 1994 and Article XVI:4 of the WTO Agreement."(footnotes omitted).

[888] Panel Report, *US – Zeroing (EC)*, footnote 134.

[889] Appellate Body Report, *US – Zeroing (EC)*, footnote 12:

> "Panel Report, para. 8.1. *The Panel decided to exercise judicial economy* and did not rule on the European Communities' claim that the application of model zeroing in the investigations listed in Exhibits EC-1through EC-15 was inconsistent with Articles 1, 2.4, 3.1, 3.2, 3.5, 5.8, 9.3, and 18.4 of the Anti-Dumping Agreement, Articles VI:1 and VI:2 of the GATT 1994, and Article XVI:4 of the WTO Agreement. *The Panel also exercised judicial economy* on the European Communities' claim that the Standard Zeroing Procedures used by the USDOC in original investigations are inconsistent, as such, with Articles 1, 2.4, 3.1, 3.2, 3.5, 5.8, 9.3, and 18.4 of the Anti-Dumping Agreement, Articles VI:1 and VI:2 of the GATT 1994, and Article XVI:4 of the WTO Agreement. (Ibid., para. 8.2)" (emphasis added).

Article 2.4.2 violation, and that making findings with respect to these additional claims would contribute little to the resolution of the dispute since the measures had already been found to be inconsistent with the covered agreements. In any case, the panel neither made a finding of inconsistency nor a finding of consistency with the provisions cited by the European Communities. As a result, we fail to see how the issue could be *res judicata*. We therefore reject the US argument that the original panel's conclusion that to rule on the claims would have provided no additional guidance as to the steps to be undertaken by the United States to implement transformed the panel's exercise of judicial economy into a negative ruling on the EC claims.

8.258 The parties disagree whether the findings of the Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)* stand for the proposition that Article 21.5 allows the reassertion, in a compliance dispute, of a claim with respect to which an original panel exercised judicial economy. The Appellate Body has observed in this regard:

> "*EC – Bed Linen (Article 21.5 – India)* concerned a claim for which the complainant was found not to have made out a *prima facie* case in the original proceedings. This is not what occurred in the original proceedings in the present case. The participants have characterized the original panel's approach as an exercise of judicial economy.[320] We do not express a view on whether this is a proper characterization of the approach taken by the original panel. <u>In any event, even if the original panel's approach should properly be characterized as judicial economy, it would still mean that the central rationale of the Appellate Body in *EC – Bed Linen (Article 21.5 – India)* would not be applicable</u>.[321] The Appellate Body explained that the issue raised in that case differed 'from a situation where a panel, on *its* own initiative, exercises 'judicial economy' by not ruling on the substance of a claim.[322]
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> [320] Panel Report, para. 7.89 and footnote 56 thereto.
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> [321] In *EC – Bed* Linen *(Article 21.5 – India)*, the Appellate Body referred to situations where there was a finding of WTO-consistency or the complainant had failed to make out a *prima facie* case in the original proceedings. (Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 96) See also Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 97.
>
> [322] The Appellate Body went on to indicate that, "in a situation where a panel, in declining to rule on a certain claim, has provided only a partial resolution of the matter at issue, a complainant should not be held responsible for the panel's false exercise of judicial economy, such that a complainant would not be prevented from raising the claim in a subsequent proceeding." (Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, footnote 115 to para. 96)."[890]

8.259 It is not totally clear to us whether the discussion of this issue by the Appellate Body *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)* is more properly regarded as an *obiter dictum*, or as an additional reason as why the claims at issue in that case were properly before the compliance panel. In any case, it is beyond doubt that the Appellate Body's findings in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)* indicate that the conclusion in the *EC – Bed Linen (Article 21.5 – India)* dispute regarding *res judicata* does not apply in cases where the original panel exercised judicial economy with respect to the claims at issue, and the Appellate Body

[890] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 148 and corresponding footnotes (italics original, underline added).

did not make any findings with respect to the claims either. The *US – Upland Cotton (Article 21.5 – Brazil)* panel understood the Appellate Body's findings in the same manner.[891]

8.260 Further, in our view, one of the considerations underlying the principle that a Member may not make before a compliance panel a claim which it did not make, but could have made, in the original dispute, and may not, in a compliance proceeding, repeat a claim which it made in the original dispute but which was rejected by the original panel, is that due process entails that a complainant should not be afforded a "second chance" to make its case. Such due process considerations do not arise in a case where the original panel exercised judicial economy with respect to certain claims made and argued before it.[892]

8.261 The United States argues that it could not be under an obligation to comply with respect to the EC claims on "injury" and that had the panel made such findings, it would have been "on notice" that the original panel considered the reconsideration of aspects of the injury analysis to be the necessary result of the change in dumped imports. In our view, these arguments are devoid of merit. In our view, the United States could not "assume" that the injury determination was consistent with the covered agreements; the United States was put on notice, by the EC claims in the original dispute, that the European Communities considered the injury determinations to be flawed because of, *inter alia*, the same inconsistencies with the *Anti-Dumping Agreement* that the European Communities now raises again. Thus, in our view, the United States was aware that the injury determination could be challenged in a compliance dispute.[893]

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[891] Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 9.26 ("the Appellate Body recently held that a claim relating to an aspect of a measure on which the panel in the original proceeding had exercised judicial economy was properly within the scope of Article 21.5 of the DSU") .

[892] See also, by analogy, Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 210, where the Appellate Body distinguishes the situation in that case (the Appellate Body reversed the original panel's findings but was unable to complete the analysis) from the situation addressed in *EC – Bed Linen (Article 21.5 – India)*, and notes that because Brazil's claims had not been resolved on the merits in the original proceedings, allowing Brazil's claims in the compliance dispute would not raise the concern that Brazil get a "second chance" to make a case it had failed to make out in the original proceedings such that the finality of the DSB's recommendations and rulings would be compromised.

[893] We also note, in this respect, certain statements made by the Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, in response to arguments of the United States that because the original panel did not make a finding of inconsistency as to its volume analysis, it was placed in a position of having to guess that the panel "might have thought" that there were WTO-inconsistencies with respect to that aspect of the measure, and that a respondent whose measure is found to be WTO-inconsistent for the first time by a compliance panel is not given a "reasonable period of time" to bring itself into conformity:

> "On the basis of the original panel's conclusions, the USDOC could not assume that its findings regarding the alleged decline in the volume of imports were WTO-consistent. The United States was given a 'reasonable period of time' to bring the USDOC's likelihood-of-dumping determination into compliance following the adoption by the DSB of the panel and the Appellate Body reports in the original proceedings. Moreover, Argentina's arguments relating to the finding on import volumes were not raised for the first time in these Article 21.5 proceedings. Instead, the parties have offered arguments and counter-arguments on the issue twice, first in the original proceedings, and then in these Article 21.5 proceedings. Additionally, we do not believe that Argentina is unfairly getting a 'second chance', as would be the case where a panel or the Appellate Body had found the measure to be WTO-consistent in the original proceedings, or that the complainant failed to make out a *prima facie* case.
>
> Furthermore, we recall that the aim of Article 21.5 of the DSU is to promote the prompt compliance with DSB recommendations and rulings and the consistency of "measures taken to comply" with the covered agreements by making it unnecessary for a complainant to begin new proceedings and by making efficient use of the original panelists and their relevant

8.262 Second, it would, in our view, be a denial of the complainant's right to seek the resolution of a dispute under the DSU to prevent it from raising, in a compliance dispute, a claim on which the original panel declined to rule as a matter of judicial economy. The Appellate Body, in *EC – Bed Linen (Article 21.5 – India)*, stated that "in a situation where a panel, in declining to rule on a certain claim, has provided only a partial resolution of the matter at issue, a complainant should not be held responsible for the panel's false exercise of judicial economy, such that a complainant would not be prevented from raising the claim in a subsequent proceeding."[894] We agree.[895]

8.263 Thus, insofar as the EC claims relate to an aspect of the measure that was challenged in the original dispute, but with respect to which the original panel exercised judicial economy and did not rule, the European Communities is not prevented from repeating them before this panel. Even if we were to consider that the EC claims concern a new measure (a new original investigation in the form of the Section 129 determination), we would come to the same conclusion, that is, that the EC "injury" claims are properly before us. In fact, we note that the arguments made by the United States in the original dispute suggest that this "new" claim could not properly have been made in the original dispute.[896] While before the original panel, the effect of the violation found on the injury determination, if any, could not have been evaluated, the situation is different now that the United States has recalculated the dumping margins, and the resulting volume of dumped imports can be determined.[897]

8.264 The EC claims raise the issue of the extent of an implementing Member's obligation to take further action where the changes effected as a result of "implementation" allegedly affect other aspects of the original measure which were not the subject of any of any findings in the original dispute. In this case, the original panel's findings addressed an inconsistency in the calculation of the margin of dumping, whereas the EC claims before us relate to the injury analysis – a different aspect of the original measure, which was not revisited in the Section 129 determinations. Yet, the DSB recommended that the United States bring its measures (*i.e.* the anti-dumping measures based on the determinations in the original investigations at issue) into conformity with its obligations under the

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experience. These considerations support the Panel's finding that the volume analysis was properly before it."

Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, paras. 150-151. (footnotes omitted).

[894] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, footnote 115, cited by the Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, footnote 322**.**

[895] In our view, it does not matter whether the original panel's exercise of judicial economy was "false" **–** what matters is that the complaining Member did not obtain a finding with respect to its claim as a result of exercise of judicial economy.

[896] See paras. 4.119-4.120 of the report of the original panel:

"The European Communities cannot establish that USDOC necessarily would have calculated zero or de minimis dumping margins in the cited cases, or that the USITC treated certain non-dumped imports as dumped. In the absence of such showings, the United States contends that the European Communities has failed to meet its burden to demonstrate that any of the cited determinations by the USITC is inconsistent with Articles 3.1, 3.2, and 3.5.

The United States notes that the European Communities, in response to the Panel's Question 32, does not deny that its claims as to such measures are merely speculative, given that the European Communities cannot presume the results of an alternative margin calculation methodology permitted by the AD Agreement. According to the United States, the European Communities instead adopts the new position that the use of so called zeroing somehow renders the injury determinations necessarily "unsound". The European Communities 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."

[897] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 86.

Anti-Dumping Agreement and the GATT 1994. In this sense, the EC claims now before us relate to an *omission* on the part of the United States to bring its measures into conformity with its obligations under the *Anti-Dumping Agreement* and the GATT 1994.[898] Further, we note that past panel and Appellate Body decisions indicate that the effect of the findings of inconsistency and of the actions taken by the implementing Member is relevant to determining the scope of the measure taken to comply.[899] The European Communities alleges that the United States could not, in implementing the DSB's recommendations and rulings, limit itself to modifying the dumping margin calculations, without also revisiting its injury determination. In this sense, the European Communities seeks to challenge an aspect of the original measure which has not changed, but which should have been changed in order to comply with the DSB recommendations and rulings to bring the measure at issue in the original dispute, the original anti-dumping measure, based on the determinations in the original investigation, into consistency with US obligations under the *Anti-Dumping Agreement* and the GATT 1994. In light of the relevance of the volume of dumped imports to the injury determination, there is no question in our minds that the EC claims fall within our terms of reference as relating to a "measure taken to comply".[900]

Substance of the EC claim

8.265 The substance of the EC claim is that the United States, having recalculated (without zeroing) the margins of dumping in cases 2, 3, 4 and 5, and having found that some exporters were not dumping or had *de minimis* dumping margins, maintained the anti-dumping duties without establishing (i) whether the resulting volume of dumped imports was causing injury to the domestic industry, and (ii) whether this volume of dumped imports was not negligible. The European Communities alleges that this is inconsistent with Articles 3.1, 3.2, 3.5, and 5.8 of the *Anti-Dumping Agreement* and Article VI:1 of the GATT 1994. The European Communities notes in particular that the United States disregarded the fact that, after the recalculation of dumping margins without zeroing, approximately 75 per cent (on average) of the volume of imports which had originally been considered as dumped could no longer be considered as dumped.

8.266 Article 3.1 of the *Anti-Dumping Agreement* provides:

> "A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both *(a)* the volume of the *dumped imports* and the effect of the *dumped imports* on prices in the domestic

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[898] In other words, the EC claims concerns the non-existence of a measure taken to comply. See Appellate Body report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 36 ("In our view, the phrase 'measures taken to comply' refers to measures which have been, *or which should be*, adopted by a Member to bring about compliance with the recommendations and rulings of the DSB." (emphasis added)) and Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 79 ("the mandate of Article 21.5 panels is to examine either the 'existence' of 'measures taken to comply' or, more frequently, the '*consistency with a covered agreement*' of implementing measures" (emphasis original)). Even though the Section 129 determinations only concern the dumping margin calculations and do not explicitly address the injury determination, in our view they can be regarded as resulting in a revised basis for the imposition the anti-dumping measure that comprises both the revised dumping determination and the original injury determination. The fact that these are, in the US system, determinations that are made by separate agencies has, in our view, no relevance to how they should be considered by a compliance panel examining the existence or WTO-consistency of measures taken to comply

[899] See, *inter alia*, *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, paras. 7.28-7.29, Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 85-86; see also Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 148.

[900] See also Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 86:

"The *amount* of dumped imports will, of course, have an impact on the assessment of the *effects* of the "dumped imports" for the purposes of determining injury."

> market for like products, and *(b)* the consequent impact of *these imports* on domestic producers of such products."(emphasis added)

8.267 Thus, Article 3.1 requires that a determination of injury be based on positive evidence and an objective examination of the volume of *dumped* imports and of the effects on price of *dumped* imports, and of the consequent impact of these *dumped* imports on the domestic industry. Article 3.2 sets out more specific guidance for the consideration of the volume and price effects of dumped imports while Article 3.5 provides further guidance in determining the causal link between the dumped imports and any injury to the domestic industry. Finally, Article 5.8 requires that the investigating authorities terminate an investigation as soon as, *inter alia*, the authorities are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case.

8.268 Several panels have expressed the view that the term "dumped imports" in Article 3 refers to all imports attributable to producers or exporters for which a margin of dumping greater than *de minimis* has been calculated and excludes imports from producers and exporters found in the course of the investigation not to have dumped.[901] The Appellate Body, in addressing the question whether imports from all unexamined producers could be treated as "dumped imports" for the purposes of injury analysis in *EC – Bed Linen (Article 21.5 – India)* observed that "[n]one of the provisions of [Articles 3.1, 3.2, 3.5] of the *Anti-Dumping Agreement* can be construed to suggest that Members may include in the volume of *dumped* imports the imports from producers that are *not* found to be dumping".[902] Further, the Appellate Body noted that:

> "[I]f a producer or exporter is found to be dumping, all imports from that producer or exporter may be *included* in the volume of dumped imports, but, if a producer or exporter is found *not* to be dumping, all imports from that producer or exporter must be *excluded* from the volume of dumped imports."[903]

8.269 More recently, the *EC – Salmon (Norway)* panel found that the European Communities had acted inconsistently with Articles 3.1 and 3.2 by treating as "dumped" imports attributable to an exporter for which it had calculated a *de minimis* dumping margin:

> "We can conceive of no rational basis on which the imports which are not legally cognizable as 'dumped' because a *de minimis* margin has been calculated for the producer/exporter in question could be included in the volume of dumped imports taken into account in assessing the question of injury. In our view, the consequences from a determination that there is no legally cognizable dumping must be taken into account in the injury analysis. ...
>
> We consider that an interpretation of 'dumped imports' in Article 3 which would allow an investigating authority to include in the volume of dumped imports for purposes of injury analysis imports attributable to a producer/exporter for which a *de minimis* margin has been calculated is impermissible. ... A consistent interpretation of the term 'dumped' requires that such imports be excluded from the "dumped imports" considered in the analysis of injury (and causation, of course)."[904]

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[901] See Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.303; Panel Report, *EC – Bed Linen*, para. 6.138; Panel Report, *EC – Bed Linen (Article 21.5 – India)*, para. 6.131; Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway* ("*EC – Salmon (Norway)*") WT/DS337/R, adopted 15 January 2008, discussed, *infra*, para. 8.269.

[902] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 112.

[903] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 115.

[904] Panel Report, *EC – Salmon (Norway)*, paras. 7.627-7.628.

8.270 In this case, the European Communities asserts that, once the United States had concluded, in the Section 129 determinations, that some of the imports previously found to be dumped were not dumped, after margins of dumping were re-calculated without zeroing, it did not reconsider its injury determination and therefore failed to base its injury determination on positive evidence and an objective examination of the correct volume of dumped imports, as required by Article 3.1 of the *Anti-Dumping Agreement*. Further, the European Communities asserts that by failing to reconsider its injury determination, the United States also failed to comply with Article 3.2, with respect to the determination of the volume of dumped imports, any increase (in absolute or relative terms) in dumped imports, and the effect of dumped imports on prices, and acted inconsistently with the Article 3.5 of the *Anti-Dumping Agreement* with respect to the determination that dumped imports were through the effects of dumping causing injury, and the examination of other known factors, including the new volume of non-dumped imports.

8.271 We consider that the European Communities has made a *prima facie* case that the volume of dumped imports had changed, and that as a consequence, the injury determination was not based on consideration of "dumped" imports within the meaning of Articles 3.1 and 3.2.[905] The volume of imports considered as dumped in the original injury determinations in the cases at issue necessarily included imports which could not properly be treated as dumped following the Section 129 determinations. Thus, we are of the view that the United States was obliged to reconsider the injury determination in cases 2, 3, 4 and 5 in light of volumes of dumped imports determined based on the Section 129 determinations in those cases. Having failed to do so, the injury determinations are necessarily inconsistent with Articles 3.1, 3.2, and 3.5 of the *Anti-Dumping Agreement*.

8.272 In light of the above findings, we do not consider it necessary to address the EC claims under Articles 5.8 of the *Anti-Dumping Agreement* and VI:1 of the GATT 1994, and make no findings with respect to those claims.

(c) EC claims with respect to the "all others" rate established in the Section 129 determinations in cases 2, 4 and 5

(i) Main arguments of the parties

8.273 The **European Communities** submits that in the Section 129 determinations in cases 2, 4 and 5, the United States unjustifiably increased the "all others" rates. The EC claim relates to the fact that the Section 129 determination in each case led to the revocation of the order with respect to some exporters and created a situation where all the company-specific dumping margins were either zero or *de minimis* or based on adverse facts available. In each case, the USDOC established a new "all others" rate based on a simple weighted average of the zero/*de minimis* and facts available rates. As a result, the all others rate increased from 3.9 per cent to 35.92 per cent in case 2 (Stainless Steel Bar from France), from 3.81 per cent to 6.6 per cent in case 4 (Stainless Steel Bar from Italy), and from 4.48 per cent to 83.95 per cent in case 5 (Stainless Steel Bar from the United Kingdom).[906] The

[905] The European Communities has referred us to its submission before the USITC in the context of sunset review proceedings, where it also submitted that 75 per cent of the volume of imports considered to be dumped in the original investigation was from exporters for which zero or *de minimis* margins were calculated in the Section 129 determinations. European Communities' Brief Pre-Hearing on Stainless Steel Bar from France, Germany, Italy and the United Kingdom, 22 October 2007, Exhibit EC-27. While the European Communities has not provided documentary evidence supporting this 75 per cent figure, the United States has not commented on the figure. Nevertheless, we consider that the European Communities has made a *prima facie* case that the volume of dumped imports decreased as a result of the Section 129 determinations, and the United States does not dispute that the original injury determination was not reconsidered in the context of implementation of the DSB's recommendations and rulings.

[906] EC First Written Submission, paras. 124-140. The European Communities refers to the Issues and Decision Memorandum for the Final Results of the Section 129 determinations, 9 April 2007, pp. 23-24 (Exhibit

European Communities claims that these increases in the "all others" rates are unreasonable and inconsistent with Articles 9.4 and 6.8 and with Annex II of the *Anti-Dumping Agreement*. First, the European Communities submits that Article 9.4 explicitly prohibits the inclusion of zero and/or *de minimis* margins, and of margins based on facts available, in the calculation of "all others" rates. In the three cases concerned, the USDOC relied on all three, calculating a weighted average including all three types of margins. The European Communities recognizes that the situation faced by the USDOC, in which all margins were either zero, *de minimis* or based on facts available, poses a problem, but considers that US law advocates a sensible approach to this problem, based on the concept of reasonableness. Section 735(c)(5)(B) of the Tariff Act of 1930 provides that, in such a situation, the USDOC may use "any reasonable method" to establish the all others rate, "including averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated". The European Communities argues that the method employed by the USDOC in the three cases is not "reasonable", since in some cases, the all others rate was multiplied by up to 19 times without there being any evidence that the underlying behaviour of the affected exporters had changed at all. An example of a reasonable solution would have been, as the European Communities advocated before the US authorities, to maintain the original "all others" rates. In any case, the European Communities considers that even if Article 9.4 does not indicate what to do in a situation such as the one faced by the USDOC in the Section 129 determinations, it clearly states what not to do, *i.e.*, use zero, *de minimis* or facts available margins.[907] While Article 9.4 establishes a ceiling on the dumping margin applicable to imports from exporters or producers not included in the sample, the last part of that provision establishes a condition which always applies (that any zero, *de minimis*, or facts available rate be disregarded) when calculating those margins of dumping within the ceiling.[908] Thus the European Communities considers that there is no need for the Panel to resolve the interpretation issue raised by the existence of a *lacuna* in Article 9.4 given that there is no *lacuna* as to what the provision requires Members not to do.[909]

8.274 Alternatively, the European Communities considers that, absent information on dumping margins other than zero, *de minimis* margins and margins based on adverse facts available, the "all others" rate should be zero. The European Communities notes in this respect that the situation arose because the duties for the major exporters in these cases were revoked after zeroing was eliminated from the calculation of their individual dumping margins. The European Communities asserts that, had the United States disregarded these companies in the original investigation, it could have selected other sources of information in order to calculate the "all others" rate.

8.275 In addition, the European Communities argues that basing the "all others" rate on adverse facts available also violates Article 6.8 and Annex II of the *Anti-Dumping Agreement* because the method used by the USDOC in the Section 129 determination in fact moves from a situation where the "all others" rate is based on "facts available" (*i.e.*, highest rate for a cooperating exporter) to one where it is largely based on "adverse inferences" (*i.e.*, rate for an exporter which has failed to "act in the best of its ability to comply with a request for information"). By doing so, the European Communities argues, the USDOC effectively determined that exporters subject to the "all others" rate

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EC-7). The European Communities also indicates that the USDOC had originally based the "all others" rates on the highest dumping margin for a non-cooperating exporter, thus excluding zero, *de minimis* and facts available margins. Once the impact of zeroing was removed in the Section 129 determination, all cooperating exporters had either zero or *de minimis* rates.

[907] EC Second Written Submission, para. 128.

[908] EC Answer to Panel Question 48. The Panel asked the parties "What significance must be given, in the resolution of the matter before the panel, to the fact that the prohibition contained in Article 9.4 is expressed in terms of a ceiling for the anti-dumping margin that may be applied to imports from exporters or producers not individually examined".

[909] EC Answer to Panel Question 49.

were guilty of behaviour that would warrant the application of adverse inferences, without demonstrating that such treatment was appropriate.[910]

8.276 The **United States** argues that the European Communities has failed to point to any obligation under the *Anti-Dumping Agreement* with which the United States has acted inconsistently, and that Article 9.4 does not address the situation with which the USDOC was faced in the Section 129 determinations, in which all individually calculated rates were either zero, *de minimis*, or based on adverse facts available. The United States also underlines what it considers to be the inconsistency of the European Communities' own suggestion that the USDOC should have used the original "all others" rates – following the European Communities' logic in the original dispute, the original "all others" rates were tainted by the USDOC's use of zeroing, such that USDOC could not, in implementing the DSB recommendations and rulings, simply use those "all others" rates.[911] The United States further submits that Article 9.4 provides a "ceiling" for the "all others" rate. In order to determine this ceiling, certain results from the investigated companies have to be excluded. However, when the only margins from investigated companies are zero, *de minimis* or facts available margins, this simply means that a ceiling cannot be determined pursuant to Article 9.4. Yet, a Member may still apply an anti-dumping duty to non-investigated companies, and under the general principles of Article 9.4, that amount may be based on the results of other companies.[912] Finally, the United States argues that where a *lacuna* exists in the covered agreements, the Members have not agreed to be bound by any specific obligation; accordingly, the Panel should not find an obligation where none exists. The Panel should be guided by those provisions of the covered agreements that address the establishment of the "all others" rate in general: the *Ad Note* 1 to paragraphs 2 and 3 of Article VI of the GATT 1994, for example, provides that "a contracting party may require reasonable security (bond or cash deposit) for the payment of any case of suspected dumping or subsidization". Moreover, Article 9.4 establishes that the "all others" rate cannot be arbitrary; rather, it provides that the "all others" rate is to be based upon the margins of dumping for those producers who have been investigated.[913]

(ii) Arguments of the third parties

8.277 **Korea** submits that the absence of cooperating, above *de minimis* respondents does not allow an investigating authority to deviate from the clear obligation in Article 9.4.[914] Korea adds that it would have been impossible for the drafters of the agreements to set out all the details in resolving a particular dispute and a fair amount of discretion has been given to a panel, within the confinement of the explicit terms of the relevant provisions, to apply a reasonable interpretation and render a reasonable decision to fill the "loopholes" in the text.[915] Therefore, Korea considers it appropriate for a WTO panel to assess the reasonableness of an allegedly WTO-inconsistent measure in resolving a dispute involving a provision of a WTO Agreement containing a *lacuna*.

(iii) Evaluation by the Panel

8.278 The EC claims raise the question of what – if any – disciplines apply to the calculation of the "all others" rate under Article 9.4 of the *Anti-Dumping Agreement* in a case where the only margins of dumping that are calculated by the investigating authority, and which could therefore serve as a basis to establish an "all others" rate, are zero or *de minimis* margins, or margins based on facts available. Article 9.4 provides, in relevant part:

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[910] EC First Written Submission, paras. 141-143
[911] US Second Written Submission, paras. 48-52.
[912] US Answer to Panel Question 49.
[913] US Answer to Panel Question 50.
[914] Korea's Answer to Panel Question 23 to the third parties.
[915] Korea's Answer to Panel Question 24 to the third parties.

> "When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed:
>
> (i) the weighted average margin of dumping established with respect to the selected exporters or producers ...
>
> provided that the authorities shall disregard for the purpose of this paragraph any zero and *de minimis* margins and margins established under the circumstances referred to in paragraph 8 of Article 6..." [916]

8.279 The specific problem we face in the present dispute arises from the fact that Article 9.4 specifies that the "all others rate" for non-investigated exporters shall not exceed a certain value, equivalent to the weighed average margin of dumping for selected exporters, and that in establishing that value, the authorities shall disregard any zero or *de minimis* margins of dumping or margins based on facts available ("margins established under the circumstances referred to in paragraph 8 of Article 6"). Article 9.4 does not, however, give any guidance as to how that value is to be established in a situation where all margins are either zero, *de minimis*, or based on facts available. The Appellate Body, in *US – Hot Rolled Steel from Japan*, referred to this as a *lacuna* in Article 9.4:

> "This *lacuna* arises because, while Article 9.4 *prohibits* the use of certain margins in the calculation of the ceiling for the 'all others' rate, it does not expressly address the issue of *how* that ceiling should be calculated in the event that *all* margins are to be *excluded* from the calculation, under the prohibitions."[917]

8.280 The European Communities submits that while Article 9.4 may not specifically provide how the "all others" rate is to be determined in such a case, Article 9.4 nonetheless makes it clear that zero or *de minimis* margins or margins based on facts available shall not be used in the establishment of the "all others" rate.

8.281 The EC argument is predicated on Article 9.4 setting forth disciplines concerning the calculation of an "all others" rate to be applied to exporters and producers who were not included in the investigated sample. However, in our view, Article 9.4 sets forth no such rule. What that provision does is establish a methodology for the calculation of a "ceiling" which the "all others" rate may not exceed. What Article 9.4 prohibits is an "all others" rate that *exceeds* the "weighted average margin of dumping established with respect to the selected exporters or producers", not including margins of zero, *de minimis*, or "facts available" margins. Article 9.4 does not specify a method for or impose disciplines on the calculation of the "all others" rate itself. It is correct, as the European Communities points out, that the closing portion of Article 9.4 indicates that the authorities

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[916] Article 9.4 applies only "[w]hen the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6". The second sentence of Article 6.10 provides that in cases where the number of exporters is so large as to make the determination of an individual margin of dumping for each *known* exporter, the investigating authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated. Thus, the provisions of Article 9.4 only apply to the calculation of an "all others" rate applicable to cooperating exporters who have made themselves known to the investigating authorities and not to exporters that have not yet exported or exporters that have not come forward to the investigating authorities. See Panel Report, *EC – Salmon (Norway)*, para. 7.431; Panel Report, *Mexico – Rice AD Measures*, para. 7.159.

[917] Appellate Body Report, *US – Hot Rolled Steel*, para. 126 (footnote omitted). See also Panel Report, *EC – Salmon (Norway)*, paras. 7.350-7.351 where the panel also refers to the *lacuna* in Article 9.4. Neither the Appellate Body in *US – Hot Rolled Steel* nor the panel in *EC – Salmon (Norway)* were called upon to resolve the *lacuna*.

shall disregard "for the purpose of this paragraph" any zero and *de minimis* margins and margins based on facts available. However, as we have noted, Article 9.4 nowhere contains any discipline or reference to the calculation of the "all others" rate itself. It follows that the prohibition set forth in the closing portion of Article 9.4 only applies to the discipline established in that paragraph, *i.e.*, that which concerns the calculation of the *ceiling* applicable to that "all others" rate. Indeed, were the European Communities correct that Article 9.4 prohibits the use of the three types of margins (zero, *de minimis*, facts available), Article 9.4 would, in situations such as the one in the case before us, result not only in a *lacuna*, but in an internal inconsistency: the EC interpretation could lead to a situation where the investigating authorities are barred from taking into consideration any and all of the margins of dumping calculated in the course of the investigation (and not only, as the European Communities suggests, those based on facts available), and therefore are left with no basis on which to establish the "all others" rate. Indeed, this case poses that very situation.

8.282 Our reading of Article 9.4 as only establishing disciplines with respect to the "ceiling" applicable to the "all others" rate is consistent with the findings of the Appellate Body in *US – Hot Rolled Steel*.[918] We refer in this respect to the statement of the Appellate Body quoted above in respect of the *lacuna*, and to the following description of the prohibition contained in Article 9.4 by the Appellate Body:

> "Article 9.4 does not prescribe any method that WTO Members must use to establish the 'all others' rate that is actually applied to exporters or producers that are not investigated. Rather, Article 9.4 simply identifies a maximum limit, or ceiling, which investigating authorities '*shall not exceed*' in establishing an 'all others' rate. Sub-paragraph (i) of Article 9.4 states the general rule that the relevant ceiling is to be established by calculating a 'weighted average margin of dumping established' with respect to those exporters or producers who *were* investigated. However, the clause beginning with 'provided that', which follows this sub-paragraph, qualifies this general rule. This qualifying language mandates that, 'for the purpose of this paragraph', investigating authorities '*shall disregard*', first, zero and *de minimis* margins and, second, "margins established under the circumstances referred to in paragraph 8 of Article 6.' Thus, in determining the amount of the ceiling for the "all others" rate, Article 9.4 establishes two *prohibitions*. The first prevents investigating authorities from calculating the 'all others' ceiling using zero or *de minimis* margins; while the second precludes investigating authorities from calculating that ceiling using 'margins established under the circumstances referred to' in Article 6.8."[919]

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[918] In *Hot Rolled Steel*, the Appellate Body found that Section 735(c)(5)(A) of the US Tariff Act of 1930 was inconsistent with Article 9.4 because that provision allowed the use of margins of dumping *partly* calculated on the basis of facts available to be used in the calculation of the "all others" rate. Appellate Body Report, *US – Hot Rolled Steel from Japan*, paras. 110 *ff*.

[919] Appellate Body Report, *US – Hot Rolled Steel from Japan*, para. 116. We note in particular that the Appellate Body makes no reference to any prohibition with respect to the actual "all others" rate and only refers to the ceiling that applies to that rate. Further, the Appellate Body found, in that case, that the US provision challenged was inconsistent with Article 9.4 not because it allowed the taking into consideration of margins based on facts available in the calculation of the "all others" rate, but because "in cases where margins established *in part* on the basis of facts available are used to calculate the "all others" rate, the "all others" rate ... may well exceed the maximum allowable "all others" rate under Article 9.4 of the *Anti-Dumping Agreement*"; accordingly, the Appellate Body affirmed the panel's conclusion that Section 735(c)(5)(A) of the US Tariff Act of 1930 was inconsistent with Article 9.4 "to the extent that [the fact that the Section requires the inclusion of margins established in part on the basis of facts available in the calculation of the 'all others' rate] results in an "all others" rate in excess of the maximum allowable rate under Article 9.4". Appellate Body Report, *US – Hot Rolled Steel from Japan*, paras. 128-129. See also the reference, by the Appellate Body, to Article 9.4 defining

8.283 In a situation such as the one that arose in the Section 129 determinations in cases 2, 4, and 5, where all the margins of dumping determined for selected exporters and producer fall within one of these categories, there are simply no margins of dumping from which the investigating authority or a panel may calculate the maximum allowable "all others" rate. Thus, in such a case, Article 9.4 simply imposes no prohibition, as no *ceiling* can be calculated.[920] It follows that there would be no legal basis for a panel to conclude that the "all others" rate actually established is inconsistent with Article 9.4. We therefore find that the United States has not acted inconsistently with Article 9.4 of the *Anti-Dumping Agreement* in establishing new "all others" rates in the Section 129 determinations in cases 2, 4 and 5.

8.284 The European Communities also raises claims under Article 6.8 and Annex II of the *Anti-Dumping Agreement*. The European Communities argues that calculating the "all others" rate on the basis of adverse facts available violates these provisions because the method used by the USDOC in the Section 129 determination in fact moves from a situation where the all others rate is based on "facts available" to one where it is largely based on "adverse inferences" (*i.e.*, the treatment provided for an exporter which has failed to "act in the best of its ability to comply with a request for information"). The European Communities submits that the USDOC effectively determined that exporters subject to the "all others" rate were guilty of behaviour that would warrant the application of adverse inferences, without demonstrating that such treatment was appropriate. We regard these claims of the European Communities as dependent on its claims of violation of Article 9.4 and do not consider that Article 6.8 and Annex II of the *Anti-Dumping Agreement* provide an independent basis for a finding of inconsistency where the all "others rate" at issue is not inconsistent with the provisions of Article 9.4. Having concluded that the United States has not acted in violation of the provisions of Article 9.4, we therefore make no findings with respect to the EC claims under Article 6.8 and Annex II.

IX. CONCLUSIONS AND RECOMMENDATION

9.1 In accordance with our mandate under Article 21.5 of the DSU, we have examined the existence or consistency with a covered agreement of measures taken by the United States to comply with the recommendations and rulings adopted by the DSB in the original proceeding. On the basis of the findings above, we conclude that:

(a) We have no authority to make findings with respect to the EC claim that the Panel was improperly constituted under Articles 8.3 and 21.5 of the DSU and therefore refrain from doing so.

(b) With respect to the EC general claims of failure, by the United States, to fully implement the recommendations and rulings of the DSB in the original dispute:

(i) The United States has failed to comply with the recommendations and rulings of the DSB in the original dispute and has acted inconsistently with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 by determining, after the end of the reasonable period of time, the amount of anti-dumping duty to be assessed based on zeroing in the 2004-2005 administrative review in case 1 (*Hot Rolled Steel from the Netherlands*) and issuing assessment instructions pursuant to that determination and by determining, after the end of the reasonable period of time, the amount of

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"the maximum anti-dumping duty" that may be applied to exports from producers not individually examined in Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 122.

[920] In the absence of any guidance in the text, we do not consider that it would be appropriate for us to fill that gap.

anti-dumping duty to be assessed based on zeroing in the 2004-2005 administrative review in case 6 (*Stainless Steel Wire Rod from Sweden*) and issuing assessment instructions pursuant to that determination.

(ii) The United States has failed to comply with the recommendations and rulings of the DSB in the original dispute by continuing to apply to imports of NSK cash deposit rates established in the 2000-2001 administrative review in case 31 (*Ball Bearings from the United Kingdom*), a measure which was found to be inconsistent with Articles 9.3 of the *Anti-Dumping Agreement* and VI:2 of the GATT 1994 in the original dispute.

(iii) The United States has not failed to comply with the recommendations and rulings of the DSB in the original dispute by taking actions to liquidate anti-dumping duties calculated with zeroing pursuant to final duty assessment determinations made before the end of the reasonable period of time (including pursuant to subsequent administrative reviews listed in the Annex to the EC Article 21.5 panel request).

(iv) The United States has not failed to comply with the recommendations and rulings of the DSB in the original dispute by determining, prior to the end of the reasonable period of time, the amount of anti-dumping duty to be assessed based on zeroing in the 2005-2006 administrative review determination in case 1 (*Hot Rolled Steel from the Netherlands*).

(v) The United States has not failed to comply with the recommendations and rulings of the DSB in the original dispute and has not acted inconsistently with Articles 2.4.2 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 by establishing a new cash deposit rate based on zeroing in the 2004-2005 administrative review determination in case 6 (*Stainless Steel Wire Rod from Sweden*) because due to the revocation of the measure in question, no cash deposit requirement was actually imposed.

(vi) Having found that none of the sunset reviews with respect to which the European Communities makes claims and which are within our terms of reference had, by the time of the establishment of the Panel, resulted in the continuation of the concerned anti-dumping orders, we make no findings in respect of the claims of the European Communities that the United States violated Articles 2.1, 2.4, 2.4.2 and 11.3 of the *Anti-Dumping Agreement* as a result of having relied on margins of dumping calculated with zeroing in the context of sunset reviews involving measures challenged in the original dispute.

(vii) We make no findings with respect to the EC claim that the United States violated Articles 21.3 and 21.3(b) of the DSU by failing to take any measure to comply between 9 April and 23 April/31 August 2007.

(c) With respect to the EC claims that certain US measures taken to comply are inconsistent with the US obligations under the covered agreements:

(i) Having found that the claim of the European Communities with respect to the Section 129 determination in case 11 (*Stainless Steel Sheet and Strip in Coils from Italy*) concerning the calculation error is not properly before us, we make no findings on the consistency of that determination with Articles 2,

5.8, 6.8, 9.3, 11.1 and 11.3 of the *Anti-Dumping Agreement* and Article VI:2 of the *GATT 1994*.

(ii) With respect to cases 2, 3, 4 and 5 (*Stainless Steel Bar from France, Germany, Italy and the United Kingdom*), the United States acted inconsistently with Articles 3.1, 3.2 and 3.5 of the *Anti-Dumping Agreement* by maintaining the anti-dumping duty orders in those cases without having made a determination of injury based on positive evidence of the volume of dumped imports following the recalculation of dumping margins in the Section 129 determinations in these cases and consequent changes in the volume of dumped imports. We make no findings regarding the EC claims under Article 5.8 of the *Anti-Dumping Agreement* and Article VI:I of the GATT 1994 in respect of the same measures.

(iii) With respect to cases 2, 4 and 5 *(Stainless Steel Bar from France, Italy and the United Kingdom*), the United States did not act inconsistently with Article 9.4 of the *Anti-Dumping Agreement* in the establishment of "all others" rates in the Section 129 determinations in these cases. We make no findings regarding the EC claims under Article 6.8 and Annex II of the *Anti-Dumping Agreement* in respect of these same measures.

9.2 To the extent that the measures taken by the United States to comply with the recommendations and rulings adopted by the DSB in the original proceeding are inconsistent with the obligations of the United States under the covered agreements, and to the extent that the United States has otherwise failed to implement the recommendations and rulings of the DSB in the original dispute, these recommendations and rulings of the DSB remain operative. We therefore make no new recommendation.

9.3 The European Communities requests that the Panel make suggestions as to how the United States should bring its measures into conformity with its obligations under the covered agreements.[921] We note that Article 19.1 of the DSU states that WTO panels may suggest ways through which the Member concerned could implement their recommendations.[922] Having in this Report provided our views with respect to US actions taken, or not taken, to implement the rulings and recommendations in the original dispute, as well as on the scope of the US obligation to implement, we see no reason to make any suggestion to the United States and therefore decline the EC request.

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[921] See *supra*, para. 4.4 and footnote 50.

[922] Article 19.1 of the DSU provides that:
"Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations." (footnotes omitted).

ANNEX A

REQUEST FOR THE ESTABLISHMENT OF A PANEL

Contents		Page
Annex A-1	Request for the Establishment of a Panel by the European Communities	A-2

ANNEX A-1

REQUEST FOR THE ESTABLISHMENT OF A PANEL BY THE EUROPEAN COMMUNITIES

WORLD TRADE ORGANIZATION

WT/DS294/25
14 September 2007

(07-3919)

Original: English

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

Recourse to Article 21.5 of the DSU by the European Communities

Request for the Establishment of a Panel

The following communication, dated 13 September 2007, from the delegation of the European Communities to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 21.5 of the DSU.

On 9 May 2006, the Dispute Settlement Body (the "DSB") adopted the Appellate Body Report and the Panel Report, as modified by the Appellate Body, in the case WT/DS294 "*United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*". The resulting DSB rulings found that the United States' administrative practice (the *zeroing* methodology in original investigations in which the weighted-average-to-weighted-average comparison method is used) and other measures (15 original investigations[1] and 16 "administrative reviews"[2] in which zeroing was used), including each of the assessment instructions issued pursuant to any of one of these measures, were inconsistent with Article VI of the General Agreement on Tariff and Trade 1994 ("GATT 1994") and the Agreement on implementation of Article VI of the GATT 1994 (the "AD Agreement"). The DSB recommended that the United States brings those measures into conformity with its obligations under those Agreements.

[1] Listed in WT/DS294/7/Rev.1, cases 1 to 15 on pages 5-6.

[2] Listed in WT/DS294/7/Rev.1, cases 16 to 31 on pages 14-15. The term "administrative review" is a term of US municipal law that is not used in the *AD Agreement*. A US "administrative review" involves an investigation into and a re-calculation of the existence and degree of an exporter's margin of dumping during the review investigation period, contemporaneous with the imports for which final liability is being assessed. An "administrative review" investigation also results in the fixing of a new "cash deposit" rate to be applied prospectively to future imports, pending the next "administrative review".

On 30 May 2006, the United States informed the DSB that it intended to implement the recommendations and rulings of the DSB in a manner consistent with its WTO obligations, but needed a reasonable period of time to do so. The parties agreed under Article 21.3(b) of the Understanding on rules and procedures governing the settlement of disputes ("DSU") that the United States would have until 9 April 2007 to implement the recommendations and rulings of the DSB (WT/DS294/19).

On 27 December 2006, the United States published a notice whereby it announced that it was abandoning "zeroing" in average-to-average comparisons in anti-dumping original investigations (see *Antidumping Proceedings: Calculation of the Weighted–Average Dumping Margin during an Antidumping Investigation; Final Modification* published in 71 FR 77722). The final modification became effective on 22 February 2007 (see *Antidumping Proceedings: Calculation of the Weighted–Average Dumping Margin in Antidumping Investigations; Change in Effective Date of Final Modification*, published in 72 FR 3783, 26 January 2007).

Subsequently, the US began a recalculation of the margins of dumping in 12 of the 15 original investigations (the anti-dumping measures having been previously revoked in three of the 15 original investigations for reasons other than zeroing[3]). The United States issued its final findings in 11 of the original investigations on 9 April 2007 ("Section 129 determinations")[4] which entered into effect on 23 April 2007 (published in 72 FR 25261, 4 May 2007) and on 20 August 2007 issued its final findings in the one outstanding case[5]. At the DSB meeting of 24 April 2007, and at subsequent DSB meetings, the United States stated that it had implemented the DSB recommendations and rulings in this dispute. The EC did not agree.

On 4 May 2007, the parties concluded an agreement on the procedures under Articles 21 and 22 of the DSU ("sequencing agreement")[6] with a view to facilitating the procedures for a resolution of the dispute.

On 9 July 2007, the European Communities initiated the procedures under Article 21.5 of the DSU by requesting the United States to enter into consultations. The request was circulated in document WT/DS294/22 of 12 July 2007. Consultations were held on 30 July 2007. Consultations have allowed a better understanding of respective positions but have failed to settle the dispute.

Accordingly, "*there is a disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings*" of the DSB. Pursuant to Article 6 and Article 21.5 of the DSU, Article 17 of the *AD Agreement*, Article XXIII of GATT 1994 and Paragraph 1 of the sequencing agreement, the EC hereby requests the establishment of a panel.

In particular, the European Communities claims the following:

1. The Section 129 determinations entered into force on 23 April 2007, not on the date of 9 April 2007 as agreed by the parties under Article 21.3(b) of the DSU. This is inconsistent

[3] Cases Number 10, 12 and 13 in the Annex to this Panel Request.

[4] The term "Section 129 determination" is a term of US municipal law that is not used in the AD Agreement. It is used in this Panel Request without prejudice to the correct categorisation of the measures at issue under one or more provisions of the *AD Agreement*.

[5] Case Number 11 in the Annex to this Panel Request. *Certain Stainless Steel Sheet and Strip from Italy (A-475-824) Published on US Commerce Department Web Site on 29 August 2007 http://ia.ita.doc.gov/download/section129/Italy-SSSS-in-Coils-129-Final-Decision-Memo-08-20-07.pdf*

[6] "Understanding between the United States and the European Communities Regarding Procedures under Articles 21 and 22 of the DSU" (WT/DS294/21, 9 May 2007).

with Article 17(14) and Article 21, including 21.3 and 21.3(b) of the DSU and with the agreement between the parties concerning the reasonable period of time. In particular:

- Article 17(14) DSU because the United States, by its actions, has not unconditionally accepted the Appellate Body Report.

- Article 21, including Article 21.3 and 21.3(b) DSU and the agreement between the parties concerning the reasonable period of time because the United States has failed to comply immediately and/or within the reasonable period of time agreed by the parties.

2. The US failed to properly implement the DSB recommendations and rulings with respect to the 16 administrative reviews found to be inconsistent with the US' WTO obligations since "zeroing" was not eliminated in any of the above-mentioned measures. This is inconsistent with Article 2, including 2.1, 2.4 and 2.4.2, Article 9.3 and Article 11, including Article 11.1 and 11.2 of the *AD Agreement* and Article VI:2 of the GATT 1994. In particular:

- Article 2, including Article 2.1 of the *AD Agreement* and Article VI:2 of the GATT 1994 because the US has not re-calculated margins of dumping for the product as whole.

- Article 2.4 of the *AD Agreement* because the United States has not made a fair comparison between normal value and export price.

- Article 2.4.2 of the *AD Agreement* because the United States has used an asymmetrical method of comparison, and zeroed, without determining and demonstrating that the conditions provided for in that provision are met.

- Article 9.3 of the *AD Agreement* and Article VI:2 of the GATT 1994 because the United States has not re-calculated margins of dumping for the product as a whole, and has failed to ensure that the amount of duty does not exceed the dumping margin, as calculated in conformity with Article 2.

- Article 11, including Article 11.1 and 11.2, because the re-calculation of the cash deposit rate is also subject to the obligations set out in those provisions, and must be calculated in accordance with the rules in Article 2, as set out above, but has not been so calculated.

3. With respect to Case No. 11 – *Stainless Steel Sheet and Strip in Coils from Italy* (*A-475-824*), in its Issues and Decision Memorandum of 20 August 2007 (*Final Results for the Section 129 Determination: Certain Stainless Steel Sheet and Strip in Coils from Italy*), the United States committed (or failed to remove) an obvious calculation error. When calculating an average unit value for a small number of US sales of the exporter in question, to which it applied a "facts available" percentage rate for the purpose of its dumping calculation, the United States erroneously inverted the fraction: instead of dividing total value by total volume, the United States has divided total volume by total value. This error artificially inflated the unit value and therefore the amount of dumping. If, in addition to eliminating zeroing, the United States would correct this obvious calculation error, the dumping margin would fall below *de minimis*, and the measure would be revoked. In respect of this measure there have been a number of subsequent review investigations as well as future review investigations involving zeroing. As regards the obvious calculation error, the European Communities claims that the measure is inconsistent with Articles 2.1 and 2.2 of the *AD Agreement* because there is an

obvious calculation error in the determination of normal value (and thus in the dumping margin); and Article 6.8 and Annex II of the *AD Agreement* because the United States has failed to correctly apply facts available. As regards zeroing and failure to revoke the measure, the US failed to properly implement the DSB recommendations and rulings since duties calculated with zeroing continue to be imposed, collected or liquidated. For the reasons set out above, this is inconsistent with Article 2, including 2.1, 2.4 and 2.4.2, Article 5.8 (since the dumping margin is *de minimis* the measure should have been terminated), Article 9.3 and Article 11, including 11.1 and 11.2 of the *AD Agreement* and Article VI:2 of the GATT 1994.

4. With respect to all measures (original investigations and administrative reviews) that were found inconsistent with the US' WTO obligations, the US continues to impose, collect or liquidate anti-dumping duties at a rate inflated by "zeroing" beyond 9 April 2007. With regard to those measures which were revoked by the Section 129 determinations[7], the US continues to impose, collect or liquidate anti-dumping duties after 9 April 2007. For the reasons set out above, this is inconsistent with the provisions cited in paragraph 1 of this Panel Request, as well as with Article 2, including 2.1, 2.4 and 2.4.2, Article 5.8 (since the United States did not immediately terminate the measures on evidence that there was no dumping or dumping below *de minimis* level), Article 9.3 and Article 11, including 11.1 and 11.2 of the *AD Agreement* and Articles VI:1 (since the United States imposes, collects or liquidates anti-dumping duties in cases where the imported product is not dumped) and VI:2 of the GATT 1994.

5. In three cases (Case No. *2*: *Stainless Steel Bar from France (A-427-820)*, Case No. 4: *Stainless Steel Bar from Italy (A-475-829)* and Case No. 5: *Stainless Steel Bar from the United Kingdom (A-412-822)*) in the Section 129 determinations, which concerned original investigations, the US re-determinations led to an unjustified increase in the "all others rate". The United States has imposed an "all others" rate based on rates calculated using a weighted average of exporters with zero or *de minimis* rates and "adverse facts available" rates. This is inconsistent with Article 2 (because there is no relation between the rate imposed and any margin of dumping calculated in accordance with Article 2), Article 6.8 and Annex II (because with respect to the "others" the United States has not correctly applied facts available and has, in particular, applied a rate partly based on "adverse facts available" to exporters which did not seek to impede the investigation and whose behaviour did not warrant the drawing of adverse inferences), Article 9, including 9.2 (because the United States has not imposed rates at an appropriate level nor taken steps to ensure non-discrimination), 9.3 (because the United States has taken no steps to ensure that the amount of duty does not exceed a lawfully calculated margin of dumping) and 9.4 (because the United States has included facts available margins in the calculation of an all others rate), and Article 18.1 (because the United States has taken a specific action against dumping other than in accordance with the provisions of the *AD Agreement*) of the *AD Agreement*.

6. With respect to original investigations in which the recalculation of dumping margins led to the conclusion that some exporters were not dumping or had *de minimis* dumping margins[8], the US maintained the Anti-Dumping order without establishing whether the remaining amount of dumped imports was causing injury to the domestic industry and whether this volume of dumped imports was not negligible. This is inconsistent with Articles 3.1, 3.2, 3.5, 5.8 of the *AD Agreement* and Article VI:1 of the GATT 1994. In particular:

[7] Cases Number 1, 2 (for Ugitech), 3 (for Einsal), 4 (for Acciaiera Valbruna S.p.A, Acciaiera Foroni S.p.A and Rodacciai S.p.A), 5 (for Corus Engineering Steels Ltd) and 6 in the Annex to this Panel Request.

[8] Cases Number 2, 3, 4 and 5 in the Annex to this Panel Request.

- Article 3.1 because it has failed to base its assessment on positive evidence and make an objective examination of the volume of dumped imports, and their effects and impact on the US industry.

- Article 3.2 because it has not correctly calculated the volume of dumped imports, or any increase, in absolute or relative terms, or their effects in the context of price undercutting.

- Article 3.5 because the US has not correctly demonstrated that the dumped imports are through the effects of dumping, causing injury, and have failed to properly examine other known factors, including non-dumped imports.

- Article 5.8 because the US has failed to properly examine whether or not the volume of dumped imports is negligible.

- Article VI:1 of the GATT 1994 because the US has failed to properly establish the existence of injurious dumping.

7. With regard to the 15 original investigations and 16 administrative reviews, the US has continued zeroing in the reviews related to the measures in question. The United States has not eliminated zeroing in these reviews though they determine the cash deposit rate currently applicable, and/or are relied upon to maintain the AD measure or to impose, collect or liquidate anti-dumping duties at a rate inflated by zeroing after 9 April 2007. Details of the reviews in question are set out in the annex. For the reasons set out above, this is inconsistent with Article 2, including 2.1, 2.4 and 2.4.2, Article 9.3, and Article 11, including 11.1, 11.2 and 11.3 (since, by relying on zeroed dumping margins, the United States did not properly determine that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury) of the *AD Agreement* and Articles VI:1 and VI:2 of the GATT 1994.

The European Communities reserves its rights in respect of all other aspects of the United States' purported compliance with its obligations in this case. In particular, the European Communities reserves its right to revisit certain measures in the light of the eventual outcome of challenges to them in United States' courts.

The European Communities requests that the Panel be established with the standard terms of reference set out in Article 7 of the DSU, and asks that this request be placed on the agenda of the meeting of the DSB on 25 September 2007. The European Communities recalls that Article 21.5 DSU provides that this dispute shall be decided through recourse to the DSU, including wherever possible resort to the original panel.

Pursuant to paragraph 2 of the Sequencing Agreement, the European Communities notes that United States shall accept the establishment of the panel at the first DSB meeting at which the European Communities' request for the establishment of an Article 21.5 panel appears on the agenda.

ANNEX

I. Reviews of the measures imposed in the 15 original investigations condemned in DS294

Product	MS	DOC Case Number (ITC Case No)	DOC Final Determination	ITC Determination	AD Order	Subsequent reviews
1. Certain hot-rolled carbon steel	NL	A-421-807 (A-903)	66 FR 50408, October 3, 2001 (amended: 66 FR 55637, November 2, 2001)	November 2001	66 FR 59565, November 29, 2001	**Administrative Reviews** 3 May 2001 – 31 Oct 2002 (69FR 43801, July 22 2004) **4.8%** 1 Nov 2002 – 31 Oct 2003 (70FR 18366, April 11, 2005) **4.42%** 1 Nov 2004 – 31 Oct 2005 (72FR 34441, June 22, 2007) **2.26%**
2. Stainless steel bar	F	A-427-820 (A-913)	67 FR 3143, January 23, 2002	February 2002	67 FR 10385, March 7, 2002	**Administrative Reviews:** 1 March 2003 – 29 February 2004 (70 FR 46482, August 10, 2005) **Ugitech 14.98%** 1 March 2004 – 28 February 2005 (71 FR 30873, May 31 2006) **Ugitech 9.68%** **Sunset Review:** DOC Final Determination 72 FR 30772, June 4, 2007

Product	MS	DOC Case Number (ITC Case No)	DOC Final Determination	ITC Determination	AD Order	Subsequent reviews
3. Stainless steel bar	G	A-428-830 (A-914)	67 FR 3159, January 23, 2002 (amended: 67 FR 10382, March 7, 2002)	February 2002	67 FR 10382, March 7, 2002	**Administrative Reviews:** 2 August 2001–28 February 2003 (69 FR 32982, June 14, 2004) **BGH 0.52%** 1 March 2004–28 February 2005 (71 FR 52063, September 1, 2006) **BGH 0.73%** **Sunset Review:** DOC Preliminary Determination 72 FR 29970, May 30, 2007
4. Stainless steel bar	I	A-475-829 (A-915)	67 FR 3155, January 23, 2002 (amended: 67 FR 8228, February 22, 2002)	February 2002	67 FR 10384, March 7, 2002	**Administrative Review:** 2 August 2001–28 February 2003 (69 FR 32984, June 14, 2004) **Foroni 4.03%** **Ugine 33%** **Sunset Review:** DOC Final Determination 72 FR 30772, June 4, 2007

Product	MS	DOC Case Number (ITC Case No)	DOC Final Determination	ITC Determination	AD Order	Subsequent reviews
5. Stainless steel bar	UK	A-412-822 (A-918)	67 FR 3146, January 23, 2002	February 2002	67 FR 10381, March 7, 2002	**Administrative review**: 1 March 2005 – 28 February 2006(72 FR 15106, March 30, 2007) **Enpar Special Alloys 33.87%** **Sunset Review:** DOC Final Determination 72 FR 30772, June 4, 2007
6. Stainless Steel Wire Rod	SW	A-401-806 (A-774)	63 FR40449, July 29,1998	September 1998	63 FR49329, September 15, 1998	**Administrative reviews**: 1 Sept. 2004 – 31 August 2005 (72FR 26337, May 9, 2007) **Fagersta 19.36%** **Sunset Review:** Continuation order, 69 FR 50167, August 13, 2004
7. Stainless Steel Wire Rod	E	A-469-807 (A-773)	63 FR40391, July 29,1998	September 1998	63 FR 49330, September 15, 1998	**Administrative review**: 5 March 1998 – 31 August 1999 (66 FR 10988, February 21, 2001) **Roldan SA 0,8%** **Sunset Review:** Continuation Order 69FR 50167, August 13, 2004
8. Stainless Steel Wire Rod	I	A-475-820 (A-770)	63 FR40422, July 29,1998	September 1998	63 FR 49327, September 15, 1998	**Sunset Review:** Continuation Order 69FR 50167, August 13, 2004

Product	MS	DOC Case Number (ITC Case No)	DOC Final Determination	ITC Determination	AD Order	Subsequent reviews
9. Certain Stainless Steel Plate in Coils	B	A-423-808 (A-788)	64 FR15476, March 31, 1999	May 1999	64 FR 27756, May 21, 1999 (amended by 68 FR 20114 April 24, 2003)	**See case 18 below**
10. Stainless Steel Sheet and Strip in Coils	F	A-427-814 (A-797)	64 FR30820, June 8, 1999	July 1999	64 FR 40562, July 27, 1999	See Cases 25 & 26 below **Measure revoked** July 2004 (70 FR 44894, August 4, 2005)
11. Stainless Steel Sheet and Strip in Coils	I	A-475-824 (A-799)	64 FR30750, June 8, 1999	July 1999	64 FR 40567, July 27, 1999	See cases 21 & 22 below
12. Stainless Steel Sheet and Strip in Coils	UK	A-412-818 (A-804)	64 FR30688, June 8,1999	July 1999	64 FR 40555, July 27,1999	**Measure revoked**: July 2004 (70 FR 44894, August 4, 2005)
13. Certain Cut-to-Length Carbon-Quality Steel Plate	F	A-427-816 (A-816)	64 FR73143, December 29,1999	February 2000	65 FR 6585, February 10, 2000	**Measure revoked**: February 2005 (70 FR 72787, December 7, 2005)
14. Certain Cut-to-Length Carbon-Quality Steel Plate	I	A-475-826 (A-819)	64 FR73234, December 29,1999	February 2000	65 FR 6585, February 10, 2000	**Sunset review:** Continuation Order (70FR 72607, December 6, 2005)
15. Certain Pasta	I	A-475-818 A-734)	61 FR30326, June 14, 1996 (amended by 66 FR65889, December 21,2001)	July 1996	61 FR38547 July 24, 1996	See Cases 19 & 20 below

Reviews subsequent to the 16 administrative reviews condemned in DS294

Product	MS	No Case	Final Results	Company	Subsequent Reviews
16. Industrial Nitrocellulose	F	A-427-009	66 FR 54213, October 26, 2001	Bergerac NC	Two subsequent Administrative reviews were rescinded, covering the periods: 1 August 2000 – 31 July 2001 1 August 2002 – 31 July 2003 **Measure revoked**: (69 FR 52231, August 25, 2004)
17. Industrial Nitrocellulose	UK	A-412-803	67 FR 77747, December 19, 2002	Imperial Chemical Industries	Two subsequent Administrative reviews were rescinded, covering the periods: 1 July 2001 – 30 June 2002 1 July 2002 – 30 June 2003 Changed circumstance review (Dec, 2003) confirmed the rate of 3.06% to apply to Troon Investments, successor to ICI **Measure revoked**: (69 FR 52231, August 25, 2004)
18. Stainless steel plate in coils	B	A-423-808	67 FR 64352, October 18, 2002	ALZ NV & TrefilARBED (affiliated US importer) – Same company Ugine & ALZ, N.V. Belgium (U&A Belgium).	Two subsequent reviews resulting in change to rate: 1 May 2002 – 30 April 2003 (70FR 2999, January 19, 2005) **2.71%** 1 May 2003 – 30 April 2004 (70FR 72789, December 7, 2005) **2.96%** **Sunset Review:** Continuation Order 70 FR 41202, July 18, 2005

Product	MS	No Case	Final Results	Company	Subsequent Reviews
19. Certain pasta	I	A-475-818	67 FR 300, January 3, 2002 Amended: 67 FR 5088, February 4, 2002	1) Ferrara 2) Pallante 3) PAM	Ferrara: Order revoked in February 2005 following third consecutive review where the company had *de minimis* rate (70FR6832, February 9, 2005) Pallante: Order revoked in November 2005 following third consecutive review where the company had *de minimis* rate (70 FR71464, November 29, 2005) PAM: Two subsequent reviews resulting in change to rate: 1 July 2001 – 30 June 2002 (69FR 6255, February 10, 2004) **45.49%** 1 July 2002 – 30 June 2003 (70FR 6832, February 9, 2005) **4.78%** **Sunset review:** DOC Final Determination 72FR 5266 February 5, 2007
20. Certain pasta	I	A-475-818	68 FR 6882, February 11, 2003	Pastifi Garofalo	One subsequent review resulting in change to rate: 1 July 2001 – 30 June 2002 (69 FR 22761, April 27, 2004) **2.57%** One review rescinded covering period: 1 July 2002 – 30 June 2003
21. Stainless steel sheet strip coils	I	A-475-824	67 FR 1715, January 14, 2002	Acciai Speciali Terni SpA	See Case 22

Product	MS	No Case	Final Results	Company	Subsequent Reviews
22. Stainless steel sheet strip coils	I	A-475-824	68 FR 6719, February 10, 2003	Acciai Speciali Terni SpA	Two subsequent reviews resulting in change to rate: 1 July 2001 – 30 June 2002 (68FR 69382, December 12, 2003) **1.62%** 1 July 2002 – 30 June 2003 (70FR 13009, March 17, 2005) **3.73%** **Sunset review:** Continuation Order 70 FR 44886, August 4, 2005
23. Granular polytetrafluoenthylene	I	A-475-703	67 FR 1960, January 15, 2002	Ausimont SpA	See Case 24
24. Granular polytetrafluoenthylene	I	A-475-703	68 FR 2007, January 15, 2003	Ausimont SpA	Two subsequent Administrative reviews were rescinded, covering the periods: 1 August 2002 – 31 July 2003 1 August 2003 – 31 July 2004 Changed circumstance review (May,2003) confirmed the rate of 12.08% to apply to Solvay Solexis, successor to Ausimont 1 subsequent review resulting in change to rate: 1 August 2004 – 31 July 2005 (72FR 1980, January 17, 2007 **39.13%** **Sunset review:** Continuation Order 70FR 76026, Dec. 22, 2005
25. Stainless steel sheet strip coils	F	A-427-814	67 FR 6493, February 12, 2002 Amended: 67 FR 12522, March 19, 2002	Ugine	See Case 26

Product	MS	No Case	Final Results	Company	Subsequent Reviews
26. Stainless steel sheet strip coils	F	A-427-814	67 FR 78773, December 26, 2002 Amended: 68 FR 4171, January 28, 2003	Ugine	3 subsequent reviews resulting in change to rate: 1 July 2001 – 30 June 2002 (68FR 69379, December 12, 2003) **2.93%** 1 July 2002 – 30 June 2003 (70 FR 7240, February 11, 2005) **9.65%** 1 July 2003 – 30 June 2004 (71 FR 6269, February 7, 2006) **12.31%** **Measure revoked:** 70 FR 44894, August 4, 2005
27. Stainless steel sheet strip coils	G	A-428-825	67 FR 7668, February 20, 2002 Amended: 67 FR 15178, March 29, 2002	KTN	See Case 28
28. Stainless steel sheet strip coils	G	A-428-825	68 FR 6716, February 10, 2003 Amended: 68 FR 14193, March 24, 2003	TKN (successor in interest of KTN)	4 subsequent reviews resulting in change to rate: 1 July 2001 – 30 June 2002 (69FR 6262, February 10, 2004) **3.72%** 1 July 2002 – 30 June 2003 (69 FR 75930, December 20, 2004) **7.03%** 1 July 2003 – 30 June 2004 (70 FR 73729 December 13, 2005) **9.5%** 1 July 2004 – 30 June 2005 (71 FR 74897, December 13, 2006) **2.45%** **Sunset review:** Continuation Order 70 FR 44886, August 4 2005

Product	MS	No Case	Final Results	Company	Subsequent Reviews
29. Ball bearings	F	A-427-801	67 FR 55780, August 30, 2002	SKF France SA and Sarma	SKF: 4 subsequent reviews resulting in change to rate: 1 May 2001 – 30 April 2002 68 FR 43712, July 24, 2003 **6.70%** 1 May 2002 – 30 April 2003 69 FR 55574, September 15, 2004 **5.25%** 1 May 2003 – 30 April 2004 70 FR 54711, September 16, 2005 **8.41%** 1 May 2004 – 30 April 2005 71 FR 40064, July 14, 2006 **12.57%** **Sunset Reviews:** Continuation Order 71 FR 54469, September 15, 2006
30. Ball bearings	I	A-475-801	67 FR 55780, August 30, 2002	FAG Italia SpA	FAG: 4 subsequent reviews resulting in change to rate: 1 May 2001 – 30 April 2002 68 FR 35623, June 16, 2003 **2.87%** 1 May 2002 – 30 April 2003 69 FR 55574, September 15, 2004 **4.79%** 1 May 2003 – 30 April 2004 70 FR 54711, September 16, 2005 **5.88%** 1 May 2004 – 30 April 2005 71 FR 40064, July 14, 2006 **2.52%**

Product	MS	No Case	Final Results	Company	Subsequent Reviews
				SKF Industrie SpA	SKF: 4 subsequent reviews resulting in change to rate: 1 May 2001 – 30 April 2002 68 FR 35623, June 16, 2003 **5.08%** 1 May 2002 – 30 April 2003 69 FR 55574, September 15, 2004 **1.38%** 1 May 2003 – 30 April 2004 70 FR 54711, September 16, 2005 **2.59%** 1 May 2004 – 30 April 2005 71 FR 40064, July 14, 2006 **7.65%** **Sunset Reviews:** Continuation Order 71 FR 54469, September 15, 2006
31. Ball bearings	UK	A-412-801	67 FR 55780, August 30, 2002	NSK Bearings Europe Ltd The Barden Corporation UK	NSK Bearings: No subsequent administrative reviews Barden: 1 subsequent administrative review rescinded for period: 1 May 2001 – 30 April 2002 2 subsequent reviews resulting in change to rate: 1 May 2002 – 30 April 2003 69 FR 55574, September 15, 2004 **4.10%** 1 May 2003 – 30 April 2004 70 FR 54711, September 16, 2005 **2.78%** **Sunset Reviews:** Continuation Order 71 FR 54469, September 15, 2006