

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

**RECOURSE TO ARTICLE 21.5 OF THE DSU BY  
THE EUROPEAN COMMUNITIES**

**AB-2009-1**

*Report of the Appellate Body*



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<i>Australia – Automotive Leather II (Article 21.5 – US)</i>	Panel Report, <i>Australia – Subsidies Provided to Producers and Exporters of Automotive Leather – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS126/RW and Corr.1, adopted 11 February 2000, DSR 2000:III, 1189
<i>Australia – Salmon</i>	Appellate Body Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327
<i>Australia – Salmon (Article 21.5 – Canada)</i>	Panel Report, <i>Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS18/RW, adopted 20 March 2000, DSR 2000:IV, 2031
<i>Canada – Aircraft (Article 21.5 – Brazil)</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU</i> , WT/DS70/AB/RW, adopted 4 August 2000, DSR 2000:IX, 4299
<i>Canada – Autos</i>	Appellate Body Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, 2985
<i>Canada – Continued Suspension</i>	Appellate Body Report, <i>Canada – Continued Suspension of Obligations in the EC – Hormones Dispute</i> , WT/DS321/AB/R, adopted 14 November 2008
<i>Canada – Periodicals</i>	Appellate Body Report, <i>Canada – Certain Measures Concerning Periodicals</i> , WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:I, 449
<i>Chile – Price Band System</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3045 (Corr.1, DSR 2006:XII, 5473)
<i>Chile – Price Band System (Article 21.5 – Argentina)</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina</i> , WT/DS207/AB/RW, adopted 22 May 2007
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<i>EC – Asbestos</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, 3243
<i>EC – Bananas III (Article 21.5 – Ecuador)</i>	Panel Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by Ecuador</i> , WT/DS27/RW/ECU, adopted 6 May 1999, DSR 1999:II, 803
<i>EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)</i>	Appellate Body Reports, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador</i> , WT/DS27/AB/RW2/ECU, adopted 11 December 2008, and Corr.1 / <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS27/AB/RW/USA and Corr.1, adopted 22 December 2008

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<i>EC – Bed Linen (Article 21.5 – India)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, 965
<i>EC – Bed Linen (Article 21.5 – India)</i>	Panel Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/RW, adopted 24 April 2003, as modified by Appellate Body Report WT/DS141/AB/RW, DSR 2003:IV, 1269
<i>EC – Chicken Cuts</i>	Appellate Body Report, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts</i> , WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, DSR 2005:XIX, 9157
<i>EC – Commercial Vessels</i>	Panel Report, <i>European Communities – Measures Affecting Trade in Commercial Vessels</i> , WT/DS301/R, adopted 20 June 2005, DSR 2005:XV, 7713
<i>EC – Sardines</i>	Panel Report, <i>European Communities – Trade Description of Sardines</i> , WT/DS231/R and Corr.1, adopted 23 October 2002, as modified by Appellate Body Report WT/DS231/AB/R, DSR 2002:VIII, 3451
<i>India – Autos</i>	Panel Report, <i>India – Measures Affecting the Automotive Sector</i> , WT/DS146/R, WT/DS175/R and Corr.1, adopted 5 April 2002, DSR 2002:V, 1827
<i>Korea – Dairy</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3
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<i>Mexico – Corn Syrup (Article 21.5 – US)</i>	Appellate Body Report, <i>Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6675
<i>US – Anti-Dumping Measures on Oil Country Tubular Goods</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico</i> , WT/DS282/AB/R, adopted 28 November 2005, DSR 2005:XX, 10127
<i>US – Certain EC Products</i>	Panel Report, <i>United States – Import Measures on Certain Products from the European Communities</i> , WT/DS165/R and Add.1, adopted 10 January 2001, as modified by Appellate Body Report WT/DS165/AB/R, DSR 2001:II, 413
<i>US – Continued Suspension</i>	Appellate Body Report, <i>United States – Continued Suspension of Obligations in the EC – Hormones Dispute</i> , WT/DS320/AB/R, adopted 14 November 2008
<i>US – Continued Zeroing</i>	Appellate Body Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/AB/R, adopted 19 February 2009
<i>US – Corrosion-Resistant Steel Sunset Review</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, 3
<i>US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)</i>	Panel Report, <i>United States – Countervailing Measures Concerning Certain Products from the European Communities – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS212/RW, adopted 27 September 2005, DSR 2005:XVIII, 8950

Short title	Full case title and citation
<i>US – Customs Bond Directive</i>	Panel Report, <i>United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties</i> , WT/DS345/R, adopted 1 August 2008, as modified by Appellate Body Report WT/DS343/AB/R, WT/DS345/AB/R
<i>US – FSC (Article 21.5 – EC)</i>	Appellate Body Report, <i>United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, 55
<i>US – FSC (Article 21.5 – EC II)</i>	Appellate Body Report, <i>United States – Tax Treatment for "Foreign Sales Corporations" – Second Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS108/AB/RW2, adopted 14 March 2006, DSR 2006:XI, 4721
<i>US – Gambling (Article 21.5 – Antigua and Barbuda)</i>	Panel Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Recourse to Article 21.5 of the DSU by Antigua and Barbuda</i> , WT/DS285/RW, adopted 22 May 2007
<i>US – Hot-Rolled Steel</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697
<i>US – Hot-Rolled Steel</i>	Panel Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/R, adopted 23 August 2001 modified by Appellate Body Report WT/DS184/AB/R, DSR 2001:X, 4769
<i>US – Line Pipe</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea</i> , WT/DS202/AB/R, adopted 8 March 2002, DSR 2002:IV, 1403
<i>US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)</i>	Appellate Body Report, <i>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</i> , WT/DS268/AB/RW, adopted 11 May 2007
<i>US – Section 129(c)(1) URAA</i>	Panel Report, <i>United States – Section 129(c)(1) of the Uruguay Round Agreements Act</i> , WT/DS221/R, adopted 30 August 2002, DSR 2002:VII, 2581
<i>US – Shrimp</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755
<i>US – Shrimp (Article 21.5 – Malaysia)</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia</i> , WT/DS58/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6481
<i>US – Shrimp (Article 21.5 – Malaysia)</i>	Panel Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia</i> , WT/DS58/RW, adopted 21 November 2001, as upheld by Appellate Body Report WT/DS58/AB/RW, DSR 2001:XIII, 6529
<i>US – Shrimp (Thailand) / US – Customs Bond Directive</i>	Appellate Body Report, <i>United States – Measures Relating to Shrimp from Thailand / United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties</i> , WT/DS343/AB/R, WT/DS345/AB/R, adopted 1 August 2008
<i>US – Shrimp (Thailand)</i>	Panel Report, <i>United States – Measures Relating to Shrimp from Thailand</i> , WT/DS343/R, adopted 1 August 2008, as modified by Appellate Body Report WT/DS343/AB/R, WT/DS345/AB/R



Short title	Full case title and citation
<i>US – Softwood Lumber IV</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, 571
<i>US – Softwood Lumber IV (Article 21.5 – Canada)</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 of the DSU</i> , WT/DS257/AB/RW, adopted 20 December 2005, DSR 2005:XXIII, 11357
<i>US – Softwood Lumber IV (Article 21.5 – Canada)</i>	Panel Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 [of the DSU]</i> , WT/DS257/RW, adopted 20 December 2005, as upheld by Appellate Body Report WT/DS257/AB/RW, DSR 2005:XXIII, 11401
<i>US – Stainless Steel (Mexico)</i>	Appellate Body Report, <i>United States – Final Anti-Dumping Measures on Stainless Steel from Mexico</i> , WT/DS344/AB/R, adopted 20 May 2008
<i>US – Steel Safeguards</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, 3117
<i>US – Upland Cotton</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, 3
<i>US – Upland Cotton (Article 21.5 – Brazil)</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil</i> , WT/DS267/AB/RW, adopted 20 June 2008
<i>US – Upland Cotton (Article 21.5 – Brazil)</i>	Panel Report, <i>United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil</i> , WT/DS267/RW and Corr.1, adopted 20 June 2008, as modified by Appellate Body Report WT/DS267/AB/RW
<i>US – Wheat Gluten</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, 717
<i>US – Zeroing (EC)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")</i> , WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, 417
<i>US – Zeroing (EC)</i>	Panel Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")</i> , WT/DS294/R, adopted 9 May 2006, as modified by Appellate Body Report WT/DS294/AB/R, DSR 2006:II, 521
<i>US – Zeroing (EC) (Article 21.5 – EC)</i>	Panel Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS294/RW, circulated to WTO Members 17 December 2008
<i>US – Zeroing (Japan)</i>	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews</i> , WT/DS322/AB/R, adopted 23 January 2007

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
<i>Ad Note</i>	Interpretive Note to paragraphs 2 and 3 of Article VI of the GATT 1994
<i>Anti-Dumping Agreement</i>	<i>Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994</i>
Cases 1 through 31	As listed in the Annex to the European Communities request for the establishment of a panel pursuant to Article 21.5 of the DSU, WT/DS294/25, annexed to the Panel Report, Annex A-1
Customs	United States Customs and Border Protection
DSB	Dispute Settlement Body
DSU	<i>Understanding on Rules and Procedures Governing the Settlement of Disputes</i>
GATT 1994	<i>General Agreement on Tariffs and Trade 1994</i>
ILC Draft Articles	Draft Articles on Responsibility of States for internationally wrongful acts, adopted by the International Law Commission at its fifty-third session (2001), annexed to the United Nations General Assembly Resolution A/RES/56/83 (29 January 2002)
NSK	NSK Bearings Europe Ltd.
original panel	Panel in the original <i>US – Zeroing (EC)</i> proceedings
original panel report	Report of the panel in the original <i>US – Zeroing (EC)</i> proceedings
Panel	Panel in these <i>US – Zeroing (EC) (Article 21.5 – EC)</i> proceedings
Panel Report	Report of the Panel in these <i>US – Zeroing (EC) (Article 21.5 – EC)</i> proceedings
Section 129	Section 129 of the Uruguay Round Agreements Act, Public Law No. 103-465, 108 Stat. 4836, <i>United States Code</i> , Title 19, Section 3538 (2000)
<i>SPS Agreement</i>	<i>Agreement on the Application of Sanitary and Phytosanitary Measures</i>
subsequent reviews	The subsequent administrative, changed circumstances, and sunset reviews adopted in relation to the 15 original investigations and the 16 administrative reviews at issue in the original proceedings challenged by the European Communities in these Article 21.5 proceedings
Tariff Act	United States Tariff Act of 1930, Public Law No. 1202-1527, 46 Stat. 741, <i>United States Code</i> , Title 19, Chapter 4, as amended
TKAST	ThyssenKrupp Acciai Speciali Terni S.p.A. and ThyssenKrupp AST USA
URAA	Uruguay Round Agreements Act
USDOC	United States Department of Commerce
USITC	United States International Trade Commission

<b>Abbreviation</b>	<b>Description</b>
<i>Vienna Convention</i>	<i>Vienna Convention on the Law of Treaties</i> , done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
<i>Working Procedures</i>	<i>Working Procedures for Appellate Review</i> , WT/AB/WP/5, 4 January 2005
WTO	World Trade Organization
<i>WTO Agreement</i>	<i>Marrakesh Agreement Establishing the World Trade Organization</i>



WORLD TRADE ORGANIZATION  
APPELLATE BODY

**United States – Laws, Regulations and  
Methodology for Calculating Dumping  
Margins ("Zeroing")**

Recourse to Article 21.5 of the DSU by the  
European Communities

European Communities, *Appellant/Appellee*  
United States, *Other Appellant/Appellee*

India, *Third Participant*  
Japan, *Third Participant*  
Korea, *Third Participant*  
Mexico, *Third Participant*  
Norway, *Third Participant*  
Separate Customs Territory of Taiwan, Penghu,  
Kinmen and Matsu, *Third Participant*  
Thailand, *Third Participant*

AB-2009-1

Present:

Oshima, Presiding Member  
Bautista, Member  
Hillman, Member

**I. Introduction**

1. The European Communities and the United States each appeals certain issues of law and legal interpretations developed in the Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities*<sup>1</sup> (the "Panel Report"). The Panel was established pursuant to Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU") to consider a complaint by the European Communities concerning the existence and consistency with the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "Anti-Dumping Agreement") and the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994") of measures taken by the United States to comply with the recommendations and rulings of the Dispute Settlement Body (the "DSB") in the original proceedings in *US – Zeroing (EC)*.<sup>2</sup>

2. The original proceedings concerned the use of the so-called "zeroing" methodology by the United States Department of Commerce (the "USDOC") when calculating margins of dumping in the context of various anti-dumping proceedings. The original panel found that the United States' zeroing

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<sup>1</sup>WT/DS294/RW, 17 December 2008.

<sup>2</sup>The recommendations and rulings of the DSB resulted from the adoption on 9 May 2006, by the DSB, of the Appellate Body Report, WT/DS294/AB/R, and the Panel Report, WT/DS294/R, in *US – Zeroing (EC)*. In this Report, we refer to the panel that considered the original complaint brought by the European Communities as the "original panel" and to its report as the "original panel report".

methodology, as it relates to original investigations<sup>3</sup>, "is a norm which, as such, is inconsistent with Article 2.4.2 of the [*Anti-Dumping*] Agreement."<sup>4</sup> The original panel also found that the United States acted inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement* by applying "model zeroing"<sup>5</sup> in 15 specific original investigations.<sup>6</sup> The original panel also found that the use of "simple zeroing"<sup>7</sup> in 16 specific administrative reviews<sup>8</sup> was not 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 the GATT 1994, and Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*").<sup>9</sup>

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<sup>3</sup>In this Report, we use the term "original investigations" to refer to investigations within the meaning of Article 5 of the *Anti-Dumping Agreement*.

<sup>4</sup>Original Panel Report, paras. 7.106 and 8.1(c). The original panel also found that other measures challenged by the European Communities, such as the "Standard Zeroing Procedures", Sections 731, 751(a)(2)(A)(i)-(ii), 771(35)(A)-(B), and 777(A)(d) of the United States Tariff Act of 1930 (Public Law No. 1202-1527, 46 Stat. 741, *United States Code*, Title 19, Chapter 4, as amended) (the "Tariff Act"), and Section 351.414(c)(2) of the USDOC Regulations, were not inconsistent, as such, with Articles 1, 2.4, 2.4.2, 5.8, 9.3, 11.1, 11.2, 11.3, 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*. (See *ibid.*, paras. 7.69, 7.291, 7.294, and 8.1(b), (g), and (f))

<sup>5</sup>Before the original panel, the European Communities used the term "model zeroing" to describe a methodology whereby an investigating authority compares the weighted average normal value and the weighted average export price for each model of the product under investigation, and treats as zero the results of model-specific comparisons where the weighted average export price exceeds the weighted average normal value when aggregating comparison results for the purposes of calculating a margin of dumping for the product under investigation. (See Original Panel Report, paras. 2.3 and 2.10)

<sup>6</sup>See Original Panel Report, paras. 7.32 and 8.1(a). The original panel reasoned that, when a margin of dumping is calculated on the basis of multiple averaging by model type, Article 2.4.2 requires that the margin of dumping for the product in question reflect the results of all such comparisons, including weighted average export prices that are above the normal value for individual models. (See *ibid.*, para. 7.31) The original investigations challenged by the European Communities before the original panel were listed in Panel Exhibits EC-1 through EC-15. (See *ibid.*, paras. 2.6 and footnote 119 to para. 7.9) The original panel exercised judicial economy in relation to the European Communities' claims under 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*. (See *ibid.*, para. 8.2)

<sup>7</sup>Before the original panel, the European Communities used the term "simple zeroing" in administrative reviews to describe a methodology whereby an investigating authority compares the prices of individual export transactions against monthly weighted average normal values and treats as zero the results of comparisons where the export price exceeds the monthly weighted average normal value when aggregating comparison results. (See Original Panel Report, paras. 2.5 and 2.12)

<sup>8</sup>In this Report, we use the term "administrative review" to describe the "periodic review of the amount of anti-dumping duty" as required in Section 751(a) of the Tariff Act. That provision requires the USDOC to review and determine the amount of any anti-dumping duty at least once during each 12-month period beginning on the anniversary of the date of publication of an anti-dumping duty order if a request for such a review has been received. The administrative reviews challenged by the European Communities before the original panel were listed in Panel Exhibits EC-16 through EC-31. (See Original Panel Report, para. 2.6 and footnote 202 to para. 7.110)

<sup>9</sup>See Original Panel Report, paras. 7.223, 7.284, 7.288, and 8.1(d), (e), and (f). The original panel reasoned, *inter alia*, that Articles 2.4 and 2.4.2 did not expressly prohibit the use of zeroing in asymmetric comparisons between weighted average normal value and export prices for individual transactions. (See *ibid.*, paras. 7.223 and 7.284)

3. On appeal, the Appellate Body upheld, on the basis of modified reasoning, the original panel's finding that the zeroing methodology, as it relates to original investigations in which the weighted average-to-weighted average comparison methodology is used to calculate margins of dumping, is inconsistent, as such, with Article 2.4.2 of the *Anti-Dumping Agreement*.<sup>10</sup> However, the Appellate Body reversed the original panel's finding that the United States did not act inconsistently with Articles 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 in the 16 administrative reviews at issue, and found instead that the use of zeroing in those administrative reviews was inconsistent with those provisions.<sup>11</sup> The Appellate Body stated that the terms "dumping" and "margins of dumping" in Article VI of the GATT 1994 and the *Anti-Dumping Agreement* apply to the product under investigation as a whole, and that, under Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, margins of dumping are established for foreign producers or exporters.<sup>12</sup> The Appellate Body reasoned that Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 require investigating authorities to ensure that the total amount of anti-dumping duties collected on entries of a product from a given exporter shall not exceed the margin of dumping for that exporter or foreign producer as established under Article 2 of the *Anti-Dumping Agreement*.<sup>13</sup> The Appellate Body held that, "if a 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 margins of dumping for the product as a whole" and, therefore, "the margins of dumping with which the assessed anti-dumping duties have to be compared under Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 are foreign producers' or exporters' margins of dumping that reflect the results of all of the multiple comparisons carried out at an intermediate stage of the calculation."<sup>14</sup> According to the Appellate Body, the USDOC acted inconsistently with this requirement because, by disregarding the results of comparisons for which the export price of specific transactions exceeded the contemporaneous average normal value, it assessed anti-dumping duties in excess of the exporters'

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<sup>10</sup>See Appellate Body Report, *US – Zeroing (EC)*, paras. 222 and 263(b).

<sup>11</sup>See Appellate Body Report, *US – Zeroing (EC)*, paras. 135 and 263(a)(i). The Appellate Body also declared "moot, and of no legal effect" the original panel's finding on Article VI:1 of the GATT 1994; declined to rule on the European Communities' claim and declared "moot, and of no legal effect" the original panel's findings under the first sentence of Article 2.4 of the *Anti-Dumping Agreement*; upheld the original panel's finding that zeroing is not an impermissible allowance or adjustment under Article 2.4, third to fifth sentences, of the *Anti-Dumping Agreement*; declined to rule on the European Communities' conditional appeal under Article 2.4.2 of the *Anti-Dumping Agreement*; upheld the original panel's finding that the United States did not act inconsistently with Articles 11.1 and 11.2 of the *Anti-Dumping Agreement*; and considered it was not necessary to rule on whether the zeroing methodology, as applied in the administrative reviews at issue, was inconsistent with Articles 1 and 18.4 of the *Anti-Dumping Agreement* and Article XVI:4 of the *WTO Agreement*. (See *ibid.*, paras. 135, 147, 159, 164, 169, 172, and 263(a)(iii)-(vii))

<sup>12</sup>See Appellate Body Report, *US – Zeroing (EC)*, paras. 126 and 129.

<sup>13</sup>See Appellate Body Report, *US – Zeroing (EC)*, para. 130.

<sup>14</sup>Appellate Body Report, *US – Zeroing (EC)*, para. 132.

margins of dumping.<sup>15</sup> However, the Appellate Body found that it could not complete the analysis to determine whether the zeroing methodology, as it relates to administrative reviews, is inconsistent, as such, 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 the GATT 1994, and Article XVI:4 of the *WTO Agreement*.<sup>16</sup>

4. On 9 May 2006, the DSB adopted the original panel and Appellate Body reports. The reasonable period of time for the United States to implement the recommendations and rulings of the DSB, mutually agreed by the parties pursuant to Article 21.3(b) of the DSU, was 11 months, expiring on 9 April 2007.<sup>17</sup>

5. On 27 December 2006, the United States announced that it would terminate the use of "model zeroing" in original investigations in which the margins of dumping are determined on the basis of weighted average-to-weighted average comparisons of export prices and normal value. This modification became effective on 22 February 2007. On 1 March 2007, the USDOC initiated proceedings pursuant to Section 129 of the Uruguay Round Agreements Act<sup>18</sup> (the "URAA") covering 12 of the 15 original investigations at issue in the original proceedings.<sup>19</sup> On 9 April 2007, the USDOC issued Section 129 determinations in which it recalculated, without zeroing, the margins of dumping for 11 of the original investigations at issue in the original proceedings. The results of those Section 129 determinations became effective two weeks later, on 23 April 2007. The Section 129 determination in the remaining case was issued on 20 August 2007, effective 31 August 2007. The recalculation without zeroing of the margins of dumping for the exporters concerned led to the revocation of two of the remaining 12 anti-dumping duty orders.<sup>20</sup> The remaining 10 original anti-dumping duty orders were revoked for the exporters or producers for which the USDOC found zero or *de minimis* margins, whereas, for other exporters or producers, duties were either reduced or increased as a result of the recalculation. In addition, the USDOC issued, in the ordinary course, administrative review determinations with respect to anti-dumping duty orders relating to the original investigations at issue in the original proceedings. The USDOC continued to apply zeroing when calculating margins of dumping in those administrative reviews.<sup>21</sup>

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<sup>15</sup>See Appellate Body Report, *US – Zeroing (EC)*, para. 133.

<sup>16</sup>See Appellate Body Report, *US – Zeroing (EC)*, paras. 228 and 263(c)(ii).

<sup>17</sup>WT/DS294/19.

<sup>18</sup>Section 129 of the Uruguay Round Agreements Act, Public Law No. 103-465, 108 Stat. 4836, *United States Code*, Title 19, Section 3538 (2000).

<sup>19</sup>Three of the 15 anti-dumping duty orders underlying the original investigations challenged by the European Communities had been previously revoked.

<sup>20</sup>See Panel Report, para. 3.1(b)(i).

<sup>21</sup>See Panel Report, para. 3.1(c).



6. With respect to the 16 administrative reviews at issue in the original proceedings, the United States considered that the cash deposit rates calculated in those proceedings—with the exception of one exporter—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[s]."<sup>22</sup>

7. Sunset reviews<sup>23</sup> were also conducted with respect to some of the measures at issue in the original proceedings. On 7 March 2007, following negative determinations by the United States International Trade Commission (the "USITC") of the likelihood of continuation or recurrence of injury, the USDOC revoked anti-dumping duty orders in four Cases where the original determinations had been challenged in the original proceedings. Twelve sunset review determinations issued in relation to the measures at issue in the original proceedings resulted in the continuation of the relevant anti-dumping duty order.<sup>24</sup>

8. On 13 September 2007, the European Communities requested that the matter of compliance with the recommendations and rulings of the DSB in *US – Zeroing (EC)* be referred to the original panel pursuant to Article 21.5 of the DSU.<sup>25</sup> On 25 September 2007, the DSB established the Article 21.5 panel. In an exchange of views relating to the composition of the compliance panel, the Secretariat of the World Trade Organization (the "WTO") indicated to the parties that two members of the original panel were not available to serve on the compliance panel.<sup>26</sup> In a letter to the WTO Secretariat dated 1 October 2007, the European Communities expressed the view that, as the remaining panelist was available, he should not be excluded from serving on the compliance panel.<sup>27</sup> On 28 November 2007, the European Communities requested the Director-General of the WTO to determine the composition of the panel. On 30 November 2007, the Director-General established the composition of the Panel by appointing three new panelists.

9. The European Communities made claims in relation to certain of the Section 129 determinations adopted by the United States to implement the recommendations and rulings of the DSB.<sup>28</sup> In addition, the European Communities challenged in these Article 21.5 proceedings

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<sup>22</sup>Panel Report, para. 3.1(d).

<sup>23</sup>In this Report, we use the term "sunset review" to describe the review of an anti-dumping duty order at the end of five years, as required by Section 751(c) of the Tariff Act and Article 11.3 of the *Anti-Dumping Agreement*. Article 11.3 requires the USDOC to conduct a review to determine, five years after the date of publication of an anti-dumping duty order, whether revocation of the anti-dumping duty order would likely lead to continuation or recurrence of dumping and material injury.

<sup>24</sup>See Panel Report, para. 3.1(e).

<sup>25</sup>WT/DS294/25.

<sup>26</sup>Panel Report, para. 5.64.

<sup>27</sup>Panel Report, para. 5.64.

<sup>28</sup>See Panel Report, para. 3.2(a) (referring to Cases 2, 3, 4, 5, and 11).

subsequent administrative reviews, changed circumstances reviews<sup>29</sup>, and sunset reviews adopted in relation to the 15 original investigations and the 16 administrative reviews at issue in the original proceedings (the "subsequent reviews")<sup>30</sup>, as well as liquidation and assessment instructions and final liquidation of duties resulting from those subsequent reviews.<sup>31</sup> The European Communities further challenged related omissions and deficiencies in the United States' implementation of the DSB's recommendations and rulings.<sup>32</sup> The European Communities also claimed that the Panel composition was not consistent with Articles 21.5 and 8.3 of the DSU.

10. Before the Panel in these Article 21.5 proceedings, the European Communities claimed that the United States failed to comply with the recommendations and rulings of the DSB, and acted inconsistently with Articles 2.1, 2.4, 2.4.2, 9.3, and 11.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, when, after the end of the reasonable period of time, the United States:

- (a) extended the measures at issue in the original proceedings pursuant to sunset review determinations that relied on margins of dumping calculated with zeroing;
- (b) continued to collect anti-dumping duties and established new cash deposit rates based on zeroing with respect to the measures at issue in the original proceedings and subsequent reviews;
- (c) failed to revoke fully the anti-dumping duty orders underlying the original investigations at issue in the original proceedings;
- (d) continued to collect duties based on zeroing in relation to the 16 administrative reviews at issue in the original proceedings and in subsequent administrative reviews, and continued to rely on margins of dumping calculated with zeroing in sunset reviews subsequent to those administrative reviews; and

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<sup>29</sup>In this Report, we use the term "changed circumstances review" to describe the review of a final affirmative dumping determination or suspension agreement, as required by Section 751(b) of the Tariff Act. That provision requires the USDOC to review a final dumping determination or a suspension agreement based upon a request by an interested party demonstrating that changed circumstances warrant a review of such a determination.

<sup>30</sup>In the Annex to its request for the establishment of a panel under Article 21.5 of the DSU, the European Communities identified 31 "Cases". In relation to each of these Cases, it also identified reviews subsequent to the 15 original investigations (Cases 1 through 15) and the 16 administrative reviews (Cases 16 through 31) at issue in the original proceedings. For ease of reference, we will use the same numbering system in this Report to facilitate identification of the 31 Cases and the various proceedings at issue, as listed in the panel request attached to the Panel Report as Annex A-1, pp. A-7 to A-16. (See Panel Report, footnote 34 to para. 3.1)

<sup>31</sup>See Panel Report, para. 3.2(b) and (c).

<sup>32</sup>See Panel Report, para. 3.2(d).

- (e) failed to take any measure to comply with the DSB's recommendations and rulings between the end of the reasonable period of time (9 April 2007) and the date on which the Section 129 determinations became effective (23 April and 31 August 2007).<sup>33</sup>

11. The European Communities also claimed that the determination of the "all others" rate and an arithmetical error in the Section 129 determinations adopted by the United States to implement the recommendations and rulings of the DSB were inconsistent with Articles 2, 3.1, 3.2, 3.5, 5.8, 6.8 and Annex II, 9.3, 9.4, 11.1, and 11.2 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994.<sup>34</sup> The United States requested the Panel to reject these claims and to find that the United States had fully complied with the DSB's recommendations and rulings in the original proceedings.

12. The Panel Report was circulated to WTO Members on 17 December 2008. The Panel found, *inter alia*, that:

- (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 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.

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<sup>33</sup>Panel Report, para. 4.1(a)-(f).

<sup>34</sup>See Panel Report, para. 4.1(g)-(i).

- (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*.

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- (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.<sup>35</sup>

13. On 13 February 2009, the European Communities notified the DSB, pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law and legal interpretations developed in the Panel Report and filed a Notice of Appeal<sup>36</sup>, pursuant to Rule 20 of the *Working Procedures for Appellate Review*<sup>37</sup> (the "*Working Procedures*"). On 20 February 2009, the European Communities filed an appellant's submission.<sup>38</sup> On 25 February 2009, the United States notified the DSB, pursuant to Article 16.4 of the DSU, of its intention to appeal certain issues of law and legal interpretations developed in the Panel Report and filed a Notice of Other Appeal<sup>39</sup>, pursuant to Rule 23(1) and (2) of the *Working Procedures*. On 2 March 2009, the United States filed an other appellant's submission.<sup>40</sup> On 10 March 2009, the United States and the European Communities each filed an appellee's submission.<sup>41</sup> On 26 February 2009, Japan filed a third participant's submission<sup>42</sup>; on 10 March 2009, Korea and Norway each filed a third participant's submission<sup>43</sup> and India, Mexico, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, and Thailand each notified its intention to appear at the oral hearing and to make an opening statement.<sup>44</sup>

14. On 16 and 19 February 2009, respectively, the European Communities and the United States requested the Appellate Body Division hearing this appeal to authorize public observation of the oral hearing. Both participants relied on the reasoning of the Appellate Body in previous cases<sup>45</sup> to authorize public observation of the oral hearing, and expressed a preference for simultaneous

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<sup>35</sup>Panel Report, para. 9.1.

<sup>36</sup>WT/DS294/28 (attached as Annex I to this Report).

<sup>37</sup>WT/AB/WP/5, 4 January 2005.

<sup>38</sup>Pursuant to Rule 21 of the *Working Procedures*.

<sup>39</sup>WT/DS294/29 (attached as Annex II to this Report).

<sup>40</sup>Pursuant to Rule 23(3) of the *Working Procedures*.

<sup>41</sup>Pursuant to Rules 22 and 23(4) of the *Working Procedures*.

<sup>42</sup>Pursuant to Rule 24(1) of the *Working Procedures*.

<sup>43</sup>Pursuant to Rule 24(1) of the *Working Procedures*.

<sup>44</sup>Pursuant to Rule 24(2) of the *Working Procedures*.

<sup>45</sup>*US – Continued Suspension / Canada – Continued Suspension; EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US); US – Continued Zeroing.*

closed-circuit television broadcast to a separate room. On 20 February 2009, the Division invited the third participants to comment in writing on the requests of the European Communities and the United States, as well as the specific logistical arrangements proposed in the requests. Comments were received on 2 March 2009 from India, Japan, Korea, Mexico, Norway, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, and Thailand. Japan, Norway, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu expressed support for the requests of the participants. India, Mexico, and Thailand expressed the view that the provisions of the DSU do not allow public hearings at the appellate stage. Korea shared these concerns, but did not object to the public observation of the oral hearing. On 4 March 2009, the Division issued a Procedural Ruling in which it authorized the public observation of the oral hearing and adopted additional procedures on logistical arrangements in accordance with Rule 16(1) of the *Working Procedures*.<sup>46</sup> Notice of the opening of the hearing to public observation and registration instructions were provided on the WTO website.

15. The oral hearing in this appeal was held on 23-24 March 2009. The participants and third participants were given the opportunity to present oral arguments and respond to questions posed by the Division hearing the appeal. Public observation took place via simultaneous closed-circuit television broadcast to a separate room.<sup>47</sup>

## **II. Arguments of the Participants and the Third Participants**

### *A. Claims of Error by the European Communities – Appellant*

#### **1. Panel Composition**

16. The European Communities alleges that the Panel failed to comply with the "basic requirements of due process" and failed to ensure the "proper exercise of its judicial function" by not addressing the European Communities' claim that the Panel was composed in a manner inconsistent with Articles 8.3 and 21.5 of the DSU.<sup>48</sup> The European Communities submits that, because panels, and ultimately the Appellate Body, have the authority and the obligation to rule on the correct interpretation of the DSU, defects that could arise during panel composition are subject to judicial review. Therefore, the Panel could not have avoided the substance of the European Communities'

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<sup>46</sup>The Procedural Ruling is attached as Annex III to this Report.

<sup>47</sup>Pursuant to the additional procedures adopted by the Division, India, Korea, Mexico, and Thailand each requested that its oral statements and responses to questions remain confidential and not be subject to public observation.

<sup>48</sup>European Communities' appellant's submission, para. 25. The European Communities believes that the Panel also acted inconsistently with Articles 1.1, 3.2, 3.3, 7.2, 11, 12.7, 19.2, and 23.1 of the DSU.

claim under Articles 8.3 and 21.5 of the DSU by characterizing it as a question of "application"<sup>49</sup> of the DSU by the Director-General.

17. According to the European Communities, the United States unlawfully withdrew, in the context of the compliance proceedings, the consent it provided pursuant to Article 8.3 of the DSU in the original proceedings to the appointment of panelists that are nationals of the parties. The European Communities maintains that the United States' erroneous interpretation of the DSU was followed by the WTO Director-General, and ultimately by the Panel, because there would have been no basis for the application of Article 8.7 of the DSU in relation to the panelist for which an agreement existed pursuant to Article 8.3. For the European Communities, the Panel erred in finding that Article 8.7 applies "whenever there is no agreement between the parties"<sup>50</sup>, because the disagreement between the parties related to the correct interpretation of Article 8.3. Instead of presupposing the absence of an agreement under Article 8.3, the Panel should have addressed the question of whether or not the United States could withdraw unilaterally its agreement under Article 8.3.

18. The European Communities requests the Appellate Body to find that the composition of the Panel in this case was inconsistent with Articles 8.3 and 21.5 of the DSU. The European Communities maintains that its claim raises systemic implications that concern the integrity of the dispute settlement system, because the Panel's approach would imply that panels can be composed in a way that would allow losing parties to "unilaterally sack panelists that have found against them half-way through the proceedings".<sup>51</sup> The European Communities observes that compliance proceedings and original proceedings relate to a "continuum of events"<sup>52</sup>, and that, under Article 21.5 of the DSU, it remained "possible"<sup>53</sup> for the original panel, consisting of the remaining panelist together with two new appointees, to deal with the matter. According to the European Communities, once a panelist has engaged in the dispute, he or she must be protected throughout the proceedings from pressure from either party. The European Communities finds contextual support for its position

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<sup>49</sup>European Communities' appellant's submission, para. 26 (quoting Panel Report, para. 8.16).

<sup>50</sup>European Communities' appellant's submission, para. 29 (quoting Panel Report, para. 8.17).

<sup>51</sup>European Communities' appellant's submission, para. 39. (emphasis omitted)

<sup>52</sup>European Communities' appellant's submission, para. 40 (referring to Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 121; Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 90; Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 136; Appellate Body Report, *US – FSC (Article 21.5 – EC II)*, para. 87; Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 397; Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 258; and Appellate Body Reports, *US – Continued Suspension and Canada – Continued Suspension*, para. 342).

<sup>53</sup>European Communities' appellant's submission, para. 41. In the European Communities' view, one of these new panelists could be a citizen of the United States, because the agreement under Article 8.3 refers to the nationality of parties to a dispute, not to individuals.

in Article 8.6 of the DSU, pursuant to which the parties shall not oppose panelists other than for compelling reasons, and in Article 21.5 of the DSU, which provides that a panel shall circulate its report within 90 days (which is a result easier to achieve with the same panelists). The European Communities also considers that its position is consistent with the object and purpose of the DSU, which includes the prompt and effective settlement of disputes by independent panelists resulting in binding panel reports.

19. The European Communities disagrees with the Panel's statement that, if it had come to the conclusion that it was improperly constituted, it would necessarily have to decline its jurisdiction to address the other claims in this dispute. In any event, the European Communities requests the Appellate Body to refrain from making any consequential finding that the Panel had no jurisdiction to examine and rule on its other claims. The European Communities considers that it has the right in this specific case, and with respect to this specific issue of consequential findings, to "partially waive or relinquish"<sup>54</sup> its rights under the DSU, and it exercises that right in this appeal. In the event that the Appellate Body should find that the Panel had no jurisdiction to examine and rule on any of the European Communities' other claims in this dispute, the European Communities would withdraw the entirety of its appeal on the question of panel composition.

## 2. The Panel's Terms of Reference

20. The European Communities argues that the Panel erred in excluding, in response to a request by the United States for a preliminary ruling, from its terms of reference the subsequent reviews that were issued *before* the adoption of the DSB's recommendations and rulings in the original proceedings. The European Communities urges the Appellate Body to reverse this finding, and to find instead that all the subsequent reviews listed in the European Communities' panel request fell within the Panel's terms of reference under Article 21.5 of the DSU, because they were: (i) amendments to the original investigations and administrative reviews at issue in the original proceedings; (ii) omissions or deficiencies in the United States' implementation of the DSB's recommendations and rulings; and, in the alternative, those reviews (iii) had a "close nexus" to those DSB rulings.

21. First, the European Communities maintains that the Panel erred in finding that the subsequent reviews did not fall under its terms of reference because they were "amendments" to the measures at issue in the original proceedings. The European Communities argues that the Panel improperly narrowed the context in which the term "any amendments" was used in the original proceedings by

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<sup>54</sup>European Communities' appellant's submission, para. 50.



focusing on the manner in which the European Communities framed its claims in its original panel request. The European Communities maintains further that an examination of how the measures at issue had been clarified in the course of the original proceedings (including in its panel request, submissions to the panel, descriptive part of the panel report, interim and final panel report, and Appellate Body report) indicates that "any amendments" to the 15 original investigations and the 16 administrative reviews at issue in that dispute would be covered by the DSB's recommendations and rulings. The European Communities adds that the use of the term "any" by the panel and the Appellate Body indicates the "broad coverage"<sup>55</sup> of the measures at issue in the original proceedings. Furthermore, the ordinary meaning of the term "amendment" indicates that any "changes or modifications"<sup>56</sup> to the measures at issue are included. In this respect, the European Communities notes that the subsequent administrative and sunset reviews listed in its Article 21.5 panel request modified the measures at issue either by assessing duties and imposing new cash deposit rates based on zeroing, or by extending the life of anti-dumping measures on the basis of margins of dumping calculated with zeroing.

22. Secondly, the European Communities argues that the Panel erred in failing to examine its claim that subsequent administrative and sunset reviews fell within the Panel's terms of reference as "omissions" or "deficiencies"<sup>57</sup> in the United States' implementation of the DSB's recommendations and rulings. In declining to address the European Communities' claim in this respect on the grounds that "any 'omission' or 'deficiency' of the United States in the form of a subsequent review would be captured in the ['close nexus'] analysis"<sup>58</sup>, the Panel disregarded the "conditional order of the legal claims"<sup>59</sup> raised by the European Communities. This is because the European Communities' claim that subsequent reviews fell within the Panel's terms of reference in the light of their "close nexus" to the original measures at issue was made in the alternative, subject to the condition that the Panel reject its main claims that subsequent reviews fell within the Panel's terms of reference either as "amendments" to the original measures at issue, or as "omissions" or "deficiencies" in the United States' implementations of the DSB's recommendations and rulings. The European Communities contends that panels are "in principle bound by the sequencing order of the legal claims made by the complaining party"<sup>60</sup> because this forms part of their mandate. Therefore, the European Communities submits that the Panel failed to comply with its mandate under Article 11 of the DSU in declining to

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<sup>55</sup>European Communities' appellant's submission, para. 71. (emphasis omitted)

<sup>56</sup>European Communities' appellant's submission, para. 72. (emphasis omitted)

<sup>57</sup>European Communities' appellant's submission, para. 79.

<sup>58</sup>European Communities' appellant's submission, para. 75 (quoting Panel Report, para. 8.86).

<sup>59</sup>European Communities' appellant's submission, para. 79. (emphasis omitted)

<sup>60</sup>European Communities' appellant's submission, para. 79.

examine its claim that any omissions and deficiencies by the United States in connection with the original measures at issue and subsequent reviews fell within the Panel's terms of reference.

23. Moreover, the European Communities argues that the Panel exercised false judicial economy in finding that the United States' omissions would be "captured" in its analysis of whether the subsequent reviews could fall within its terms of reference by virtue of their close nexus to the original measures at issue. According to the European Communities, the only "omission" by the United States that the Panel addressed in its "close nexus" analysis was the continued imposition of cash deposits at rates calculated with zeroing after the end of the reasonable period of time. However, the European Communities' challenge in this regard also encompassed other omissions by the United States that were not addressed by the Panel's "close nexus" analysis. More specifically, the European Communities challenged omissions by the United States in the form of actions to assess and collect duties *after* the end of the reasonable period of time with respect to unliquidated entries made *before* that date, and the United States' failure to recalculate, without zeroing, margins of dumping upon which United States authorities would rely in making their likelihood-of-dumping determinations in the subsequent sunset reviews at issue. Consequently, the Panel's analysis only partially addressed omissions and deficiencies in the United States' implementation of the DSB's recommendations and rulings. According to the European Communities, each of the omissions by the United States fell within the Panel's terms of reference because "the necessary 'measure taken to comply' [did] not exist."<sup>61</sup>

24. Finally, the European Communities submits that the Panel erred in excluding the subsequent reviews that were issued *before* the adoption of the DSB's recommendations and rulings from its terms of reference, for the reason that they did not have a sufficiently close nexus, in terms of *timing*, with the original measures at issue and the DSB's recommendations and rulings. The European Communities considers that the fact that a measure pre-dates the adoption of the DSB's recommendations and rulings cannot be determinative of the question whether it falls within the scope of compliance proceedings. The European Communities emphasizes that compliance does not necessarily occur by virtue of actions that take place after the adoption of the DSB's recommendations. Rather, a Member may withdraw a measure within the meaning of Article 3.7 of the DSU, or bring it into conformity with its obligations under Article 19.1 of the DSU, at any time after the establishment of the panel and before the adoption of the panel or Appellate Body reports. The European Communities adds that the "inherent limits"<sup>62</sup> of the claims that may be submitted to an

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<sup>61</sup>European Communities' appellant's submission, para. 81 (referring to Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 67).

<sup>62</sup>European Communities' appellant's submission, para. 90.

Article 21.5 panel should not allow circumvention of a WTO Member's implementation obligations, and should not undermine the effective resolution of disputes. For this reason, the European Communities suggests that the *effects* of a measure are the relevant factor in determining whether such measure may be examined in proceedings under Article 21.5 of the DSU.<sup>63</sup> By contrast, factors such as the timing, direction, or intention of a measure cannot limit the scope of compliance proceedings, because they could be used by WTO Members to circumvent their compliance obligations.

25. In the European Communities' view, the Panel's finding that the *timing* of subsequent measures may undermine their close nexus with the DSB's recommendations and rulings ignores the fact that successive determinations of different types are made in a single trade remedy proceeding. In this sense, subsequent reviews form part of a "continuum of events"<sup>64</sup> that is largely determined by the provisions of the *Anti-Dumping Agreement*. According to the European Communities, "giving relevance to the timing of the subsequent measures to break the close connection with the DSB recommendations and rulings in the original dispute *ignores* the fact that those successive determinations of different types are made in the context of a *single trade remedy proceeding*, involving the imposition, assessment and collection of anti-dumping duties on imports of a particular subject product, from the same country."<sup>65</sup> Therefore, determinations made in subsequent reviews under the same anti-dumping duty order are closely connected for the purposes of assessing compliance with the DSB's recommendations and rulings, regardless of their timing. According to the European Communities, the United States confirmed this link when it claimed before the Panel that the existence of such subsequent reviews "implemented" the DSB's recommendations and rulings or constituted "withdrawal" of the measures found to be WTO-inconsistent.<sup>66</sup> The European Communities adds that, because the United States' actions to collect cash deposits and assess and liquidate entries based on zeroing took place *after* the end of the reasonable period of time, and fell within the Panel's terms of reference as omissions in the United States' implementation obligations, it is immaterial whether those actions were based on determinations that pre-date the adoption of the DSB's recommendations and rulings.

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<sup>63</sup>European Communities' appellant's submission, paras. 91 and 92 (referring to Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, paras. 65 and 66; and Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 238).

<sup>64</sup>European Communities' appellant's submission, para. 93.

<sup>65</sup>European Communities' appellant's submission, para. 93 (original emphasis) (referring to Appellate Body Report, *US – Continued Zeroing*, para. 181).

<sup>66</sup>European Communities' appellant's submission, para. 94 (quoting United States' first written submission to the Panel, paras. 96 and 102).

3. The Scope of the United States' Compliance Obligations

26. The European Communities argues that the Panel erred in rejecting its claims that certain actions or omissions by the United States based on zeroing after the end of the reasonable period of time were inconsistent with the United States' obligations to comply immediately with the recommendations and rulings of the DSB, and with Articles 9.3 and 11.3 of the *Anti-Dumping Agreement*, Article VI:2 of the GATT 1994, and Article 21.5 of the DSU. The European Communities requests the Appellate Body to modify or reverse these findings, and to find that the United States acted inconsistently with these provisions by continuing to assess and collect duties and to impose cash deposit rates based on zeroing after the end of the reasonable period of time, on the basis of determinations made before that date.

27. The European Communities explains that rulings contained in reports adopted by the DSB are not treaty-making by the WTO Members but, rather, constitute judicial activity aimed at clarifying, interpreting, and applying the covered agreements, which are binding since their entry into force. Accordingly, neither Article 28 of the *Vienna Convention on the Law of Treaties*<sup>67</sup> (the "*Vienna Convention*"), nor specific provisions of the covered agreements that speak to inter-temporal law issues or general considerations about inter-temporal law are relevant to a consideration of the temporal reach of DSB rulings. Article 28 provides that a new treaty does not apply to any act that took place or any situation that ceased to exist before its entry into force. Article 28 is silent, however, on continuing situations, which, in the European Communities' view, implies that a new treaty applies immediately to a continuing situation. For the European Communities, a ruling of inconsistency contained in a report adopted by the DSB creates "a presumption of inconsistency *going forward*", which applies "*from the date on which the measure came into existence to the date on which the measure is withdrawn or amended so as to remove the inconsistency.*"<sup>68</sup> Thus, the European Communities distinguishes the temporal effects of *rulings* by the DSB, which establish that a measure is WTO-inconsistent from the date of its adoption, from the temporal scope of the DSB's *recommendations*, which require Members to bring that measure into conformity by the end of the reasonable period of time. In this regard, the European Communities adds that the reasonable period of time is the time considered necessary for a Member to operate its legislative or administrative procedures, rather than a "transitional period"<sup>69</sup>, after which any implementing measure must be effective.

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<sup>67</sup>Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679.

<sup>68</sup>European Communities' appellant's submission, para. 135 (original emphasis) (referring to European Communities' response to Panel Question 32).

<sup>69</sup>European Communities' appellant's submission, para. 143.

28. Turning to the administrative reviews concluded *after* the end of the reasonable period of time (9 April 2007), and in particular the 2004-2005 administrative review concluded on 22 June 2007 in *Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands* (Case 1), the European Communities underscores that the temporal scope of that administrative review is a factual element of United States municipal law that is not in dispute between the parties. The European Communities also asserts that a major flaw in the United States' position is "to construe the DSB rulings and recommendations as if they were legislative activity on an equal footing with treaty making by the WTO Members, whereas in fact they constitute judicial activity, clarifying, interpreting and applying the covered agreements."<sup>70</sup> By applying an administrative review determination based on zeroing to "continuing situations"<sup>71</sup> after the end of the reasonable period of time, the United States did not immediately comply with its obligation not to use zeroing. Thus, whereas the European Communities agrees with the Panel's ultimate finding that the United States failed to comply with the DSB's recommendations and rulings by issuing assessment instructions based on zeroing following the 2004-2005 administrative review in Case 1, it contests the underlying reasoning. For the European Communities, these assessment instructions are inconsistent, not because they are consequent upon the results of the administrative review, but because no action may be taken after the end of the reasonable period of time based on zeroing. Furthermore, the European Communities argues that the final liquidation of duties following the 2004-2005 administrative review in Case 1 also constitutes a failure to comply, because it was based on zeroing after the expiry of the reasonable period of time, and the Panel erroneously omitted to make any finding in this respect.<sup>72</sup>

29. Next, the European Communities addresses assessment instructions or final liquidations that take place *after* the end of the reasonable period of time in relation to the measures found to be WTO-inconsistent in the original panel proceedings. The European Communities argues that any assessment instructions or final liquidations relating to these measures issued or occurring after the end of the reasonable period of time must not be based on zeroing. The European Communities rejects the view that it is the municipal law in force at the date of entry that determines the amount to be assessed, irrespective of whether or not such municipal law is WTO-consistent, and irrespective of the obligations flowing from the DSU. For the European Communities, if a measure found to be WTO-inconsistent is to continue to be applied or have effects beyond the end of the reasonable period of time, this may only be done in a WTO-consistent manner.

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<sup>70</sup>European Communities' appellant's submission, para. 147. (emphasis omitted)

<sup>71</sup>European Communities' appellant's submission, para. 148.

<sup>72</sup>The European Communities suggests that the same argument applies, *mutatis mutandis*, to the 2004-2005 administrative review in *Stainless Steel Wire Rod from Sweden* (Case 6). (See European Communities' appellant's submission, para. 188)

30. Moving to cases where subsequent administrative reviews take place *before* the end of the reasonable period of time, but assessment instructions are issued or final liquidation occurs *after* that date, the European Communities notes that its arguments in this respect are not entirely dependent upon the existence of municipal judicial proceedings, because this situation may also result from a lapse of time between the results of the administrative review and the issuance of assessment instructions. The European Communities' view is based on the principle that immediate compliance by the end of the reasonable period of time precludes any action or omission involving zeroing after that date, regardless of whether those actions are or relate to administrative reviews, assessment instructions, or any other type of action. For the European Communities, the Panel erred in assuming that assessment instructions are entirely "consequent"<sup>73</sup> upon administrative reviews. In this respect, the European Communities observes that, whereas the calculations in the administrative review are expressed as exporter-specific calculations, assessment instructions are importer-specific. Furthermore, zeroing might be reintroduced at the collection stage as customs authorities might receive instructions to collect duties on a transaction-by-transaction basis (disregarding those transactions where export price exceeded normal value).

31. The European Communities submits that several interpretative considerations provide "overwhelming support"<sup>74</sup> for the principle that immediate compliance by the end of the reasonable period of time precludes all actions or omissions based on zeroing after that date. Thus, the European Communities points to the requirements in Articles 19.1 and 21.3 of the DSU that "Members must comply *immediately* following the end of the reasonable period of time."<sup>75</sup> The European Communities also maintains that several provisions of the *Anti-Dumping Agreement* support its approach to compliance, which seeks to preserve the rights of exporters and importers, at no detriment to the domestic industry, and is opposed to a logic that would result in "using a 'transitional period' to perpetuate an *unlawful* situation".<sup>76</sup> Relying on the context provided by Articles 1, 5.9, and 18.1 of the *Anti-Dumping Agreement*, the use of the term "applied" in Article 1 of the *Anti-Dumping Agreement*, the reference in Articles 8.1, 9.1, 10.4, 11.2, 11.3, 12.2.1, 12.2.2, and 18.3 of the *Anti-Dumping Agreement* to the terms "impose" and "imposition", the use of the term "levy" in Article VI:2 of the GATT 1994 and the definition of this term in footnote 12 of the *Anti-Dumping Agreement*, and the language of Article 9 of the *Anti-Dumping Agreement* that refers to the imposition and collection of anti-dumping duties, the European Communities contends that the *Anti-Dumping Agreement* disciplines all actions taken by WTO Members against dumping. Such actions include

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<sup>73</sup>European Communities' appellant's submission, para. 167 (quoting Panel Report, para. 8.208).

<sup>74</sup>European Communities' appellant's submission, para. 168.

<sup>75</sup>European Communities' appellant's submission, para. 169. (original emphasis)

<sup>76</sup>European Communities' appellant's submission, para. 170. (original emphasis)

both "the full range of actions by which anti-dumping duties might be imposed, assessed and finally collected", and "the moment when the anti-dumping duty is finally collected."<sup>77</sup> For the European Communities, it follows that those actions for collecting duties are, logically, relevant for assessing compliance with the DSB's recommendations and rulings as well as the covered agreements.<sup>78</sup> The European Communities contends that its views are also supported by statements of the United States in the panel proceedings in *US – Section 129(c)(1) URAA*, where the United States indicated that United States municipal law does not preclude the WTO-consistent treatment of unliquidated entries that occurred before the end of the reasonable period of time.<sup>79</sup>

32. For the European Communities, its analysis is not affected by the possibility that assessment instructions (or final liquidations) might be delayed as a result of judicial proceedings. The European Communities underscores that there is an obligation in Article 13 of the *Anti-Dumping Agreement* to provide for adequate judicial review of determinations, and that footnote 20 of the *Anti-Dumping Agreement* recognizes the possibility that assessment proceedings be delayed as a result of judicial proceedings. According to the European Communities, WTO Members are not allowed to circumvent compliance with DSB recommendations and rulings by shielding the result of their domestic litigation proceedings from their obligations under the WTO agreements. Thus, the European Communities contends that, regardless of whether there is domestic litigation, the anti-dumping duties that are collected after the end of the reasonable period of time duties must not reflect the zeroing methodology.

33. Applying the principles outlined above to the specific Cases before the Panel, the European Communities requests the Appellate Body to modify the Panel's reasoning in relation to the 2004-2005 administrative reviews in *Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands* (Case 1) and *Stainless Steel Wire Rod from Sweden* (Case 6). Specifically, the European Communities seeks review of the Panel's finding that assessment instructions are entirely "consequent" upon administrative reviews, and requests a specific finding with respect to final liquidations occurring after the end of the reasonable period of time. With respect to the 2005-2006 administrative review in Case 1, the European Communities contends that the Panel also erred in

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<sup>77</sup>European Communities' appellant's submission, para. 172.

<sup>78</sup>The European Communities finds additional contextual support in Article 7.2 of the *Anti-Dumping Agreement* (which provides that withholding appraisalment may constitute an appropriate provisional measure) for its position because, when such a provisional measure is taken, the amount of the final liability is determined at the moment of final liquidation and, therefore, this action is "necessarily regulated by the disciplines of the *Anti-Dumping Agreement*". (European Communities' appellant's submission, para. 179)

<sup>79</sup>European Communities' appellant's submission, para. 180 (referring to Panel Report, *US – Section 129(c)(1) URAA*, para. 6.42).

finding that the United States did not fail to bring its measures into conformity by issuing assessment instructions on 16 April 2007, and by liquidating the relevant duties on 23 April 2007.

34. Furthermore, the European Communities argues that the Panel erred in failing to address the specific Cases for which anti-dumping duty orders remain in place, which permits the United States to continue to apply duties or cash deposit rates based on zeroing after the end of the reasonable period of time in relation to 12 of the 16 administrative reviews at issue in the original proceedings. The European Communities observes that the Panel conducted a specific analysis of Case 31 and made findings of inconsistency in relation to cash deposits applied after the expiry of the reasonable period of time, and correctly observed that anti-dumping duty orders in four Cases had been revoked. However, the Panel did not examine the remaining 11 Cases<sup>80</sup> for which anti-dumping duty orders remain in place, on the grounds that it did not have before it any substantive arguments or supporting materials in relation to these Cases that would have allowed it to make any additional substantive findings. Relying on statements, arguments, and claims in the compliance panel request, its written submissions and oral statements before the Panel, and its replies to the Panel's questions, the European Communities asserts that "the Panel had enough evidence to conclude that the United States continued collecting duties and establishing or maintaining cash deposits based on zeroing after the expiry of the reasonable period of time."<sup>81</sup> On this basis, the European Communities requests the Appellate Body to reverse these findings, complete the analysis, and to find that, with respect to these 11 Cases and to Case 31, the United States has failed to comply with the DSB's recommendations and rulings, and continues to act in a WTO-inconsistent manner, by continuing to maintain duties or cash deposit rates based on zeroing after the expiry of the reasonable period of time. The European Communities also requests the Appellate Body to find that the Panel's failure to address these Cases constitutes a violation of Article 11 of the DSU.

35. As a separate matter, the European Communities claims that the Panel erred in its treatment of the "domino theory"<sup>82</sup> advanced by the European Communities that, once an anti-dumping duty order was revoked pursuant to a Section 129 determination (because in the absence of zeroing, no dumping was found), the United States was not entitled, after the end of the reasonable period of time, to conduct administrative reviews based on zeroing, or to take other actions based on zeroing, in relation to that revoked order. For the European Communities, a measure cannot be understood to have been withdrawn if its effects are still in place. The European Communities considers, as the relevant Section 129 determinations imply, that once the legal basis of the anti-dumping measures

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<sup>80</sup>These were Cases 18, 19, 20, 21, 22, 23, 24, 27, 28, 29, and 30.

<sup>81</sup>European Communities' appellant's submission, para. 195.

<sup>82</sup>European Communities' appellant's submission, para. 198.



disappeared the United States was no longer allowed to take subsequent actions (including administrative reviews) based on zeroing after the expiry of the reasonable period of time.

4. The Subsequent Sunset Reviews

36. The European Communities claims that the Panel erred in finding that the European Communities did not demonstrate that the United States had failed to comply with the DSB's recommendations and rulings in the subsequent sunset review proceedings at issue, because "the results of those sunset reviews had not yet materialised at the time when the Panel was established (*i.e.*, 25 September 2007)."<sup>83</sup> The European Communities also claims that the Panel, in so doing, failed to fulfil its duties pursuant to Article 11 of the DSU. The European Communities requests the Appellate Body to reverse the Panel's findings and to find instead that, by relying in the sunset review proceedings on margins calculated in prior proceedings with the use of zeroing, the United States failed to comply with the DSB's recommendations and rulings in the original proceedings and acted inconsistently with Articles 2.1, 2.4, 2.4.2, and 11.3 of the *Anti-Dumping Agreement*.

37. The European Communities argues that "the fact that continuation orders had not yet been published with respect to some subsequent sunset reviews at the time the Panel was established *does not mean* that the USDOC's dumping determinations made in the context of those sunset review proceedings are *irrelevant* for assessing the US compliance with the DSB recommendations and rulings in the original dispute."<sup>84</sup> In this respect, the European Communities notes that, because of those positive determinations of likelihood of recurrence of dumping by the USDOC relying on dumping margins based on zeroing, the original measures were extended beyond the expiry of the reasonable period of time and some remained in place at the date of the establishment of the Panel, contrary to the United States' obligations under the *Anti-Dumping Agreement* and the DSB's recommendations and rulings in the original proceedings.

38. According to the European Communities, the relevant action that should serve to assess compliance by the United States is the final determination by the USDOC of the likelihood of dumping, rather than the publication of the continuation order. The European Communities notes that even the Panel "took into account the date of the publication of the USDOC's final determinations as the relevant *action* by the United States (rather than the publication of the continuation order) to bring some subsequent sunset reviews within its terms of reference."<sup>85</sup> The European Communities

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<sup>83</sup>European Communities' appellant's submission, para. 111.

<sup>84</sup>European Communities' appellant's submission, para. 112. (original emphasis)

<sup>85</sup>European Communities' appellant's submission, para. 113 (original emphasis) (referring to Panel Report, para. 8.124).

contends that, "if such action is considered a measure taken to comply falling within the scope of the compliance proceeding, Articles 11 and 21.5 of the DSU require panels to examine its consistency with the DSB recommendations and rulings and the covered agreements, and make the findings provided for in the covered agreements."<sup>86</sup>

39. The European Communities further submits that, pursuant to Article 11.3 of the *Anti-Dumping Agreement*, the anti-dumping duty may remain in force pending the outcome of a sunset review so that, during sunset review proceedings, imports are still subject to duties/cash deposits. The European Communities contends that, when the Panel was established, the original measures were kept in effect and "the United States was requiring cash deposits based on zeroing because the United States had extended the duration of the sunset review proceedings pursuant to [the] USDOC's determinations which relied on dumping margins based on zeroing."<sup>87</sup>

40. The European Communities therefore concludes that the failures by the United States in these sunset review proceedings had already materialized at the date of the establishment of the Panel and had allowed the United States to extend the life of the original measures found to be in violation of Articles 2.1, 2.4, 2.4.2 and 11.3 of the *Anti-Dumping Agreement* and the DSB's recommendations and rulings. The European Communities further contends that, in Case 19, the USITC had already confirmed on 7 September 2007, before the date of the establishment of the Panel, that the original order would remain in place. Regarding Cases 2, 3, 4, and 5, the European Communities argues that, the fact that the sunset review proceedings resulted in the revocation of the original anti-dumping duty order with effect as of 7 March 2007, does not change the fact that imports occurring after the end of the reasonable period of time were subject to cash deposit requirements based on zeroing until the revocation of the original order.

41. Finally, the European Communities contends that the Panel acted inconsistently with Article 11 of the DSU because it did not address the claim that, by keeping in place certain aspects of the measures at issue in the original proceedings (that is, the dumping margins based on zeroing), the United States failed to comply with the DSB's recommendations in the original proceedings.

42. In particular, regarding Case 19, the European Communities contends that, in carrying out its determination of the likelihood of recurrence of dumping, the USDOC relied on the same dumping margin based on zeroing calculated in the original investigation and in the administrative review, and that such a determination could not constitute a proper foundation for the continuation of

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<sup>86</sup>European Communities' appellant's submission, para. 113. (italics removed)

<sup>87</sup>European Communities' appellant's submission, para. 116.

anti-dumping duties under Article 11.3 of the *Anti-Dumping Agreement*. Therefore, contrary to the Panel's conclusion, the European Communities considers that a finding on this separate claim is necessary to solve the dispute.

5. The Non-Existence of Measures between 9 April and 23 April/31 August 2007

43. The European Communities submits that the Panel disregarded its mandate and erred in failing to make findings regarding the non-existence of measures taken to comply between 9 April and 23 April/31 August 2007. The European Communities requests the Appellate Body to find that the Panel erred in this respect, and to complete the analysis and find that the United States violated Articles 19.1, 21.3, and 21.3(b) of the DSU in not putting into effect measures taken to comply between 9 April and 23 April/31 August 2007.

44. For the European Communities, in rejecting its claim on the basis of judicial economy, the Panel acted in a manner inconsistent with its obligations under Article 11 of the DSU. The fact that a WTO Member did not act within a particular period of time following the expiry of the reasonable period of time is an independent measure or, in this case, omission subject to different claims that must be examined separately from other claims concerning other measures taken to comply. The European Communities argues that, in failing to rule on this omission, the Panel failed to examine a matter that was part of its mandate, and "abused"<sup>88</sup> the concept of judicial economy, as the Panel provided only a partial resolution to the matter at issue. The European Communities considers that measures that have expired before the request for panel establishment are measures at issue within the meaning of Article 6.2 of the DSU and, thus, form part of the terms of reference of a compliance panel. According to the European Communities, it was not for the Panel to examine the practical implications of the requested finding as to the obligations of the United States, because the European Communities was entitled to obtain the findings it considered necessary to resolve the dispute. The European Communities adds that Article 21.3 of the DSU implies that WTO Members have the obligation to bring their WTO-inconsistent measures into conformity with their obligations immediately after the adoption of the recommendations and rulings of the DSB, or, should a reasonable period be agreed between the parties to the dispute, at the end of such a period at the latest.

6. The Arithmetical Error in the Section 129 Determination in Case 11

45. The European Communities submits that the Panel erred in finding that the European Communities' claims in respect of an alleged arithmetical error in the Section 129 determination in

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<sup>88</sup>European Communities' appellant's submission, para. 218.

Case 11 were not properly before it. The European Communities requests the Appellate Body to reverse this finding, complete the analysis, and find that the United States, by failing to correct the arithmetical error in the calculation of the margin of dumping in the Section 129 determination in Case 11, failed to comply with the DSB's recommendations and rulings, and acted inconsistently with 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, for the following reasons.

46. Initially, the European Communities contends that the arithmetical error was an "*integral part*"<sup>89</sup> of the measure taken to comply by the United States, and thus falls within the scope of these compliance proceedings. The European Communities notes that the United States consciously took the decision to calculate TKAST's<sup>90</sup> dumping margin without zeroing on the basis of the same data set as the one used in the original investigation, which contained the arithmetical error. Moreover, "the USDOC extended the duration of the Section 129 proceeding by four additional months *precisely* because it was considering the allegations made by the interested parties, including the clerical error in question."<sup>91</sup> Thus, for the European Communities, the fact that the United States explicitly dealt with the issue of the clerical error and decided to keep it for the dumping calculation in the Section 129 determination concerned, implied that the error became part of the "measure taken to comply" in the present case. In this regard, the European Communities argues that the arithmetical error "cannot be *separated*" from the re-determination of dumping without zeroing made by the United States in the Section 129 determination concerned, considering that "both the data set and the comparison methodology operate together and are the bases underlying *a single inquiry*: the dumping calculation."<sup>92</sup> The European Communities recalls that, in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)* and in *EC – Bed Linen (Article 21.5 – India)*, the Appellate Body considered relevant the fact that the particular aspect in question operated together with the other aspects of the measure taken to comply with respect to the same subject matter to determine whether they constituted an integral part of the measure taken to comply.<sup>93</sup>

47. Alternatively, the European Communities claims that the arithmetical error fell within the scope of this compliance proceeding because of its particularly close relationship to the re-determination of dumping carried out in the Section 129 determination concerned. The European

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<sup>89</sup>European Communities' appellant's submission, para. 248. (original emphasis)

<sup>90</sup>ThyssenKrupp Acciai Speciali Terni S.p.A. and ThyssenKrupp AST USA (a manufacturer/exporter of stainless steel sheet and strip in coils from Italy).

<sup>91</sup>European Communities' appellant's submission, para. 249. (original emphasis)

<sup>92</sup>European Communities' appellant's submission, para. 253. (original emphasis)

<sup>93</sup>European Communities' appellant's submission, para. 255 (referring to Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, paras. 146 and 148, in turn referring to Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 86).

Communities maintains that, should the Appellate Body find that the arithmetical error was an integral part of the "measure taken to comply", the European Communities considers that the Appellate Body would not need to examine this alternative claim.

48. The European Communities contends that the arithmetical error contained in the data set has a particularly close relationship to the re-determination of dumping without zeroing, in view of its *nature, effects, and timing*. The exclusion of such an error from the scope of this compliance proceeding would lead to circumvention by the United States of its obligations in the light of the covered agreements. According to the European Communities, both the arithmetical error and the zeroing methodology affect the calculation of the dumping margin, and it is not possible to isolate one of these elements from the rest of the dumping margin calculation in the Section 129 determination. The European Communities notes that, in order to comply with the DSB's recommendations and rulings, the United States recalculated the margin of dumping without zeroing; however, because of the arithmetical error, a positive margin of dumping was obtained and the United States kept in place a measure inconsistent with the *Anti-Dumping Agreement* that would otherwise have been terminated.

49. Furthermore, the European Communities claims that the Panel erred in finding that the European Communities was precluded from raising claims against the arithmetical error in these compliance proceedings. The European Communities considers that a Member is not prevented from raising new claims before a compliance panel against unchanged aspects of the original measure, provided that such claims were not examined by the original panel. The European Communities contends that allowing a Member to raise such new claims "does not provide the complaining Member with a second chance to make its case"<sup>94</sup>, because the finality of the report adopted by the DSB in the original proceedings "was *limited* to the particular claims on zeroing and the specific aspects of the measure dealing with the comparison methodology"<sup>95</sup> and did not relate to the particular arithmetical error in question. The European Communities also dismisses concerns raised by the Panel in relation to "the principles of fundamental fairness and due process"<sup>96</sup>, because in the present case the United States had sufficient notice of the European Communities' claim concerning the arithmetical error, given that it was mentioned in the European Communities' compliance panel request. Moreover, the United States could not assume that the aspect of the measure taken to comply at issue was WTO-consistent, as there was no such finding in the original proceedings.

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<sup>94</sup>European Communities' appellant's submission, para. 272.

<sup>95</sup>European Communities' appellant's submission, para. 276. (original emphasis)

<sup>96</sup>European Communities' appellant's submission, para. 277. (italics removed)

50. For the European Communities, the Panel misunderstood the Appellate Body's statement in *US – Upland Cotton (Article 21.5 – Brazil)* that "[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."<sup>97</sup> According to the European Communities, this statement by the Appellate Body should be read in the light of the statements made in the preceding paragraphs, which led to the conclusion that, if one issue was not resolved on the merits in the original proceedings, a new claim against the same aspect of the measure could be brought in compliance proceedings.

51. The European Communities adds that allowing a Member to raise new claims against an unchanged aspect of an original measure in the measure taken to comply would also be consistent with the purpose of Article 21.5 of the DSU. In this respect, the European Communities notes that an implementing measure should rectify the inconsistencies found in the DSB's recommendations and rulings, and not be otherwise inconsistent with the covered agreements. Preventing new claims against unchanged aspects of original measures that are WTO-inconsistent would provide Members with a mechanism allowing them to circumvent their obligations resulting from a particular dispute. The European Communities further notes that the Panel's finding would require the European Communities to bring the claim against the arithmetical error in the same measure (that is, the Section 129 determination concerned) in separate dispute settlement proceedings, with the result that the United States would benefit from an additional period of time to comply with its WTO obligations. The European Communities suggests further that the Panel's findings on this issue raise significant systemic concerns, because they imply that complaining Members would have to raise all possible legal claims against a measure at the very beginning of dispute settlement proceedings, even consequential claims, rather than choosing the main claims for a finding of WTO-inconsistency, as the European Communities has done in the original proceedings in this case.

7. The "All Others" Rates Calculated in the Section 129 Determinations in Cases 2, 4, and 5

52. The European Communities claims that the Panel erred in finding that the United States did not act inconsistently with Article 9.4 of the *Anti-Dumping Agreement* in the establishment of the

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<sup>97</sup>European Communities' appellant's submission, para. 279 (quoting Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 211). According to the European Communities, the Appellate Body observed, in that case, that: (i) when a Member failed to make a *prima facie* case in the original proceeding, that Member cannot bring the same claim against an element of the measure that remained unchanged since the original proceedings in an Article 21.5 proceeding; and (ii) when an aspect of a measure in the original proceeding has been found to be WTO-consistent expressly, the same claim cannot be brought against an unchanged aspect of that measure in an Article 21.5 proceeding; however, (iii) when a claim has not been resolved in the original procedure (for example, because the Appellate Body could not complete the analysis— or because of judicial economy), the same claim can be brought in an Article 21.5 proceeding. (*Ibid.*, para. 281)

"all others" rates in the Section 129 determinations in Cases 2, 4, and 5 and in failing to examine its claims under Article 6.8 and Annex II of the *Anti-Dumping Agreement*. The European Communities requests the Appellate Body to reverse these findings, complete the analysis, and find that the United States acted inconsistently with Articles 9.4 and 6.8 and Annex II of the *Anti-Dumping Agreement* in calculating the "all others" rates in the Section 129 determinations in Cases 2, 4, and 5, for the following reasons.

53. First, the European Communities argues that the Panel erred in finding that the existence of a lacuna in Article 9.4 of the *Anti-Dumping Agreement* precludes a finding that Article 9.4 prohibits the use of zero, *de minimis*, or "facts available" dumping margins in the calculation of the "all others" rate in cases where all the margins of dumping for selected exporters and producers fall into one of these categories. In the European Communities' view, the Panel misinterpreted the Appellate Body's finding in *US – Hot-Rolled Steel*, where the Appellate Body did not address the lacuna in Article 9.4 but, rather, found that the United States acted inconsistently with Article 9.4 by using a methodology that included margins based on facts available in the calculation of the "all others" rate. The European Communities submits that the facts in *US – Hot-Rolled Steel* are "identical"<sup>98</sup> to those in the present dispute, because all the margins of dumping calculated for the selected exporters in that dispute were partially based on facts available. Yet, the fact that the USDOC did not have other margins of dumping from investigated exporters and producers from which to derive the ceiling provided for in Article 9.4, did not preclude the Appellate Body from finding in that case that the United States acted inconsistently with that provision by basing the "all others" rate on a methodology that included margins established using facts available.<sup>99</sup> Although the Appellate Body did recognize the existence of a lacuna in Article 9.4, it confirmed that "[t]his appeal does not raise the issue of how that *lacuna* might be overcome on the basis of the present text of the *Anti-Dumping Agreement*"<sup>100</sup> and, therefore, did not address that question. According to the European Communities, the Panel should have proceeded similarly in this dispute.

54. Secondly, the European Communities argues that, correctly interpreted, Article 9.4 of the *Anti-Dumping Agreement* requires investigating authorities to disregard margins of dumping based on facts available when calculating the "all others" rate, even in cases where all margins established for the selected exporters/producers fall under the prohibition contained in that provision. This is because the purpose of Article 9.4 is to prevent exporters who were not asked to cooperate in the investigation

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<sup>98</sup>European Communities' appellant's submission, paras. 316 and 324.

<sup>99</sup>European Communities' appellant's submission, para. 319 (referring to Appellate Body Report, *US – Hot-Rolled Steel*, para. 129).

<sup>100</sup>European Communities' appellant's submission, paras. 319 and 321 (quoting Appellate Body Report, *US – Hot-Rolled Steel*, para. 126).

from being prejudiced by gaps or shortcomings in the information supplied by the investigated exporters.<sup>101</sup> Consequently, any methodology that includes margins based on facts available in the calculation of the "all others" rate, alone or in combination with other margins, must be inconsistent with Article 9.4.

55. In addition, the Panel's statement that the European Communities' interpretation would be "internally inconsistent" ignores the context of Article 9.4. According to the European Communities, Article 9.4 provides an exception to the general rule in Article 6.10 that a margin of dumping must be established for each individual exporter. The investigating authority's discretion not to investigate individually all exporters is limited by the ceiling provided for in Article 9.4, which mandates the exclusion of zero, *de minimis*, and "facts available" margins from the calculation of the "all others" rate. By contrast, the Panel's interpretation of Article 9.4 implies that there is no obligation whatsoever when all margins for the selected exporters are either zero, *de minimis*, or based on facts available. In the European Communities' view, this interpretation could lead to abuses, as the "all others" rate would be exclusively a function of the exporters that the investigating authority chooses to investigate.

56. Thirdly, the European Communities submits that "the fact that Article 9.4 of the *Anti-Dumping Agreement* refers to a 'ceiling' and does not provide any specific methodology for the calculation of a margin of dumping to be applied to non-investigated [exporters or producers] does not exclude the possibility that the requirement to exclude certain types of margins when calculating 'all others' rates was *intended* to be included by implication."<sup>102</sup> In support of this contention, the European Communities refers to the negotiating history of Article 9.4, which suggests that the drafters intended to include the prohibition to use certain types of margins in the provision, at least by implication.<sup>103</sup>

57. Turning to the claims it raised under Article 6.8 and Annex II of the *Anti-Dumping Agreement*, the European Communities submits that the Panel erred in rejecting these claims on the basis that they were dependent on the European Communities' claim under Article 9.4. The European Communities considers that Article 6.8 and Annex II provide an independent basis for a finding of

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<sup>101</sup>European Communities' appellant's submission, para. 326 (referring to Appellate Body Report, *US – Hot-Rolled Steel*, para. 123).

<sup>102</sup>European Communities' appellant's submission, para. 333. (original emphasis)

<sup>103</sup>The European Communities refers to the negotiating history of Article 9.4 of the *Anti-Dumping Agreement*, and also draws an analogy between this case and *US – Corrosion-Resistant Steel Sunset Review*, where the Appellate Body found that the fact that Article 11.3 of the *Anti-Dumping Agreement* does not require the use of any specific methodology in a sunset review did not imply that investigating authorities could disregard the disciplines of Article 2.4 of that Agreement. (European Communities' appellant's submission, paras. 334 and 335)



inconsistency where the "all others" rate is not inconsistent with Article 9.4. According to the European Communities, the Panel's finding is "contradictory"<sup>104</sup> because, on the one hand, the Panel concluded that Article 9.4 contains no prohibition and therefore does not provide a legal basis for a finding of inconsistency and, on the other hand, it concluded that a particular methodology is not inconsistent with that provision. In the European Communities' view, if Article 9.4 does not regulate an issue, it cannot be concluded that a particular situation is consistent with that provision.

58. Moreover, the European Communities submits that Article 6.8 and Annex II of the *Anti-Dumping Agreement* provide an independent basis for a finding of inconsistency where the establishment of the "all others" rate falls under the alleged lacuna in Article 9.4. The European Communities submits that Article 6.8 and Annex II are the provisions that regulate the establishment of the "all others" rate in these circumstances because these provisions limit the application of margins of dumping based on facts available, which are "less favourable" to the "exceptional circumstance" where the interested party did not "cooperate".<sup>105</sup> Exporters or producers falling under the "all others" category are "known" exporters or producers that "decided to 'cooperate'"<sup>106</sup>, but from which no further information was requested. Therefore, in the European Communities' view, Article 6.8 and Annex II prohibit the use of margins of dumping based on facts available in the calculation of the "all others" rate.

#### 8. The European Communities' Request for a Suggestion

59. The European Communities requests the Appellate Body to issue a suggestion to the United States, pursuant to Article 19.1 of the DSU, on how to implement the DSB's recommendations and rulings. The European Communities requests the Appellate Body to suggest to the United States, including the United States' administrative authorities and independent judicial authorities, "that they forthwith take all necessary steps of a general or particular character to ensure the conformity of all the measures at issue and all the measures taken to comply with the *Anti-Dumping Agreement*, the *GATT 1994*, the *DSU* and the rulings and recommendations of the DSB in the original proceeding, with full effect not later than the end of the reasonable period of time, such that any and all actions, including administrative reviews, assessment instructions and final liquidations after that date are not based on zeroing, and are revised as necessary to achieve that result".<sup>107</sup>

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<sup>104</sup>European Communities' appellant's submission, para. 339.

<sup>105</sup>European Communities' appellant's submission, para. 346.

<sup>106</sup>European Communities' appellant's submission, para. 348.

<sup>107</sup>European Communities' appellant's submission, para. 351.

B. *Arguments of the United States – Appellee*

1. Panel Composition

60. The United States argues that the Panel correctly rejected the European Communities' claim that it was improperly composed, in violation of Articles 8.3 and 21.5 of the DSU. The United States observes that the European Communities' appeal does not "fundamentally pertain"<sup>108</sup> to the substantive dispute between the European Communities and the United States. Rather, it appears to be grounded on "a concern about the functioning of the WTO as an institution".<sup>109</sup> Nonetheless, the concern raised by the European Communities does not necessarily bring that matter within the scope of review by a panel or the Appellate Body. In this regard, the United States observes that, under Article 11 of the DSU, "the function of panels is to assist the DSB in discharging its responsibilities under the [DSU] and the covered agreements." However, during the panel composition process, the European Communities had recourse to the Director-General of the WTO, rather than to the DSB.

61. In addition, the United States argues that the European Communities' claim on the panel composition did not fall within the Panel's jurisdiction. For the United States, it is difficult to see how the composition of the Panel could fall within its terms of reference, as panel composition invariably follows panel establishment. This is particularly the case in proceedings under Article 21.5 of the DSU, which are limited to resolving a "disagreement as to the existence or consistency with the covered agreements of measures taken to comply with the recommendations and rulings" of the DSB.

62. Moreover, according to the United States, an improperly composed panel would not have the authority to make findings on the merits of the European Communities' claims, including on claims related to its own composition; it would have no authority to issue a report and there would be no basis for an appeal. In any event, the United States argues that the European Communities failed to demonstrate any violation of the DSU. The United States observes that two of the three original panelists were not available, and therefore recourse to "the original *panel*" was not "possible" within the meaning of Article 21.5 of the DSU.<sup>110</sup> Article 21.5 does not discipline the process of panel composition when recourse to the original panel is not possible, and therefore the European Communities requested—and the United States agreed—that the Director-General compose the panel.

63. With respect to the European Communities' waiver of its alleged DSU rights and its conditional withdrawal of the appeal in the event of success, the United States asserts that it also has

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<sup>108</sup>United States' appellee's submission, para. 154.

<sup>109</sup>United States' appellee's submission, para. 154.

<sup>110</sup>United States' appellee's submission, para. 157. (original emphasis)

due process rights in the composition of the panel, and that the European Communities is not in any position to waive the rights of another WTO Member. The United States further disputes the European Communities' allegation that the facts underlying the panel composition process are "uncontested".<sup>111</sup> For the United States, the only truly uncontested fact is that the parties turned to the Director-General to appoint the panelists. The United States emphasizes that the European Communities "did not have the permission"<sup>112</sup> to disclose confidential communications about this issue, and that the Panel took account of the United States' objections in this regard by deleting all references to the alleged statements by the United States from the Panel's final report.

## 2. The Panel's Terms of Reference

64. The United States argues that the Panel was correct in making the preliminary finding that the subsequent reviews that were completed before the adoption of the DSB's recommendations and rulings did not fall within the Panel's terms of reference under Article 21.5 of the DSU. The United States requests the Appellate Body to uphold this finding, because these subsequent reviews were not (i) "amendments" to the original investigations and administrative reviews at issue in the original proceedings, or (ii) "omissions" or "deficiencies" in the United States' implementation of the DSB's recommendations and rulings; nor were they (iii) sufficiently connected to these compliance proceedings.

65. First, the United States contends that the Panel properly rejected the European Communities' argument that the subsequent reviews were covered by the DSB's recommendations and rulings as "amendments" to the original measures at issue. The Panel correctly concluded that it would not be "tenable" to describe assessment and other types of reviews as "merely clarifying" the terms of the original investigations and administrative reviews at issue in the original proceedings.<sup>113</sup> In subsequent administrative reviews, the USDOC examines different imports, over a different time period, than it did in the original investigation or in a prior administrative review. Similarly, sunset reviews are distinct from original investigations and administrative reviews because they determine whether the expiration of an anti-dumping duty would likely lead to the continuation or recurrence of dumping. Therefore, the Panel correctly concluded that subsequent determinations are not amendments to, or modifications of, the original investigations and administrative reviews at issue in the original proceedings.

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<sup>111</sup>United States' appellee's submission, para. 159 (quoting European Communities' appellant's submission, para. 10, in turn quoting Panel Report, para. 8.10).

<sup>112</sup>United States' appellee's submission, para. 159 (quoting United States' second written submission to the Panel, para. 7 and footnote 5 thereto).

<sup>113</sup>United States' appellee's submission, para. 24 (quoting Panel Report, para. 8.84).

66. The United States underscores that the Panel was correct in concluding that reference to "amendments" in the European Communities' original panel request referred to "amendment[s] of the specific measure listed to correct for ministerial errors"<sup>114</sup> and does not refer to any subsequent review. The United States notes that the European Communities' original panel request treats subsequent reviews as separate measures, rather than amendments to the original measures. The United States adds that the USDOC provides interested parties the opportunity to comment on alleged ministerial errors in its determinations, and corrects any such errors by publishing an "amended" determination. Thus, because references to "amendments" in the European Communities' original panel request have a very precise meaning in the context of this dispute, the recommendations and rulings of the DSB could not have broadened the scope of the measures covered by those rulings.

67. Secondly, the United States submits that the Panel correctly rejected the European Communities' claim that the subsequent reviews fell within the Panel's terms of reference as "omissions" or "deficiencies" in the United States' implementation of the DSB's recommendations and rulings. The Panel was correct in noting that the European Communities had not substantiated its claim before the Panel, as the European Communities indicated in response to the Panel's questioning that the subsequent reviews constituted "evidence of the US omissions and deficiencies"<sup>115</sup> in implementing the DSB's recommendations and rulings, rather than omissions and deficiencies which themselves fell within the Panel's terms of reference. Having found that none of the subsequent reviews constituted "amendments" to the original measures at issue, the Panel was also correct in concluding that none of the subsequent reviews "implicated"<sup>116</sup> the question of whether a measure taken to comply "existed" within the meaning of Article 21.5 of the DSU, and properly decided to move on to consider the question of whether the subsequent reviews themselves should be regarded as "measures taken to comply". In any event, the United States underscores that the Panel examined the alleged "substantive 'omissions' or 'deficiencies'"<sup>117</sup> in its substantive analysis.

68. The United States argues further that the European Communities is incorrect in arguing that the Panel was bound by the "sequencing order of the legal claims"<sup>118</sup> raised by the European Communities. According to the United States, the precedents cited by the European Communities do

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<sup>114</sup>United States' appellee's submission, para. 27 (quoting Panel Report, para. 8.76).

<sup>115</sup>United States' appellee's submission, para. 33 (quoting European Communities' responses to Panel Questions, para. 33). (emphasis omitted)

<sup>116</sup>United States' appellee's submission, para. 34.

<sup>117</sup>United States' appellee's submission, para. 35.

<sup>118</sup>United States' appellee's submission, para. 36 (quoting European Communities' appellant's submission, para. 79).

not support this proposition.<sup>119</sup> The United States submits that, in any event, the Panel did address the European Communities' claims in the order proposed. The United States further suggests that the European Communities failed to substantiate its claim that the Panel failed to comply with its mandate under Article 11 of the DSU in structuring its analysis.

69. Thirdly, the United States submits that the Panel correctly excluded from its terms of reference the subsequent reviews that were concluded before the adoption of the DSB's recommendations and rulings as not having a sufficient nexus in terms of *timing* with these compliance proceedings. Initially, the United States underscores that reviews pre-dating the DSB's recommendations and rulings are not "measures taken to comply" with such rulings, but are rather reviews undertaken and completed at the request of interested parties or as required by domestic law pursuant to the provisions of the *Anti-Dumping Agreement*.<sup>120</sup> The United States acknowledges that compliance can be achieved through events occurring prior to the adoption of the DSB's recommendations and rulings, for example, where a challenged measure is withdrawn prior to adoption. However, in this dispute, the United States is not relying on any of the measures identified by the European Communities to assert compliance. Additionally, even though measures other than those declared to be "taken to comply" may also be examined in an Article 21.5 proceeding where such measures "potentially circumvent implementation or undermine measures officially taken to comply"<sup>121</sup>, the United States observes that the European Communities failed to demonstrate that any of the reviews completed prior to the adoption of the DSB's recommendations and rulings had the effect of "circumventing" or "undermining" the compliance declared to have been achieved by the United States. In this regard, the Panel appropriately found that the subsequent reviews were so remote in time that they could not have had the necessary effects to bring them within the scope of these compliance proceedings. The United States also notes that, to the extent that the European Communities is challenging "positive actions"<sup>122</sup> taken by the United States after the end of the reasonable period of time, the European Communities has failed to demonstrate any connection between the alleged "omissions" in the form of liquidation of duties and the relevant subsequent review that would sufficiently demonstrate that those reviews circumvented or undermined compliance.

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<sup>119</sup>United States' appellee's submission, para. 36. The United States makes reference, in footnote 46, to Appellate Body Report, *US – Shrimp*, para. 120; and Panel Report, *EC – Sardines*, paras. 7.14-7.19.

<sup>120</sup>United States' appellee's submission, para. 40.

<sup>121</sup>United States' appellee's submission, para. 42 (quoting Panel Report, para. 8.116).

<sup>122</sup>United States' appellee's submission, para. 44 (referring to European Communities' appellant's submission, para. 96).

70. Finally, in the event that the Appellate Body finds that the Panel wrongly excluded any reviews from the scope of these proceedings, the United States contends that the Appellate Body should reject the European Communities' request to complete the analysis and find those reviews inconsistent with the relevant provisions of the DSU, the *Anti-Dumping Agreement*, and the GATT 1994. According to the United States, the European Communities failed to provide any argumentation relating to these alleged inconsistencies, and failed to point out the factual findings by the Panel or undisputed facts in the Panel record that would enable the Appellate Body to do so.

### 3. The Scope of the United States' Compliance Obligations

71. The United States argues that the Panel correctly rejected the European Communities' claims that the United States failed to comply with the DSB's recommendations and rulings, and acted inconsistently with Articles 9.3 and 11.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, by taking "actions or omissions" based on zeroing *after* the end of the reasonable period of time.

72. The United States submits that an anti-dumping duty is a border measure and that, in disputes involving border measures, compliance is achieved when the measure is withdrawn or brought into compliance with respect to entries of goods after the end of the reasonable period of time.<sup>123</sup> The United States contends that it brought itself into compliance with the recommendations and rulings of the DSB by withdrawing the border measures, or by implementing new WTO-consistent border measures, to future entries subject to the 31 measures that were the subject of the DSB's recommendations and rulings in the original proceedings. Accordingly, the United States rejects the European Communities' view that the DSB's recommendations and rulings encompass the liquidation of entries after the end of the reasonable period of time, when the entries were made before or during the reasonable period of time, if for any reason those entries remained unliquidated at the end of the reasonable period of time.

73. For the United States, the fact that Article 21.3 of the DSU may provide a Member with a reasonable period of time to bring itself into compliance with DSB recommendations and rulings does not imply that the Member is not subject to the underlying obligation during that period. The United States refers to a previous statement of the Appellate Body that "remedies in WTO law are generally understood to be prospective in nature."<sup>124</sup> The United States agrees that Article 28 of the *Vienna Convention* is inapplicable to the present dispute because DSB recommendations and rulings do not

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<sup>123</sup>United States' appellee's submission, paras. 62 and 72.

<sup>124</sup>United States' appellee's submission, para. 66 (quoting Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, footnote 494 to para. 243).

create new obligations. The United States considers that the reasonable period of time allows a Member sufficient time to bring its measure into compliance with its obligations without being required to provide compensation or being subject to the suspension of concessions. The United States reasons that recommendations and rulings by the DSB do not create an obligation to comply with the covered agreements, as that obligation already exists in the covered agreements themselves. Rather, it is the right to a remedy against a breach of the covered agreements (in the sense of compensation or suspension described in Article 22.1 of the DSU) that arises only after a Member fails to comply with the DSB's recommendations and rulings within the reasonable period of time. Thus, according to the United States, a Member is not "permitted"<sup>125</sup> to breach the covered agreements during the reasonable period of time. Instead, that Member is merely not subject to the remedies contemplated in Article 22 of the DSU for such breaches.

74. The United States argues that, in disputes involving border measures, it has been consistently recognized that compliance is achieved when the measure is withdrawn or brought into compliance with the DSB's recommendations and rulings with respect to entries of goods after the end of the reasonable period of time. According to the United States, this is the approach that the European Communities took to implementation of the recommendations and rulings of the DSB in the *EC – Chicken Cuts* dispute, as the European Communities asserted compliance in that dispute by removing the border measure for entries taking place after the end of the reasonable period of time.<sup>126</sup> A similar conclusion was reached by the compliance panel in *EC – Bananas III (Article 21.5 – Ecuador)*, where the panel found that, in order to comply with the DSB's recommendations and rulings, the European Communities did not have to correct its past breaches of the *General Agreement on Trade in Services* with regard to licenses that were allocated before the end of the reasonable period of time. Rather, the European Communities had to ensure that licenses allocated after the end of the reasonable period of time were allocated in a WTO-consistent way.<sup>127</sup> According to the United States, the practice of the DSB and individual WTO Members is that compliance with DSB recommendations and rulings with respect to WTO-inconsistent border measures is accomplished by withdrawing the border measure, or by applying a WTO-consistent border measure with respect to future entries of goods.<sup>128</sup> According to the United States, nothing in the *Anti-Dumping Agreement* suggests that a different rule would apply when the border measure in question is an anti-dumping duty. Moreover, this practice suggests

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<sup>125</sup>United States' appellee's submission, para. 71.

<sup>126</sup>United States' appellee's submission, para. 73 (referring to Appellate Body Report, *EC – Chicken Cuts*, para. 347(c)).

<sup>127</sup>United States' appellee's submission, para. 74 (referring to Panel Report, *EC – Bananas III (Article 21.5 – Ecuador)*, para. 6.105).

<sup>128</sup>The United States submits that previous panel reports do not suggest otherwise. (United States' appellee's submission, paras. 75-77 (referring to Panel Report, *EC – Commercial Vessels*, para. 8.4; and Panel Report, *India – Autos*, paras. 7.204 and 7.253))

that actions to enforce or collect duties applied to imports occurring prior to the end of the reasonable period of time do not undermine compliance achieved by the elimination of the border measure. In the United States' view, withdrawal of WTO-inconsistent border measures with respect to future entries constitutes compliance with the DSB's recommendations and rulings, even if domestic procedures with respect to final collection of duties on entries prior to the reasonable period of time are not complete. The United States considers that the European Communities' approach to implementation raises serious systemic concerns, because it would allow private parties to make use of domestic procedures to delay liquidation of duties, thereby obtaining retroactive application of DSB recommendations and rulings to entries made prior to the end of the reasonable period of time.

75. According to the United States, the European Communities fails to recognize that the DSB's recommendations and rulings, as applied to the 31 individual measures, are limited to the measures that were found to be inconsistent in the original proceedings. The United States recalls that, in the original proceedings, the European Communities sought—but did not obtain—a finding that zeroing in administrative reviews was inconsistent, as such, with the covered agreements. The United States emphasizes further that the European Communities presupposes the existence of the "unlawful zeroing methodology"<sup>129</sup>, when the Appellate Body in the original proceedings was unable to complete the analysis as to whether such zeroing methodology in administrative reviews was inconsistent, as such, with the covered agreements.

76. The United States argues further that its implementation obligations do not extend to administrative reviews completed after the end of the reasonable period of time, but cover entries made prior to that date. For the United States, the Panel's approach to implementation disadvantages Members using retrospective duty systems, because such Members would need to bring past entries into compliance with the DSB's recommendations and rulings, whereas Members using prospective duty assessment systems would not. Furthermore, the United States considers that the requirement to bring into conformity with the DSB's recommendations and rulings any duty assessment proceeding (in a retrospective system) or duty refund proceeding (in a prospective system) for entries made prior to the end of the reasonable period of time would imply a retroactive remedy.

77. Moreover, the United States contends that the Panel correctly held that the United States did not fail to comply with the DSB's recommendations and rulings by finally liquidating duties on entries made before the end of the reasonable period of time. The United States argues that nothing in the *Anti-Dumping Agreement* or the DSU suggests that the status of past entries as "liquidated" or

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<sup>129</sup>United States' appellee's submission, para. 83 (quoting European Communities' appellant's submission, para. 148).



"unliquidated" is relevant to the scope of a Member's compliance obligations. For the United States, the question of whether a Member has come into compliance with DSB recommendations and rulings with respect to duties it imposes on a particular merchandise should be evaluated by examining the Member's treatment of that merchandise on the date of entry, because that date is when liability attaches to the imports in question.<sup>130</sup> In this respect, the United States underscores the Panel's finding that, if implementation obligations do not attach to final decisions made prior to the end of the reasonable period of time, those obligations should not further depend on when the actual collection takes place. In addition, the Panel correctly concluded that implementation obligations should not depend on the fact that the mere act of collecting duties by the authorities is delayed due to actions of private parties for reasons wholly unrelated to the dispute at hand. The United States adds that DSB recommendations and rulings do not serve as a basis for the reimbursement of duties<sup>131</sup>, and reiterates that, to ensure a "level playing field"<sup>132</sup> among Members with retrospective systems, prospective *ad valorem* systems, and prospective normal value systems, prospective implementation requires that duties levied on imports occurring on or after the date of implementation be made consistently with the DSB's recommendations and rulings.

78. The United States also suggests that the Panel correctly declined to make findings with respect to 11 of the 16 administrative reviews at issue in the original proceedings for which anti-dumping duty orders remain in place. The United States argues that the European Communities failed to identify any evidence or any particular measure in which a margin of dumping was calculated using zeroing and which was being used by the United States as the basis for a cash deposit rate for any anti-dumping duty order at the time of Panel establishment. However, the United States objects to the Panel's inference that, if the United States were applying cash deposit rates calculated in subsequent administrative reviews using zeroing, this would constitute a failure to comply with the DSB's recommendations and rulings in this dispute.<sup>133</sup> The United States characterizes this statement as purely "hypothetical"<sup>134</sup>, given the European Communities' failure to adduce any evidence in this regard. Accordingly, the United States considers that the Panel's statement is "without legal effect".<sup>135</sup>

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<sup>130</sup>United States' appellee's submission, paras. 92 and 95 (referring to Panel Reports, *China – Auto Parts*, para. 7.184; Appellate Body Report, *US – Line Pipe*, para. 129; and Panel Report, *US – Certain EC Products*, para. 6.106).

<sup>131</sup>The United States adds that even the European Communities' municipal law recognizes the principle that DSB recommendations and rulings do not serve as a basis for the reimbursement of duties. (United States' appellee's submission, para. 97 (referring to Case C-351-04, *Ikea Wholesale Ltd. v. Commissioners of Customs and Excise*, Judgment of the Court of Justice of 27 September 2007, Second Chamber [2007] ECR I-7723 (Panel Exhibit US-34)))

<sup>132</sup>United States' appellee's submission, para. 98.

<sup>133</sup>United States' appellee's submission, para. 106 (referring to Panel Report, para. 8.218).

<sup>134</sup>United States' appellee's submission, para. 106.

<sup>135</sup>United States' appellee's submission, para. 106.

Nevertheless, should the Appellate Body reverse the Panel's finding that the European Communities failed to substantiate its claim in relation to cash deposit rates, the United States contends that the recommendations and rulings of the DSB do not cover cash deposit rates, because a cash deposit is not an anti-dumping duty but, rather, a security.

79. The United States also posits that the Panel correctly declined to make separate findings with respect to the European Communities' "domino theory" arguments, in particular, the European Communities' assertion that the United States has not withdrawn the original measures at issue when it takes any "positive act" after the end of the reasonable period of time on the basis of those measures.<sup>136</sup> For the United States, the Panel acted correctly in refusing the European Communities' request to issue an advisory opinion as to what types of acts, in general, the United States may or may not take in order to comply with the DSB's recommendations and rulings. The United States explains that a panel acting under Article 21.5 of the DSU is not called upon to opine generally about the recommendations and rulings of the DSB independently of the identification of specific instances in which measures (including omissions) are relevant to the question of the existence or consistency of measures taken to comply.

80. Finally, the United States argues that the Appellate Body should reject the European Communities' request to complete the analysis with respect to a number of claims and measures, including those relating to assessment instructions or liquidation after the end of the reasonable period of time, because the European Communities failed to identify the factual findings by the Panel or undisputed facts in the Panel record that would enable the Appellate Body to do so.

#### 4. The Subsequent Sunset Reviews

81. The United States requests the Appellate Body to reject the European Communities' claim that all subsequent sunset reviews listed in its panel request fell within the Panel's terms of reference. The United States submits that none of the subsequent sunset reviews—neither those that the Panel found to be within its terms of reference, nor those excluded by the Panel from its terms of reference—are in fact within the scope of these compliance proceedings. The United States argues that the DSB's recommendations and rulings in the original proceedings were limited to 15 original investigations and 16 administrative reviews, and there were no recommendations and rulings regarding determinations made in sunset reviews; therefore, there was no question as to the existence of measures taken to comply with respect to sunset reviews.

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<sup>136</sup>United States' appellee's submission, para. 111 (referring to European Communities' appellant's submission, paras. 198-202).

82. The United States also contends that the sunset reviews "have no sufficient 'close connection' or 'nexus' to either the measures at issue in the original dispute or to the DSB's recommendations and rulings that would bring those determinations within the jurisdiction of the compliance Panel."<sup>137</sup> The United States points out that the analysis in sunset reviews is different from the analysis in original investigations and administrative reviews, because sunset reviews determine whether the expiration of an anti-dumping duty would be likely to lead to the continuation or recurrence of dumping and injury, not duty existence or liability. The United States also argues that sunset reviews are required by Article 11.3 of the *Anti-Dumping Agreement*; they are not made in view of the DSB's recommendations and rulings. Finally, the United States claims that 11 of the 16 sunset reviews challenged by the European Communities cannot possibly be regarded as closely connected to the determinations originally challenged, or to the DSB's recommendations and rulings, because they were completed prior to the adoption of the DSB's recommendations and rulings.

83. Regarding those sunset reviews that the Panel found to be within its terms of reference, the United States requests the Appellate Body to uphold the Panel's finding that the European Communities failed to demonstrate that the USDOC determinations it challenged had caused the continuation of the orders at the time the Panel was established. The United States argues that, "[a]s a matter of logic, measures that have not been taken at the time of panel establishment cannot form the basis of a claim of inconsistency."<sup>138</sup> The United States notes that sunset reviews under its domestic laws have several components, which include the final likelihood-of-dumping determination by the USDOC and the determination by the USITC of whether the revocation of the anti-dumping duty order would likely lead to a continuation or recurrence of material injury. The United States points out that sunset reviews are not based solely on the determination by the USDOC, and argues that a determination by the USDOC of likelihood of dumping alone is insufficient to find a violation. The United States further contends that this is illustrated by the fact that, for five of the orders for which the Panel found a sunset review to fall within its terms of reference, four were ultimately revoked.

84. The United States also contends that, if an initial sunset review results in the revocation of the order, such revocation is effective on the fifth-year anniversary date of the anti-dumping duty order, so that any security in the form of cash deposits that are provided for entries on or after that date, pending the sunset review, is refunded with interest if the sunset review results in revocation.

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<sup>137</sup>United States' appellee's submission, para. 51.

<sup>138</sup>United States' appellee's submission, para. 57.

85. Finally, the United States contends that the European Communities failed to demonstrate any interest in pursuing this claim in respect of Cases 2, 3, 4, and 5, considering that, following the sunset reviews in these Cases, the anti-dumping duty orders were revoked.

5. The Non-Existence of Measures between 9 April and 23 April/31 August 2007

86. According to the United States, the Panel correctly rejected the European Communities' request for a finding that the United States has failed to comply with the recommendations and rulings of the DSB in certain Cases by not taking any measures between the end of the reasonable period of time and the date on which the Section 129 determinations entered into force. The United States considers that, as there was no disagreement within the meaning of Article 21.5 of the DSU that the United States did not implement the Section 129 determinations before 23 April/31 August 2007, the European Communities' request was not within the scope of these compliance proceedings. The United States further considers that the findings requested by the European Communities would have been of little relevance to the effective resolution of the dispute. In any event, the United States argues that the Panel was correct to find that the United States did not breach Article 21.3 of the DSU, because Article 21.3 does not impose an obligation on the Member concerned; rather, Article 21.3 provides the implementing Member with the right to a reasonable period of time should immediate compliance be impracticable. In any event, there being no "disagreement" within the meaning of Article 21.5 as to the existence of the Section 129 determinations at issue as of the date of Panel establishment, there is no basis for the Appellate Body to disturb the Panel's stance on this issue.

6. The Alleged Arithmetical Error in the Section 129 Determination in Case 11

87. The United States considers that the Panel correctly found that the European Communities' claim regarding the alleged arithmetical error in the Section 129 determination in *Stainless Steel Sheet and Strip in Coils from Italy* (Case 11) was not properly before it. Contrary to the European Communities' allegation, the USDOC never acknowledged in either the original investigation or during the Section 129 proceeding in this Case that an arithmetical error had been made. Moreover, the United States does not acknowledge, as the European Communities claims it does, that the dumping margin would have been negative if the USDOC had corrected the alleged calculation error in the Section 129 proceeding, in addition to eliminating zeroing.

88. The United States argues further that the alleged error is "separable"<sup>139</sup> from the measure taken to comply. In this respect, the United States submits that, in recalculating the margin of

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<sup>139</sup>United States' appellee's submission, para. 130.

dumping in the Section 129 determination, in accordance with the DSB's recommendations and rulings, the USDOC changed only the language that caused the computer program to disregard non-dumped comparisons. The USDOC then re-ran the program and calculated the revised margin of dumping, while making no other changes to the computer program. The United States is of the view that, having recalculated the margin of dumping without zeroing, it complied with the DSB's recommendations and rulings.

89. The United States also contends that the alleged arithmetical error is an aspect of the original measure that is unchanged, and, even if it became an integral part of the measure taken to comply, as the European Communities contends, the Panel properly found that the European Communities' claim was not within the scope of these proceedings. The United States also agrees with the Panel that to allow the claims by the European Communities against the alleged arithmetical error would "unfairly" allow complaining Members a "second chance" to pursue claims they could have pursued in the original proceeding, and would thus present "fundamental due process concerns".<sup>140</sup> According to the United States, "[a] Member is provided a 'second *chance*'—that is, a second *opportunity*—if it is permitted to raise a claim in a compliance proceeding that, as a legal and practical matter, it *could have raised* before the original panel, but did not."<sup>141</sup> The United States contends that, if the European Communities was permitted to raise claims against the alleged arithmetical error in the Article 21.5 proceedings, it would be given another opportunity to raise a claim it should and could have raised in the original proceedings. The United States also agrees with the Panel that the United States was entitled to assume that this aspect of the original measures was WTO-consistent, "given the absence of a finding of violation [in this respect] in the original [panel] report".<sup>142</sup>

90. The United States further suggests that to allow the claims by the European Communities against the alleged arithmetical error would be "at odds with the nature of Article 21.5 proceedings, including the abbreviated time periods set out in Article 21.5"<sup>143</sup> and with the fact that no second reasonable period of time is available if the Member concerned is found not to have complied with the DSB's recommendations and rulings. In this respect, the United States recalls that compliance proceedings exist for a limited purpose, and not in order to examine new claims that could have been raised, but were not, in the initial dispute, as doing so could "raise unwarranted litigation difficulties for the responding Member".<sup>144</sup> The United States believes that the Panel correctly declined to

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<sup>140</sup>United States' appellee's submission, para. 134 (referring to Panel Report, paras. 8.240 and 8.241).

<sup>141</sup>United States' appellee's submission, para. 136. (original emphasis)

<sup>142</sup>United States' appellee's submission, para. 139 (referring to Panel Report, para. 8.240, in turn referring to Panel Report, *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, paras. 7.75 and 7.76).

<sup>143</sup>United States' appellee's submission, para. 137.

<sup>144</sup>United States' appellee's submission, para. 138.

examine this claim, because the alleged error was not a failure to implement DSB recommendations and rulings, or a measure taken to comply; nor did it call into question or otherwise affect the existence of a measure taken to comply.

91. Finally, the United States contends that the Panel's findings are supported by considerations of orderly administration. The United States argues that the alleged arithmetical error, like other determinations by the USDOC, was subject to judicial review in the United States, and the responding parties sought judicial review of precisely this alleged ministerial error and failed to succeed in overturning the USDOC's determination. According to the United States, the Section 129 determination should not become an opportunity for one interested party to raise new claims of error that would otherwise have been untimely, as this would undermine the orderly administration of anti-dumping proceedings. In the view of the United States, these considerations support the USDOC's decision not to reopen the Section 129 proceeding to consider new issues not relevant to the implementation of the DSB's recommendations and rulings.

7. The "All Others" Rates Calculated in the Section 129 Determinations in Cases 2, 4, and 5

92. The United States contends that the Panel was correct in finding that the United States did not violate Articles 9.4 and 6.8 and Annex II of the *Anti-Dumping Agreement* in the calculation of the "all others" rates in Cases 2, 4, and 5, and requests the Appellate Body to uphold this finding.

93. The United States first observes that the sunset reviews in Cases 2, 4, and 5 resulted in the revocation of the underlying anti-dumping duty orders, effective 7 March 2007. As a result, the United States refunded all cash deposits collected subsequent to 7 March 2007, including on imports subject to the "all others" rates challenged by the European Communities. Therefore, the United States submits that the European Communities has no "articulable interest" in pursuing these claims and is seeking no more than an "advisory opinion".<sup>145</sup>

94. The United States points out that Article 9.4 merely provides that the "all others" rate "shall not exceed" the weighted average margin of dumping for the investigated exporters or producers, and restricts the use of zero, *de minimis*, or margins based on facts available in the calculation of that ceiling. The United States disagrees with the European Communities' assertion that Article 9.4 prohibits the use of margins based on facts available in the calculation of the "all others" rate in all circumstances. Rather, the United States agrees with the Panel that this prohibition extends only to the ceiling provided for in Article 9.4, and that Article 9.4 provides no methodological guidance on

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<sup>145</sup>United States' appellee's submission, para. 144.

the calculation of the "all others" rate. According to the United States, where all margins of dumping are zero, *de minimis*, or based on facts available, a ceiling cannot be determined pursuant to Article 9.4. Given that this situation is not addressed in Article 9.4, the prohibition contained therein does not apply. Nevertheless, a Member may still apply anti-dumping duties to the non-investigated exporters or producers in an amount based on the results of investigated exporters or producers. However, since Article 9.4 establishes no ceiling in this instance, there is no applicable prohibition.

95. The United States emphasizes that Article 9.4 is silent as to the situation that arises in this dispute, and notes that, in *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body "declined to read into the silence of the treaty text obligations that were not there".<sup>146</sup> Similarly, in this case, the Appellate Body should not find an obligation where the WTO agreements do not provide for one. In addition, the United States argues that Article 9.4 establishes that the "all others" rate cannot be arbitrary. The United States characterizes as "reasonable"<sup>147</sup> the methodology it developed to establish the "all others" rate in these Cases, because it was based on the results of exporters and producers that had been investigated.

96. The United States also underscores that the European Communities does not offer "plausible alternatives"<sup>148</sup> to the Panel's interpretation of Article 9.4. Although the European Communities acknowledges that Article 9.4 does not discipline situations where all margins of dumping for the investigated exporters or producers are zero, *de minimis*, or based on facts available, the European Communities does not provide an answer to the question of how the "all others" rate should be calculated in those circumstances. The outcome of the European Communities' interpretation of Article 9.4 is that Members do not have a basis for calculating the "all others" rate in cases where a Member limits the investigation pursuant to Article 6.10, and all investigated exporters and producers have zero, *de minimis*, or "facts available" margins of dumping.

#### 8. The European Communities' Request for a Suggestion

97. Finally, the United States argues that the Appellate Body should reject entirely the European Communities' request for a suggestion in this dispute. The United States considers that the suggestion sought by the European Communities "merely restate[s] the findings or rulings that the EC is seeking in this appeal", and therefore "would provide no 'useful guidance and assistance' in implementing such

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<sup>146</sup>United States' appellee's submission, para. 149 (referring to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 123).

<sup>147</sup>United States' appellee's submission, para. 150.

<sup>148</sup>United States' appellee's submission, para. 151.

rulings".<sup>149</sup> The United States also considers that the European Communities' request for a suggestion would extend the Panel's findings to "an indeterminate set of future measures"<sup>150</sup>, none of which would fall within the Panel's terms of reference.

C. *Claims of Error by the United States – Other Appellant*

1. The Panel's Terms of Reference (Cases 1 and 6)

98. The United States argues that the Panel erred in finding that the 2004-2005 administrative reviews in *Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands* (Case 1) and *Stainless Steel Wire Rod from Sweden* (Case 6) fell within the Panel's terms of reference under Article 21.5 of the DSU by virtue of their close nexus with the original measures at issue and the DSB's recommendations and rulings. The United States requests the Appellate Body to reverse this finding and to declare without legal effect the Panel's finding that the United States failed to comply with the DSB's recommendations and rulings and acted inconsistently with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 in those two specific administrative reviews.

99. The United States distinguishes the facts of this case from the facts in *US – Softwood Lumber IV (Article 21.5 – Canada)*, where the panel and Appellate Body found significant that (i) the administrative review at issue resulted in a cash deposit rate that superseded the revised cash deposit rate established in the Section 129 determination and (ii) a particular aspect of the analysis in the administrative review was made "in view of"<sup>151</sup> the DSB's recommendations and rulings in the original proceedings in relation to that type of analysis. The United States emphasizes that, by contrast, the DSB's recommendations and rulings with respect to Cases 1 and 6 in this dispute concerned only the original investigations in those Cases, and that it has taken measures to comply with those rulings by issuing Section 129 determinations in which the underlying anti-dumping duty orders have been revoked.

100. Because the margins of dumping resulting from the recalculation in the Section 129 determinations in Cases 1 and 6 were zero or *de minimis*, the United States revoked the anti-dumping duty orders in those Cases, effective 23 April 2007. As a result, no potential anti-dumping duty liability arose, nor were any cash deposits required, on entries made on or after that date. By contrast, the 2004-2005 administrative reviews in Cases 1 and 6 applied to entries that occurred prior to the end

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<sup>149</sup>United States' appellee's submission, para. 161 (quoting Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 325).

<sup>150</sup>United States' appellee's submission, para. 161.

<sup>151</sup>United States' other appellant's submission, para. 58 (quoting Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 84).



of the reasonable period of time, and indeed before the adoption of DSB's recommendations and rulings; they were not measures the United States took to comply with the DSB's recommendations and rulings. Therefore, the United States stresses that, because the 2004-2005 administrative reviews in Cases 1 and 6 did not establish a new cash deposit rate that applied for future entries, given that the underlying anti-dumping duty order had been revoked, they "had no effect whatsoever on the continued validity and effect of the measure taken to comply"<sup>152</sup>, in the form of the relevant Section 129 determinations.

101. According to the United States, the purpose of the "nexus-based test" is to determine whether measures that are not declared to be "measures taken to comply" are nonetheless "closely connected" to those measures so that they should be reviewed by the compliance panel in order to avoid "circumvention" of a Member's implementation obligations.<sup>153</sup> Thus, according to the United States, "[w]here the declared measure taken to comply achieves compliance, but that compliance is 'negat[ed]' by another measure, it is appropriate to consider the latter measure in an Article 21.5 proceeding in order to resolve the disagreement as to the 'existence ... of measures taken to comply'"<sup>154</sup> within the meaning of Article 21.5 of the DSU. In this dispute, however, the results of the 2004-2005 administrative reviews in Cases 1 and 6 did not have any effect on the United States' declared measures taken to comply in the form of two Section 129 determinations, because no cash deposit rates resulted from those determinations. According to the United States, this is the case irrespective of whether those determinations were themselves consistent with Articles 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.

102. In addition, the United States submits that, in terms of their *nature*, successive administrative reviews under the same anti-dumping duty orders will "generally have ... some connection"<sup>155</sup> in terms of their nature with the original anti-dumping investigation, because they will usually involve the same type of merchandise exported from the same country. Thus, a closer connection with the declared measure taken to comply must exist in order for a subsequent review to fall within the scope of an Article 21.5 proceeding. In the United States' view, the DSB's recommendations and rulings related exclusively to the use of zeroing in specified original investigations, and none of the Appellate Body's "as applied" findings in relation to the use of zeroing in administrative reviews related to the two specific administrative reviews at issue in Cases 1 and 6; nor did the Appellate Body make an "as such" finding regarding the use of zeroing in administrative reviews in the original proceedings.

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<sup>152</sup>United States' other appellant's submission, para. 63. (original emphasis)

<sup>153</sup>United States' other appellant's submission, para. 66 (referring to Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 245).

<sup>154</sup>United States' other appellant's submission, para. 73.

<sup>155</sup>United States' other appellant's submission, para. 76.

103. Turning to the Panel's analysis of the nexus, in terms of *effects*, between the two specific administrative reviews and the original measures at issue, the United States submits that the Panel erred in finding that the use of zeroing in those reviews "allows for the assessment of anti-dumping duties at a rate that is based on zeroing ... despite alleged implementing action to eliminate such zeroing".<sup>156</sup> For the United States, the Panel incorrectly treated zeroing as "a unitary phenomenon"<sup>157</sup>, despite the fact that the DSB's recommendations and rulings with respect to zeroing in original investigations "are not identical"<sup>158</sup> to those made with respect to zeroing in assessment reviews, in terms of coverage and legal conclusions.

104. Finally, the United States argues that the *timing* of the 2004-2005 administrative reviews in Cases 1 and 6 was insufficient to justify their inclusion in the scope of the compliance proceedings, because administrative reviews that modify measures taken to comply with DSB recommendations and rulings will always be issued after the adoption of those recommendations and rulings.

## 2. The United States' Compliance Obligations (Cases 1 and 6)

105. The United States claims that the Panel erred in finding that the United States failed to comply with the DSB's recommendations and rulings, and acted inconsistently with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, by making determinations and issuing assessment instructions based on zeroing in the 2004-2005 administrative reviews in *Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands* (Case 1) and *Stainless Steel Wire Rod from Sweden* (Case 6). The United States urges the Appellate Body to reverse this finding and to find instead that the United States did not act inconsistently with Articles 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 in those two specific administrative reviews.

106. With respect to Case 1, the United States asserts that it complied with the recommendations and rulings of the DSB by providing "offsets" when it recalculated the margin of dumping in the Section 129 determination and revoking the anti-dumping duty order, effective 23 April 2007. The United States also underscores that, as a result of a subsequent determination by the USDOC in a sunset review, the revocation of the anti-dumping duty order became effective 29 November 2006, and cash deposits made on imports occurring on or after that date have been refunded with interest. With respect to Case 6, the United States contends that it also complied with the recommendations and rulings of the DSB by providing "offsets" for non-dumped sales in the recalculation of the margin of dumping in the Section 129 determination. As a result of this Section 129 determination, the

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<sup>156</sup>United States' other appellant's submission, para. 79 (quoting Panel Report, para. 8.108).

<sup>157</sup>United States' other appellant's submission, para. 84.

<sup>158</sup>United States' other appellant's submission, para. 80.

anti-dumping duty order was revoked, effective 23 April 2007, and any entries occurring on or after that date were not subject to anti-dumping duties. Therefore, in the United States' view, the termination of the anti-dumping duty orders in Cases 1 and 6 with respect to entries occurring on or after 23 April 2007 constitutes "withdrawal" of those measures within the meaning of Article 3.7 of the DSU, insofar as future imports of the products concerned will no longer incur any anti-dumping duty liability upon entry into the United States. For the United States, anti-dumping and countervailing duty measures are border measures and, accordingly, eliminating a WTO-inconsistent anti-dumping or countervailing duty measure at the border with respect to all future entries will achieve compliance.

107. The United States submits that the DSB made "as applied" recommendations and rulings in the original proceedings with respect to the use of weighted average-to-transaction comparisons in certain individually identified assessment reviews that did not relate to Cases 1 and 6. The United States considers that the Panel conflated original investigations and assessment reviews, which are distinct proceedings that serve different purposes. Whereas, pursuant to Article 5.1 of the *Anti-Dumping Agreement*, the purpose of the original investigation is "to determine the existence, degree and effect of any alleged dumping", the purpose of an assessment review is to determine the final amount of the anti-dumping duties consistent with Article 9.3 of the *Anti-Dumping Agreement*. According to the United States, the recommendations and rulings of the DSB concerning Cases 1 and 6 were limited to the use of zeroing in the original investigations at issue, and the United States has complied with these recommendations and rulings by recalculating the margins challenged in the original investigations at issue and withdrawing the orders in accordance with the results of those recalculations.

108. The United States observes that the 2004-2005 administrative reviews in Cases 1 and 6 covered entries made *before* the end of the reasonable period of time, even though they were concluded *after* that date. Therefore, in finding that the United States failed to comply with the recommendations and rulings of the DSB in the original proceedings by using zeroing in these two 2004-2005 administrative reviews, the Panel provided an "impermissible, retroactive relief"<sup>159</sup> that extended the implementation obligations to past entries. However, the United States submits that the *date of entry*, rather than the date of final determination and collection of dumping duties, is determinative of whether relief is "retroactive" or "prospective" in the context of anti-dumping duties. In the view of the United States, textual elements of Articles VI:2 and VI:6(a) of the GATT 1994, as well as the interpretive Note to paragraphs 2 and 3 of Article VI of GATT 1994 (the "Ad Note"),

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<sup>159</sup>United States' other appellant's submission, para. 42.

confirm that it is the legal regime in existence at the time of importation that determines whether the importer is liable for payment of anti-dumping duties. The United States adds that Articles 8.6, 10.1, 10.6, and 10.8 of the *Anti-Dumping Agreement* show that "whenever the [*Anti-Dumping Agreement*] specifies an applicable date for an action, the scope of applicability is based on entries occurring on or after that date."<sup>160</sup> The United States considers that it "has acted consistently with the principle of prospective implementation, as understood in the antidumping duty context."<sup>161</sup>

109. In addition, the United States argues that applying implementation obligations to future entries only is not unique to retrospective duty assessment systems. Such a principle would also govern implementation in prospective duty assessment systems, as there is no obligation to refund anti-dumping duties assessed on importations occurring prior to the end of the reasonable period of time under such systems. Therefore, the United States posits that recognizing the date of entry as determinative of a Member's implementation obligation would maintain neutrality between retrospective and prospective duty assessment systems.

D. *Arguments of the European Communities – Appellee*

1. The Panel's Terms of Reference (Cases 1 and 6)

110. The European Communities requests the Appellate Body to uphold the Panel's findings that the 2004-2005 administrative reviews in Cases 1 and 6 and respective assessment instructions fell within the Panel's terms of reference under Article 21.5 of the DSU, for the following reasons.

111. First, the European Communities disputes the United States' argument that the DSB's recommendations and rulings applied exclusively to the original investigations in Cases 1 and 6. The European Communities emphasizes that, in the original proceedings, it challenged the original investigations in Cases 1 and 6, including "any amendments and their assessment instructions".<sup>162</sup> Thus, the 2004-2005 administrative reviews in Cases 1 and 6 and respective assessment instructions were covered by the DSB's recommendations and rulings and, as such, fell within the Panel's terms of reference.

112. Secondly, the European Communities reiterates that the 2004-2005 administrative reviews in Cases 1 and 6 fell within the Panel's terms of reference as "omissions" or "deficiencies" in the

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<sup>160</sup>United States' other appellant's submission, para. 48; see also paras. 46 and 47. The United States also refers to the reasoning of the panel in *EC – Bananas III (Article 21.5 – Ecuador)* in support of its argument. (*Ibid.*, para. 50)

<sup>161</sup>United States' other appellant's submission, para. 51.

<sup>162</sup>European Communities' appellee's submission, para. 10.

United States' compliance. The European Communities disagrees with the United States' claim to have achieved "full and complete compliance"<sup>163</sup> in these Cases, and underscores that the fact that the United States failed to stop making determinations, and continues to collect duties based on zeroing with respect to the original measures at issue, indicates that the necessary "measures taken to comply" do not exist.

113. Thirdly, the European Communities argues that the 2004-2005 administrative reviews in Cases 1 and 6 undermined the measures taken to comply by the United States and circumvented compliance with the DSB's recommendations and rulings. According to the European Communities, a compliance panel may examine measures on the basis of the close connection of those measures either with the declared "measure taken to comply", the measure at issue in the original proceedings, and/or the DSB's recommendations and rulings. Thus, the United States is incorrect in suggesting that the "close-nexus test" applies exclusively to measures that undermine the declared "measure taken to comply". Rather, the Panel correctly held that the relevant inquiry is whether a closely connected measure "undermines or circumvents compliance"<sup>164</sup> with the DSB's recommendations and rulings so as to fall within the scope of compliance proceedings. The key issue for the European Communities is whether the implementing Member complied or undermined compliance with the DSB's recommendations and rulings, and not whether the implementing Member has undermined its own declared "measure taken to comply". In these proceedings, the Panel correctly concluded that actions taken by the United States in the context of the subsequent reviews at issue "negat[ed]"<sup>165</sup> the measures taken to comply, and therefore circumvented compliance with the DSB's recommendations and rulings.<sup>166</sup>

114. In addition, the European Communities submits that the administrative reviews in question affected the measures taken to comply by the United States, because they provided the basis for the assessment of duties calculated with zeroing despite the fact that the underlying anti-dumping duty orders had been previously revoked because the recalculation of the margins in the Section 129 determinations led to the conclusion that, in Cases 1 and 6, no dumping would have been found absent zeroing. Thus, according to the European Communities, the 2004-2005 administrative reviews in Cases 1 and 6 and respective assessment instructions "negated the compliance asserted to have been

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<sup>163</sup>European Communities' appellee's submission, para. 11 (quoting United States' other appellant's submission, paras. 30, 31, and 62; and United States' first written submission to the Panel, para. 95).

<sup>164</sup>European Communities' appellee's submission, para. 16.

<sup>165</sup>European Communities' appellee's submission, para. 17.

<sup>166</sup>The European Communities believes that the Panel correctly relied on previous panel and Appellate Body reports in *Australia – Automotive Leather II (Article 21.5 – US)*, *Australia – Salmon (Article 21.5 – Canada)*, and *US – Softwood Lumber IV (Article 21.5 – Canada)* in making these conclusions.

achieved by the withdrawal of the original measures".<sup>167</sup> The fact that the underlying anti-dumping duty orders were revoked, and that cash deposits were no longer required for imports made on or after 23 April 2007, does not mean that the effects of those measures no longer exist. Rather, Cases 1 and 6 illustrate that determinations made in subsequent assessment reviews based on zeroing may continue to nullify and impair the benefits of the European Communities even after the revocation of those anti-dumping duty orders.

115. Fourthly, the European Communities contends that the Panel correctly applied the "nexus-based test" with respect to the 2004-2005 administrative reviews in Cases 1 and 6 by examining the *nature, effects, and timing*. As regards the links, in terms of *nature*, between those reviews and the DSB's recommendations and rulings, the Panel correctly identified the issue of zeroing as the element closely connecting the subsequent administrative reviews and the DSB's recommendations and rulings. The European Communities agrees with the Panel that successive determinations of different types are made in the context of a single trade remedy proceeding, form part of a continuum of events, and are thus all measures inextricably linked. Where findings were made under different legal provisions, they were premised on the same fundamental obligations under the *Anti-Dumping Agreement*, flowing from the definition of the term "margin of dumping" under that Agreement. In addition, the European Communities rejects the United States' assertion that the Panel erred in treating zeroing as "a unitary phenomenon, allegedly existing in both original investigations and administrative reviews".<sup>168</sup> The European Communities stresses that, according to the Appellate Body, "zeroing' under different comparison methodologies and in different stages of anti-dumping proceedings simply reflect[s] different manifestations of a single rule or norm."<sup>169</sup> Referring to the Appellate Body's statement in the original proceedings that "the central focus of this appeal is the issue of zeroing, both as it relates to original investigations and administrative reviews"<sup>170</sup>, the European Communities emphasizes that the Appellate Body made it clear that, in the original proceedings, the use of zeroing in original investigations and administrative reviews amounted to a single issue that led to the same WTO-inconsistent result, whether applied in original investigations or subsequent administrative reviews.

116. With respect to the links, in terms of *effects*, between the 2004-2005 administrative reviews in Cases 1 and 6 and the DSB's recommendations and rulings, the European Communities disputes the

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<sup>167</sup>European Communities' appellee's submission, para. 18.

<sup>168</sup>European Communities' appellee's submission, para. 27 (referring to United States' other appellant's submission, paras. 78 and 84).

<sup>169</sup>European Communities' appellee's submission, para. 27 (referring to Appellate Body Report, *US – Zeroing (Japan)*, para. 88).

<sup>170</sup>European Communities' appellee's submission, para. 28 (quoting Appellate Body Report, *US – Zeroing (EC)*, para. 164). (emphasis added by the European Communities omitted)

United States' allegation that cash deposits were the only element that connected those measures. Rather, the Panel correctly observed that assessment rates calculated in administrative reviews may also affect a Member's implementation of the DSB's recommendations and rulings. For the European Communities, the use of zeroing in subsequent determinations would make implementation with respect to original investigations meaningless, since this would inflate again the cash deposits and duties to be collected, contrary to the *Anti-Dumping Agreement*. According to the European Communities, the application of zeroing in the 2004-2005 administrative reviews in Cases 1 and 6 "perpetuate[s] the WTO-inconsistent anti-dumping measure[s] beyond the end of the reasonable period of time"<sup>171</sup> and affects the United States' compliance with the DSB's recommendations and rulings.

117. Moreover, the European Communities disputes the United States' argument that *timing* alone was insufficient to establish that the 2004-2005 administrative reviews in Cases 1 and 6 bore a sufficiently close connection with the DSB's recommendations and rulings, because administrative reviews following Section 129 determinations made in order to achieve compliance will always be issued after the adoption of those recommendations and rulings of the DSB. The European Communities reiterates that *timing* was one of the factors taken into account by the Panel in its "close-nexus" analysis, but it was not decisive. The European Communities agrees with the Panel that the fact that the USDOC "expressly declined"<sup>172</sup> to implement the DSB rulings with respect to administrative reviews in the Section 129 determinations, "supports inclusion of these measures in the scope of this [compliance] proceeding".<sup>173</sup> In addition, the European Communities emphasizes that the 2004-2005 administrative reviews in Cases 1 and 6 were concluded after the adoption of the DSB's recommendations and rulings and, indeed, a few months after the adoption of the Section 129 determinations. The European Communities further argues that the USDOC's explicit refusal to extend the Section 129 determinations to entries covered by the subsequent administrative reviews suggests that these reviews are interconnected.

## 2. The United States' Compliance Obligations (Cases 1 and 6)

118. The European Communities requests the Appellate Body to reject the United States' appeal of the Panel's findings that the 2004-2005 administrative reviews in Cases 1 and 6 are WTO-inconsistent and constitute a failure to comply with the rulings and recommendations of the DSB. The European Communities argues that the United States' submissions regarding the revocation of the original

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<sup>171</sup>European Communities' appellee's submission, para. 34. (emphasis omitted)

<sup>172</sup>European Communities' appellee's submission, para. 35. (emphasis omitted)

<sup>173</sup>European Communities' appellee's submission, para. 35 (referring to Panel Report, para. 8.123).

orders are irrelevant to the question whether the two administrative reviews are WTO-consistent and comply with the rulings and recommendations of the DSB. Furthermore, the European Communities emphasizes that it is not seeking a retroactive remedy; rather, various United States actions and omissions after the expiry of the reasonable period of time are WTO-inconsistent and constitute a failure to comply with the DSB's recommendations and rulings. For the European Communities, the provisions of the GATT 1994 and the *Anti-Dumping Agreement* to which the United States refers confirm that it is the WTO legal regime in existence at the time a measure is adopted (and imports occur) that determines the Members' WTO rights and obligations.<sup>174</sup> The European Communities submits that all these provisions set out obligations that bind all WTO Members; they are treaty obligations and not "compliance obligations", a term that does not appear in Article 19.1 of the DSU. The European Communities considers that the provisions of the GATT 1994 and the *Anti-Dumping Agreement* to which the United States refers provide no support for the proposition that measures relating to imports occurring before the expiry of the reasonable period of time need not be WTO-consistent.

119. The European Communities also rejects the United States' argument that the Panel's approach unfairly disadvantages retrospective duty assessment systems. The European Communities considers that nothing in its submissions or in the Panel's findings is inconsistent with the proposition that the amount finally collected in response to a given dumping behaviour should not in principle vary according to which type of collection system is used. The European Communities submits that it is a well-established principle that, whilst there may be some minor technical or procedural differences, the retrospective and prospective duty assessment systems are for all essential purposes the same. According to the European Communities, the United States omits to address the "backward-looking aspect"<sup>175</sup> of the prospective duty assessment system—that is, the refund proceedings under Article 9.3.2 of the *Anti-Dumping Agreement*. The European Communities emphasizes that all the pertinent WTO obligations must be complied with by the end of the reasonable period of time, even if the goods in question entered before the end of this period. The European Communities is of the view that prospective duty assessment systems do require a WTO-consistent remedy for certain goods that enter before the end of the reasonable period of time, while the United States appears to be seeking special protection from DSU remedies for such entries under its retrospective system. The European Communities adds that it is merely seeking an effective process to enforce its rights under the covered agreements, and that the United States should not be permitted to frustrate these efforts.

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<sup>174</sup>European Communities' appellee's submission, para. 43 (referring to United States' other appellant's submission, paras. 43-51, where the United States refers to Articles VI:2 and VI:6(a) and the *Ad Note* to Article VI:2 and 3 of the GATT 1994, and Articles 8.6, 10.1, 10.6, and 10.8 of the *Anti-Dumping Agreement*).

<sup>175</sup>European Communities' appellee's submission, para. 49.



E. *Arguments of the Third Participants*

1. India

120. Pursuant to Rule 24(2) of the *Working Procedures*, India chose not to submit a third participant's submission. India's statement at the oral hearing focused on the decision by the Appellate Body to allow the public observation of the oral hearing, on the scope of the Panel's jurisdiction under Article 21.5 of the DSU, and on the establishment of the "all others" rate under Article 9.4 of the *Anti-Dumping Agreement*.

2. Japan

121. Japan agrees with the European Communities that the Panel erred in finding that the United States did not fail to comply with the DSB's recommendations and rulings by applying zeroing in subsequent reviews that were issued under the same anti-dumping duty order as the measures found to be WTO-inconsistent in the original proceedings.

122. First, Japan argues that the Panel erred in excluding from its terms of reference the subsequent reviews that were concluded *before* the adoption of the DSB's recommendations and rulings. Japan submits that Article 21.5 of the DSU covers any measure that may result in achieving or undermining compliance, irrespective of its *timing*. Properly interpreted in the context provided to it by Articles 3.7 and 19.1 of the DSU, Article 21.5 requires actions that result in "the elimination of the WTO-inconsistency in the original measure."<sup>176</sup> Whether a measure achieves this result does not depend on the timing or purpose of such measure, because nothing precludes a WTO Member from achieving compliance by a measure "taken in advance of, and without regard to"<sup>177</sup>, the DSB's recommendations and rulings. Therefore, an implementing Member must be able to offer measures pre-dating the adoption of the DSB's recommendations and rulings as a defence to a claim that no compliance measures "exist". However, Article 21.5 requires a panel to review those measures for consistency with the covered agreements. In finding that *timing* is one the relevant factors in assessing whether a measure is one "taken to comply", the Appellate Body did not indicate either that this factor is determinative, or that measures pre-dating the adoption of the DSB's recommendations and rulings cannot be "measures taken to comply".<sup>178</sup> According to Japan, Article 21 of the DSU generally contemplates events post-dating the adoption of the DSB's recommendations and rulings because the process of "surveillance" can only begin *after* the adoption of those recommendations.

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<sup>176</sup>Japan's third participant's submission, para. 107.

<sup>177</sup>Japan's third participant's submission, para. 108.

<sup>178</sup>Japan's third participant's submission, para. 113 (referring to Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77).

Nevertheless, Article 21 "does not prescribe that 'measures taken to comply' must come into existence *after* such recommendations and rulings are made."<sup>179</sup>

123. Japan suggests further that the Panel's position that *timing* is determinative makes the implementing Member's intent decisive. However, the Appellate Body found that compliance panels are not limited to reviewing measures that "*have the objective of achieving[] compliance.*"<sup>180</sup> Therefore, a measure may be "taken to comply" even if it was not adopted with the purpose of achieving compliance. The Panel itself recognized this elsewhere in its reasoning, when it rejected the United States' argument that subsequent reviews issued after the adoption of the DSB's recommendations and rulings were not "taken to comply" because they were not adopted "in view of"<sup>181</sup> those recommendations. Conversely, if a measure need not move "*in the direction of*"<sup>182</sup> compliance to be considered a measure "taken to comply", a measure that "moves away from compliance, or that reinforces non-compliance"<sup>183</sup>, can also fall within the scope of Article 21.5 review, even though there was no intent to comply. Thus, Japan posits that measures that undermine or circumvent compliance may fall within the scope of Article 21.5 proceedings even if taken before the adoption of the DSB's recommendations and rulings.

124. Moreover, Japan underscores that the United States itself asserted that it had brought its WTO-inconsistent measures into conformity by virtue of compliance measures that pre-dated the adoption of the DSB's recommendations and rulings. Before the Panel, the United States argued that it had achieved compliance with the DSB's recommendations and rulings by revoking certain of the original measures at issue and by issuing administrative reviews that "superseded"<sup>184</sup> the original measures. Of the 18 revocation notices and subsequent administrative reviews identified by the United States, 17 were issued *before* the adoption of the DSB's recommendations and rulings. Thus, although the United States argued that subsequent administrative reviews were not measures "taken to comply" with the DSB's recommendations and rulings by virtue of their timing, it simultaneously claimed to have achieved compliance because the original measures had been superseded by those reviews. In Japan's view, in order to assert the "existence" of measures taken to comply, the United States declared certain measures as "taken to comply", even though all but one of them were taken prior to the adoption of the DSB's recommendations and rulings.

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<sup>179</sup>Japan's third participant's submission, para. 115. (original emphasis)

<sup>180</sup>Japan's third participant's submission, para. 119 (quoting Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 67 (original emphasis)).

<sup>181</sup>Japan's third participant's submission, para. 121 (referring to Panel Report, paras. 8.122 and 8.123).

<sup>182</sup>Japan's third participant's submission, para. 123 (quoting Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 67 (original emphasis)).

<sup>183</sup>Japan's third participant's submission, para. 123.

<sup>184</sup>Japan's third participant's submission, para. 132 (referring to Panel Exhibit US-17).

125. In addition, Japan argues that the Panel erred in failing to assess the consistency with the covered agreements of the subsequent reviews that pre-dated the adoption of the DSB's recommendations and rulings. Where subsequent administrative reviews are offered as evidence of the "existence" of "measures taken to comply", these measures necessarily fall within the scope of the compliance proceedings, regardless of the date of their adoption. In these circumstances, Article 21.5 of the DSU required the Panel to review those measures for consistency with the covered agreements, and its failure to do so constitutes legal error. Under a harmonious interpretation of Articles 3.7, 19.1, and 21.5 of the DSU, the United States was entitled to rely on measures taken before the adoption of the DSB's recommendations and rulings to assert that it had achieved compliance. However, the same harmonious interpretation of those provisions required the Panel to consider the consistency of those declared measures with the covered agreements. Even if those measures are not regarded as "declared" measures taken to comply, they enjoy a particularly close relationship to the original measures and the DSB's recommendations and rulings in terms of *nature* and *effects*, and can "circumvent"<sup>185</sup> the compliance obligations of the United States. Japan notes that subsequent reviews concern the same anti-dumping duty order, the same products, exported from the same country, and involve the same zeroing procedure. Therefore, irrespective of the date on which those circumventing measures were adopted, they are "measures taken to comply" that must be examined under Article 21.5 of the DSU for consistency with the covered agreements. In Japan's view, *timing* alone is not of decisive importance, but is rather one factor to consider together with *nature* and *effects*. In this dispute, weighing these factors together suggests that the subsequent reviews are "measures taken to comply" within the meaning of Article 21.5 of the DSU.

126. Secondly, Japan supports the European Communities' claim that the Panel made serious legal errors in finding that the United States was not obliged to bring the assessment rates in the original administrative reviews into conformity with its WTO obligations, with prospective effect from the end of the reasonable period of time. Japan argues that these errors stem from the Panel's incorrect interpretation and application of Article 19.1 of the DSU. More specifically, Japan asserts that the Panel erred in failing to identify the "measures" covered by the DSB's recommendations and rulings as the original administrative reviews. Japan explains that both Articles 3.7 and 19.1 of the DSU indicate that the subject of the DSB's recommendations and rulings is a "specific measure at issue" that the panel and/or Appellate Body found to be inconsistent with the covered agreements. However, in this dispute, the Panel failed to define the DSB's recommendations and rulings by reference to the 16 administrative reviews at issue in the original proceedings. Instead, the Panel stated that the DSB's

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<sup>185</sup>Japan's third participant's submission, paras. 146 and 151 (quoting Panel Report, para. 8.109 (emphasis omitted)).

recommendations and rulings "concerned the *calculation of margins of dumping*"<sup>186</sup> in the original reviews, and that the recommendations and rulings therefore required that the calculation of the margins of dumping be WTO-consistent in new administrative reviews adopted after the end of the reasonable period of time. Although the Panel had not stated it expressly, it "essentially"<sup>187</sup> treated the calculation of the margins of dumping using zeroing as a "measure" that must be brought into conformity by the end of the reasonable period of time, thereby failing to identify the 16 original administrative reviews as the subject of the DSB's recommendations and rulings. The Panel further found that the use of zeroing had to "cease"<sup>188</sup> by the end of the reasonable period of time. By incorrectly identifying the measure at issue, the Panel incorrectly assessed the actions required by the United States during the implementation period. According to Japan, the Panel should have focused on the fact that the specific measures found to be WTO-inconsistent in the original proceedings were the 16 original administrative reviews. Those were the measures within the meaning of Article 17.4 of the *Anti-Dumping Agreement* that the United States was required to bring into conformity by the end of the reasonable period of time.

127. Japan further submits that the Panel erred in finding that the measures covered by the DSB's recommendations and rulings were solely the administrative reviews adopted *after* the end of the reasonable period of time. Japan explains that the Panel found that the date of determination in an administrative review is the relevant date in deciding whether an administrative review is covered by the DSB's recommendations and rulings. According to Japan, this interpretation by the Panel reduces Articles 3.7, 19.1, and 21.3 of the DSU to inutility, and eviscerates the object and purpose of the dispute settlement system, since it implies that no implementation obligations ever apply to the original measures covered by the DSB's rulings. As a consequence, the WTO-inconsistency in an original measure is never removed and, after the end of the reasonable period of time, the implementing Member remains free to enforce an original measure already found to be inconsistent with the covered agreements, by collecting excessive anti-dumping duties, without facing suspension of concessions to offset the ongoing nullification or impairment. Japan asserts that, under the Panel's approach, the reasonable period of time ceases to serve as a time for the adoption of measures to comply with the DSB's recommendations and rulings, but instead is transformed into a time for the implementing Member to adopt new WTO-inconsistent measures. Japan further contends that the Panel's findings nullify the protection afforded by Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994. By considering that the date of determination under Article 9.3.1 is

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<sup>186</sup>Japan's third participant's submission, para. 256 (emphasis added) (quoting Panel Report, paras. 8.175 and 8.180)

<sup>187</sup>Japan's third participant's submission, para. 259 (quoting Panel Report, para. 8.175).

<sup>188</sup>Japan's third participant's submission, para. 259.

decisive, the Panel in essence reduced Article 9.3 to an obligation that imposes disciplines on one single day—the date of the Article 9.3.1 determination. In Japan's view, the Panel overlooked that the chapeau of Article 9.3 establishes an "overarching"<sup>189</sup> obligation limiting the amount of the duties collected.

128. Additionally, Japan holds the view that the Panel erred in finding that the continuing legal effects of the administrative reviews at issue in the original proceedings do not compel the United States to bring these measures into conformity with its WTO obligations. Japan explains that, although the Panel found that the date of determination is the relevant date, it also stated that an original administrative review would have to be "amended"<sup>190</sup> if it continued to produce legal effects after the end of the reasonable period of time. Japan concurs with the Panel's statement that a Member must, in order 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."<sup>191</sup> However, the Panel failed to apply this approach to the assessment rates established in the original measures by finding that an original administrative review need not be revised to ensure that duty collection measures taken after the end of the reasonable period of time are WTO-consistent. The only supporting reason the Panel gave is that the continuing legal effects of administrative reviews after the end of the reasonable period of time are "due to actions on the part of private parties".<sup>192</sup> Japan disagrees with these statements and contends that they are not actions by private parties, but instead are acts of the United States' courts, taken on the basis of United States law and therefore attributable to the United States under WTO law. Further, Japan submits that a decision by a United States court to issue an injunction is taken after determining "that there is a likelihood of success on the merits"<sup>193</sup>, a legal standard that forms part of the United States' municipal law. Japan further notes that, although the Panel found that the assessment rates need not be brought into conformity, despite the fact that they have ongoing legal effects after the end of the reasonable period of time, the Panel reached a different conclusion with respect to cash deposit rates, by stating that they must be WTO-consistent *after* the end of the reasonable period of time, even if the rates were established *before* that date. In Japan's view, the Panel's distinction between assessment reviews and cash deposit rates cannot be reconciled with its interpretation of the relevant provision.

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<sup>189</sup>Japan's third participant's submission, para. 290 (quoting Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 102).

<sup>190</sup>Japan's third participant's submission, para. 296 (quoting Panel Report, para. 8.169).

<sup>191</sup>Japan's third participant's submission, para. 296 (quoting Panel Report, footnote 820 to para. 8.218). (emphasis added by Japan omitted)

<sup>192</sup>Japan's third participant's submission, para. 302 (quoting Panel Report, para. 8.192).

<sup>193</sup>Japan's third participant's submission, para. 305. (footnote deleted)

129. Furthermore, Japan argues that the Panel's finding that the original administrative reviews need not to be brought into conformity when they have continuing legal effects is wrong, because it allows the United States to adopt new WTO-inconsistent measures after the end of the reasonable period of time on the basis of the original administrative reviews. In Japan's view, these new measures will give rise to a continued violation of Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 through the collection of anti-dumping duties in excess of the correct margin of dumping; and violation of Articles II:1(a) and II:1(b) of the GATT 1994, not justified by Article II:2(b), through the collection of import duties in excess of the bound tariff. Japan asserts that, where a measure found to be WTO-inconsistent will provide a basis for new measures after the end of the reasonable period of time, implementation action is necessary to eliminate the original inconsistency in order to ensure that the new measures are themselves WTO-consistent, and thereby to terminate the nullification or impairment.

130. Moreover, Japan contends that the Panel made certain legal errors in its analysis of Article 28 of the *Vienna Convention*. Japan observes that the Panel started its analysis with the proposition that the DSU only provides for "prospective" and not "retrospective" remedies, and then decided upon a meaning for these terms "by analogy"<sup>194</sup> with Article 28 of the *Vienna Convention*. However, the Panel admitted that the terms "retrospective" and "prospective" do not feature in the DSU as such. By analogy to Article 28, the Panel held that a "retrospective remedy" consists of applying the DSB's rulings and recommendations 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".<sup>195</sup> This analysis became the foundation of the Panel's findings on the temporal scope of the implementation obligation. In Japan's view, the Panel erred by giving effect to non-treaty labels instead of fulfilling its task to give effect to the wording in the covered agreements. According to Japan, rules of treaty interpretation do not apply to non-treaty labels; there is no text, context, and object and purpose by which to interpret non-treaty language. Furthermore, Japan argues that the Panel's conception of retrospective remedies, based upon an improper analogy with Article 28 of the *Vienna Convention*, is at odds with the phrase "bring the measure into conformity", which the Panel should have interpreted. For Japan, this phrase connotes "transformative action"<sup>196</sup> by the implementing Member to change the original measure from a state of non-conformity with WTO law into a state of conformity. In its Report, the Panel excluded the measures at issue in the original proceedings from the scope of implementation, because they were past acts adopted before the end of the reasonable period of time. The Panel found that the

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<sup>194</sup>Japan's third participant's submission, paras. 348, 352, and 358.

<sup>195</sup>Japan's third participant's submission, para. 252 (quoting Panel Report, para. 8.169).

<sup>196</sup>Japan's third participant's submission, para. 366.

United States was not required "to revisit"<sup>197</sup> the original measures, or to "recalculate"<sup>198</sup> the assessment rates in those measures. However, Japan asserts that the fact that an original measure is "revised" during the implementation period does not mean that WTO dispute settlement imposes a retrospective remedy; the measure must be revised with prospective effect from the end of the reasonable period of time. In Japan's view, the United States is not required to repay inflated duties that were collected before the end of the reasonable period of time following original administrative reviews, since these were completed in the past. However, where the United States had not yet collected the duties by the end of the reasonable period of time, it must revise its original measure and consequent actions, occurring after the end of the reasonable period of time, in order to make that measure WTO-consistent. Japan refers to Articles 13, 14, and 15 of the 2001 Draft Articles on Responsibility of States for internationally wrongful acts<sup>199</sup> (the "ILC Draft Articles") in support of its contention that Article 19.1 of the DSU requires the United States to bring the administrative reviews at issue in the original proceedings into conformity with its WTO obligations when they continue to produce legal effects after the end of the reasonable period of time in order to prevent new or continuing WTO-inconsistencies.

131. Lastly, Japan asserts that its interpretation of Article 19.1 of the DSU places retrospective and prospective duty collection systems on an "equal footing"<sup>200</sup> in terms of implementation obligations, and does not create inequalities as the United States suggests. Under Japan's interpretation, the implementation of the DSB's recommendations and rulings operates in exactly the same way in both systems. Both systems allow for an administrative review to take place, pursuant to Articles 9.3.1 and 9.3.2 of the *Anti-Dumping Agreement*, and that review determines the definitive amount of duties due. Similarly, both systems provide for a refund in the event that the duties collected at the time of importation exceed the margin of dumping. Japan explains further that, if a panel or the Appellate Body finds that an administrative review is inconsistent with Article 9.3, the review will have to be brought into conformity with WTO law if it continues to produce legal effects after the end of the reasonable period of time. Japan notes that this situation could arise under both systems.

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<sup>197</sup>Japan's third participant's submission, para. 367 (quoting Panel Report, para. 8.193).

<sup>198</sup>Japan's third participant's submission, para. 367 (quoting Panel Report, para. 8.191).

<sup>199</sup>Draft Articles on Responsibility of States for internationally wrongful acts, adopted by the International Law Commission at its fifty-third session (2001). The text of the ILC Draft Articles is annexed to the United Nations General Assembly Resolution A/RES/56/83 (29 January 2002).

<sup>200</sup>Japan's third participant's submission, para. 248 (quoting Panel Report, para. 8.191).

3. Korea

132. In Korea's view, the Panel adopted a fairly mechanistic approach and failed to capture the "reality" and "particular context"<sup>201</sup> of this dispute by considering the *timing* of the subsequent reviews to be critical, and determining that only those subsequent reviews decided *after* the adoption by the DSB of the original panel and Appellate Body reports fell within its terms of reference. Korea submits that the Panel erred by placing too much emphasis on the temporal element of the subsequent reviews. In addition, Korea contends that the Panel failed to provide any detailed explanation as to why reviews subsequent to the original investigations and administrative reviews at issue in the original proceedings that were rendered *before* the adoption of the reports by the DSB should be treated differently from those that were decided after adoption by the DSB. According to Korea, the Panel's rigid focus on timing constitutes a legal error that violates Article 21.5 of the DSU.

133. For Korea, *timing* is not the most critical element in addressing this particular issue: the controlling element should be "substance" as opposed to "form".<sup>202</sup> Korea argues that effects of the subsequent reviews that were decided *before* the adoption of the reports by the DSB could reasonably continue to exist effectively (or exert influence) *after* adoption. Arguably, the impact of these subsequent reviews continues to persist, as the cash deposit rates calculated from these reviews continue to affect future entries covered by the same anti-dumping duty order. Korea contends that the Panel disregarded this continuing effect, and submits that the subsequent reviews with resulting effects after the adoption of the original panel and Appellate Body reports by the DSB fell within the Panel's terms of reference.<sup>203</sup>

134. Furthermore, according to Korea, the Panel should have taken into consideration the context of this particular dispute. Korea reiterates in particular that each of the subsequent reviews does not exist as an insulated measure, but instead is a continuing process that administers a particular anti-dumping duty order established as a result of an anti-dumping investigation. Korea argues that the Panel's decision is not entirely consistent with the Appellate Body's decision in *US – Continued Zeroing*, where the Appellate Body endorsed the concept of a single trade remedy proceeding, involving the imposition, assessment, and collection of anti-dumping duties on imports of a particular

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<sup>201</sup>Korea's third participant's submission, para. 17.

<sup>202</sup>Korea's third participant's submission, para. 20.

<sup>203</sup>Korea refers to situations where zeroing is used in an administrative review decided before the adoption of the DSB rulings, and, as a result, cash deposits distorted by zeroing are applied to future entries, and such entries remain unliquidated after the end of the reasonable period of time. (Korea's third participant's submission, paras. 20-22)



product from the same country.<sup>204</sup> Korea asserts that, in this dispute, it can also be argued that the subsequent reviews where decisions were taken before the adoption by the DSB of the original reports form part of "a string of successive proceeding pertaining to the same antidumping duty order".<sup>205</sup>

135. As its second point, Korea holds the view that the Panel erred by failing to recognize that subsequent reviews also constitute "omission or deficiencies" on the part of the implementing Member and, therefore, fell within the Panel's terms of reference. According to Korea, the refusal of the Panel to review the claim independently of its substantive analysis of whether compliance had been achieved constitutes a legal error.

136. In Korea's view, after the end of the reasonable period of time, not only affirmative action by the implementing Member to keep an WTO-inconsistent measure in place, but also "simple inaction"<sup>206</sup> to take a necessary measure to rectify the WTO-inconsistency, constitutes a failure to comply with the DSB's recommendations and rulings. It is this failure, be it in the form of affirmative action or inaction, that fell under the Panel's terms of reference. Korea refers to Article 2 of the ILC Draft Articles<sup>207</sup>, which illustrates that there is no difference as to the legal effect between an affirmative action and an omission of a state when it comes to the determination of the existence of an internationally wrongful act resulting in state responsibility.

137. Korea observes, as shown by evidence in the Panel record, that the United States continued to apply zeroing in subsequent reviews after the end of the reasonable period of time. Therefore, in Korea's view, the United States failed to implement the DSB's recommendations and rulings in due course. According to Korea, if the omission is "obvious"<sup>208</sup>, as the Panel acknowledged in its Report, the subsequent reviews that provide evidence of "omissions" and "deficiencies" by the implementing Member should be covered by the Panel's terms of reference.

138. With respect to establishment of the "all others" rate, Korea supports the European Communities' claim that the increases in the "all others" rates are unreasonable and inconsistent with Articles 9.4 and 6.8 and Annex II of the *Anti-Dumping Agreement*. According to Korea, the Panel's conclusion that Article 9.4 does not contain a specific rule to calculate an "all others" rate in a

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<sup>204</sup>Korea's third participant's submission, para. 25 (referring to Appellate Body Report, *US – Continued Zeroing*, paras. 181, 185, and 190).

<sup>205</sup>Korea's third participant's submission, para. 26 (quoting Appellate Body Report, *US – Continued Zeroing*, para. 191).

<sup>206</sup>Korea's third participant's submission, para. 29.

<sup>207</sup>*Supra*, footnote 199.

<sup>208</sup>Korea's third participant's submission, para. 32.

particular anti-dumping proceeding "is almost tantamount to the statement that an investigating authority of a Member retains almost unbridled discretion in applying an 'all others' rate."<sup>209</sup>

139. In contrast to the Panel's finding, Korea contends that Article 9.4 of the *Anti-Dumping Agreement* does provide for specific rules for the calculation of the "all others" rate. In Korea's view, Article 9.4 unequivocally states two things: first, an "all others" rate should be related to the rates assigned to the exporters and producers individually investigated, and these rates set a ceiling for the "all others" rate; secondly, the use of zero, *de minimis*, or "facts available" margins in the calculation of an "all others" rate is prohibited. Therefore, even if Article 9.4 does not specify what to do in a situation where there are no margins other than zero, *de minimis*, or based on facts available, what the two guidelines in Article 9.4 collectively stand for is that any calculation of an "all others" rate should be "reasonable".<sup>210</sup>

140. Furthermore, Korea argues that it is appropriate for a WTO panel to assess the "reasonableness" of an allegedly WTO-inconsistent measure that involves a WTO provision that contains a lacuna. Since the drafters of an agreement could not possibly set out all the details necessary to resolve a particular dispute, and since a panel enjoys certain discretion, Korea deems it appropriate for a panel to apply a reasonable interpretation and render a reasonable decision to fill the lacuna in the text of the provision. Korea argues that this proposition is supported by the requirement in Article 11 of the DSU that a panel make an objective assessment of the matter before it. Korea asserts that the Panel, however, failed to analyze whether the "all others" rate is reasonable in the present case, and instead found that no specific rules exist in this area: this "should not be translated into providing a *carte blanche* to an investigating authority."<sup>211</sup> Therefore, in Korea's view, the Panel failed to fulfil its obligation under Article 11 of the DSU.

141. In addition, Korea contends that the Panel's decision not to consider the European Communities' claims of violation of Article 6.8 and Annex II of the *Anti-Dumping Agreement*, because they were dependent on the claim of violation of Article 9.4, was misplaced. In Korea's view, the "facts available" standard cannot readily be resorted to by an investigating authority for the purpose of merely facilitating the calculation process. Article 6.8 and paragraphs 3 and 6 of Annex II of the *Anti-Dumping Agreement* clearly set out conditions that need to be fulfilled before an investigating authority can apply the "facts available" standard. These provisions make it clear that the *Anti-Dumping Agreement* does not provide unrestricted liberty to an investigating authority

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<sup>209</sup>Korea's third participant's submission, para. 36

<sup>210</sup>Korea's third participant's submission, para. 39.

<sup>211</sup>Korea's third participant's submission, para. 43.

whenever it encounters less than optimal information from a foreign respondent. Korea contends, however, that the Panel simply allowed an investigating authority to use adverse facts available as "data of convenience".<sup>212</sup>

4. Mexico

142. Pursuant to Rule 24(2) of the *Working Procedures*, Mexico chose not to submit a third participant's submission. Mexico's statement at the oral hearing focused on the "nexus-based test" to determine whether subsequent reviews are within the scope of Article 21.5 proceedings, on the temporal scope of the implementation obligations, and on the establishment of the "all others" rate under Article 9.4 of the *Anti-Dumping Agreement*.

5. Norway

143. Regarding the issue of the jurisdiction of the Panel, Norway argues that the Panel should have found that all subsequent reviews challenged by the European Communities in this dispute are "measures taken to comply" that fell within the scope of its jurisdiction under Article 21.5 of the DSU.

144. Norway submits that the Panel erred in finding that the *timing* of the subsequent reviews was the decisive factor with regard to its jurisdiction, and not just one of the optional factors that "may" be taken into consideration in the "nexus-based" analysis, listed on an equal footing with *nature* and *effects*.

145. Norway agrees with the European Communities that subsequent reviews fell within the Panel's jurisdiction as (i) "amendments" to the original measure, (ii) "omissions" or "deficiencies" in the United States' implementation of the DSB's recommendations and rulings, or alternatively (iii) "measures taken to comply", because they have a sufficiently close nexus with the measures at issue and the DSB's recommendations and rulings in the original proceedings. According to Norway, the fact that subsequent reviews are "amendments" to the original measure follows from the description of the measures at issue in the original proceedings, which included "any amendments". Each administrative review must be considered a continuum within one single anti-dumping duty order. If this were not the case, then the United States could circumvent its WTO obligations by enacting successive measures.

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<sup>212</sup>Korea's third participant's submission, para. 46.

146. Norway also agrees with previous panel and Appellate Body reports that it is for the panel, and not for the Member alone, to determine what constitutes a "measure taken to comply" within the meaning of Article 21.5 of the DSU.<sup>213</sup> Norway contends that the United States cannot make the argument that subsequent reviews are not "measures taken to comply" while, at the same time, presenting them as evidence of compliance.

147. Norway asserts that the focus of the compliance process, in the context of the DSU, in particular Articles 3.7 and 19.1, is the end result of the measure at issue, namely, to achieve consistency with a Member's WTO obligations. According to Norway, the important point is not when a subsequent review is decided, but whether or not it achieved compliance.

148. Norway notes that the Appellate Body has previously rejected the *timing* of a measure as a factor justifying its exclusion from the scope of the proceeding<sup>214</sup>, and that the United States has recognized that "compliance need not necessarily occur subsequent to the DSB recommendation and rulings, as a WTO Member might modify or remove measures at issue after establishment of a panel but prior to adoption of the panel or Appellate Body report".<sup>215</sup> According to Norway, "[b]y making timing the determinative element in respect of the scope of Article 21.5, the Panel in essence designates the [M]ember's *intent* as the acid test."<sup>216</sup> However, Norway emphasizes that the Appellate Body has previously held that the scope of a panel's jurisdiction is not confined to measures that "move in the direction of, or have the objective of achieving, compliance".<sup>217</sup> Finally, Norway states that requiring the European Communities to initiate new panel proceedings to challenge dumping determinations in measures that supersede the original ones would go against the aim of Article 21.5 of the DSU and result in the anticipatory circumvention of Members' compliance obligations.

149. With respect to the issue of the establishment of the "all others" rate, Norway submits that the Panel erred in concluding that Article 9.4 of the *Anti-Dumping Agreement* imposes no obligations on Members in a situation where all margins of investigated exporters or producers are either zero, *de minimis*, or calculated using facts available. In particular, Norway argues that the Panel erred

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<sup>213</sup>Norway's third participant's submission, para. 23 (referring to Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 73; Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 78; Panel Report, *Australia – Automotive Leather II (Article 21.5 – US)*, para. 6.4; and Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.10(22)).

<sup>214</sup>Norway's third participant's submission, para 27 (referring to Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 88).

<sup>215</sup>Norway's third participant's submission, para 27 (quoting Panel Report, *US – Gambling (Article 21.5 – Antigua and Barbuda)*, para. 5.11).

<sup>216</sup>Norway's third participant's submission, para. 28. (original emphasis)

<sup>217</sup>Norway's third participant's submission, para. 29 (quoting Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 67 (original emphasis omitted)).

because it did not interpret Article 9.4 in accordance with the *Vienna Convention*, but merely made references to the difficulties of investigating authorities in such cases.

150. Norway emphasizes that trade restrictions cannot be imposed at will by a Member, but only in accordance with the provisions of the WTO covered agreements. Referring to Articles 1 and 18.1 of the *Anti-Dumping Agreement*, Norway argues that Members do not enjoy the discretion to fill lacunae at will, and that doing so would be contrary to the object and purpose of the *WTO Agreement* to provide a rules-based multilateral trading system. In Norway's opinion, any anti-dumping measure must be in full conformity with Article VI of the GATT 1994 and the *Anti-Dumping Agreement*.

151. Turning to the text of Article 9.4 of the *Anti-Dumping Agreement*, Norway observes that Article 9.4 is an exception to the general principle set forth in Article 6.10, first sentence, that each exporter or producer has the right to its own individual margin. The "all others" rate as provided for by Article 9.4 applies to exporters or producers that were not asked by the investigating authorities to participate in the investigation. Norway stresses that the decision not to investigate these exporters or producers, and to provide them with an individual margin, was taken by the investigating authority. Therefore, those exporters or producers are not at fault.

152. Norway further explains that Article 9.4 sets forth the weighted average of the dumping margins calculated for investigated exporters or producers as the maximum ceiling for the "all others" rate. Norway points out that Article 9.4 provides that margins that are either zero, *de minimis*, or calculated using facts available should be disregarded in calculating the weighted average margin of dumping. Thus, in a situation where all margins are either zero, *de minimis*, or calculated using facts available, none of those margins can be used to calculate the average dumping margin for purposes of setting the "all others" rate. According to Norway, the Panel made a legal error in concluding that in such a situation "it was a 'free for all' for the investigating authorities to impose the margin it saw fit."<sup>218</sup> In Norway's view, this conclusion is contrary to Article 9.4 of the *Anti-Dumping Agreement*. Norway maintains that duties can be imposed only where the Agreement specifically allows for it, and where there is no legal basis to impose a measure, it cannot be imposed. Norway asserts that the investigating authorities have no credible basis to draw conclusions as to the possible dumping behaviour of non-investigated exporters or producers, since there are no margins available for the calculation of the "all others" rate. According to Norway, two options are available to investigating authorities in such cases: (i) to exempt all non-investigated exporters or producers from the measure; or (ii) to extend the investigation by including more exporters or producers within the sample of investigated exporters/producers such that it is representative.

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<sup>218</sup>Norway's third participant's submission, para. 50.

153. Based on the above, Norway submits that, in a situation where all margins of the investigated exporter or producers are either zero, *de minimis*, or calculated using facts available, Article 9.4 of the *Anti-Dumping Agreement* requires Members not to apply anti-dumping measures against non-investigated exporters or producers.

6. Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu

154. Pursuant to Rule 24(2) of the *Working Procedures*, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu chose not to submit a third participant's submission. At the oral hearing, the opening statement of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu focused on the relationship between the United States' anti-dumping system and the scope of Article 21.5 proceedings.

7. Thailand

155. Pursuant to Rule 24(2) of the *Working Procedures*, Thailand chose not to submit a third participant's submission. Thailand's statement at the oral hearing focused on the scope of the Panel's jurisdiction under Article 21.5 of the DSU, and on the temporal scope of implementation obligations.

**III. Issues Raised in This Appeal**

156. The following issues are raised in this appeal.

- (a) Whether the Panel erred in refraining from ruling on the European Communities' claim that the Panel was improperly composed.
- (b) Whether the Panel erred in finding that certain administrative and sunset reviews issued under the same anti-dumping duty orders as the measures at issue in the original proceedings fell within the Panel's terms of reference under Article 21.5 of the DSU. In particular, whether the Panel erred:
  - (i) in finding that certain subsequent reviews did not fall within its terms of reference as "amendments" to the measures at issue in the original proceedings;
  - (ii) in finding that the subsequent reviews that pre-dated the adoption of the recommendations and rulings of the DSB did not fall within its terms of reference, because they did not have a sufficiently "close nexus" with the original measures at issue and the recommendations and rulings of the DSB;

- (iii) in finding that the 2004-2005 administrative reviews in *Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands* (Case 1) and *Stainless Steel Wire Rod from Sweden* (Case 6) fell within its terms of reference, in the light of their close nexus with the original measures at issue and the recommendations and rulings of the DSB; and
  - (iv) in failing to address the European Communities' claim that the subsequent reviews fell within its terms of reference as "omissions" or "deficiencies" in the United States' implementation of the recommendations and rulings of the DSB, and in so doing, acted inconsistently with Article 11 of the DSU.
- (c) Whether the Panel erred by not extending the United States' compliance obligations to actions consequent to the assessment of duties, including the collection or liquidation of duties occurring after the end of the reasonable period of time related to administrative review determinations completed before that date.
- (d) Whether the Panel erred in its examination of specific subsequent administrative reviews and consequent actions to collect anti-dumping duties when it evaluated whether the results of these reviews or these actions establish failures to comply with the recommendations and rulings of the DSB; in particular:
- (i) regarding *Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands* (Case 1), whether the Panel erred in its analysis of the 2004-2005 administrative review, the rescission of the 2005-2006 administrative review, as well as consequent assessment instructions and liquidation instructions;
  - (ii) regarding *Stainless Steel Wire Rod from Sweden* (Case 6), whether the Panel erred in its analysis of the 2004-2005 administrative review, as well as consequent assessment instructions and liquidation instructions;
  - (iii) regarding *Ball Bearings and Parts Thereof from the United Kingdom* (Case 31), whether the Panel erred in refraining from making a specific finding with respect to the assessment after the end of the reasonable period of time of duty liability for imports of an exporter; and

- (iv) with respect to *Stainless Steel Plate in Coils from Belgium* (Case 18), *Certain Pasta from Italy* (Cases 19 and 20), *Stainless Steel Sheet and Strip in Coils from Italy* (Cases 21 and 22), *Granular Polytetrafluoroethylene Resin from Italy* (Cases 23 and 24), *Stainless Steel Sheet and Strip in Coils from Germany* (Cases 27 and 28), *Ball Bearings and Parts Thereof from France* (Case 29), and *Ball Bearings and Parts Thereof from Italy* (Case 30), whether the Panel erred in refraining from making additional substantive findings on the grounds that the European Communities did not substantiate its claims.
- (e) With respect to the subsequent sunset reviews relating to the measures at issue in the original proceedings:
  - (i) whether the Panel erred in finding that the European Communities had not demonstrated that the United States failed to comply with the recommendations and rulings of the DSB in the subsequent sunset review proceedings in *Stainless Steel Bar from France, Germany, Italy, and the United Kingdom* (Cases 2, 3, 4, and 5) and *Certain Pasta from Italy* (Case 19), because the results of those sunset reviews had not yet materialized at the time the Panel was established;
  - (ii) whether the Panel acted inconsistently with Article 11 of the DSU in not addressing the European Communities' claim that the United States failed to comply with the recommendations and rulings of the DSB in the original proceedings given that certain aspects of the measures at issue in the original proceedings remained in place; and
  - (iii) in the event the Appellate Body reverses the Panel's findings in subparagraphs (i) and (ii) above and the Panel's findings that certain sunset reviews did not fall within its terms of reference, whether, by relying, in all the sunset review proceedings mentioned in the Annex to the European Communities' request for the establishment of a panel under Article 21.5 of the DSU, on margins calculated in prior proceedings using zeroing, the United States acted inconsistently with Articles 2.1, 2.4, 2.4.2, and 11.3 of the *Anti-Dumping Agreement* and Articles 19.1 and 21.3 of the DSU and failed to comply with the recommendations and rulings of the DSB in the original proceedings.



- (f) Whether the Panel erred in declining to make findings with respect to the claims of the European Communities regarding the non-existence of measures taken to comply between 9 April 2007 and 23 April/31 August 2007.
- (g) Whether the Panel erred in finding that the European Communities' claim regarding an alleged arithmetical error in the Section 129 determination in *Stainless Steel Sheet and Strip in Coils from Italy* (Case 11) was not a claim that the European Communities could properly make in the context of these Article 21.5 proceedings.
- (h) Whether the Panel erred in finding that the United States did not act inconsistently with Article 9.4 of the *Anti-Dumping Agreement* when calculating the "all others" rates in the Section 129 determinations in *Stainless Steel Bar from France, Italy, and the United Kingdom* (Cases 2, 4, and 5), and in failing to address the European Communities' related claim under Article 6.8 and Annex II of the *Anti-Dumping Agreement*.

#### **IV. Introduction to the United States' System for the Imposition and Assessment of Anti-Dumping Duties**

157. Because this dispute concerns the use of zeroing by the United States when determining anti-dumping duties, we consider it useful to provide a brief overview of the United States' retrospective system for the imposition and assessment of anti-dumping duties.<sup>219</sup> This overview is based on the description contained in the Panel Report and the original panel report, as clarified by the participants during the course of these appellate proceedings.

158. The first stage of the system is the "original investigation" for the imposition of anti-dumping duties. The United States Department of Commerce (the "USDOC") conducts an investigation to determine whether dumping by one or more exporters has occurred during a given period of time (the "period of investigation") and, if so, what the initial margin of dumping is for each exporter. This is done by calculating an individual weighted average dumping margin for each known exporter and producer.<sup>220</sup> The USDOC then issues a Notice of Final Determination of Sales at Less than Fair Value, setting out its assessment of the existence and level of dumping. The United States International Trade Commission (the "USITC") then determines whether the relevant United States industry is materially injured or threatened with material injury by reason of the dumped imports. If

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<sup>219</sup>See Panel Report, paras. 2.4-2.9. See also Original Panel Report, paras. 2.1-2.5.

<sup>220</sup>United States' other appellant's submission, para 11 (referring to Section 777A of the United States Tariff Act of 1930 (Public Law No. 1202-1527, 46 Stat. 741, *United States Code*, Title 19, Chapter 4, as amended (the "Tariff Act")) (Panel Exhibit US-3)).

the USDOC finds that dumping existed during the period of investigation and the USITC finds that the domestic industry was materially injured or threatened with material injury by reason of the dumped imports, the USDOC issues a Notice of Antidumping Duty Order and imposes "a cash deposit of the estimated amount of antidumping duties at the time of importation"<sup>221</sup>, equivalent to the individual weighted average dumping margin for each exporter individually examined. In addition, the Notice of Antidumping Duty Order sets out an "all-others" rate applicable to exporters that were not individually examined in those cases in which the number of exporters was too large to make determining individual margins for each practicable.

159. In order to determine the existence of dumping and the individual weighted average dumping margin for each exporter investigated, the USDOC normally groups the exports into specific models or varieties of the product where each grouping or model contains only those varieties of the product at issue that are virtually identical in physical characteristics. The weighted average-to-weighted average comparison between the normal value and the export price is then made within each such averaging group. In the past, if the export price exceeded the normal value for one or more of the models being compared, the dumped amount for that model was considered to be zero. This practice has been referred to as "model zeroing". The Panel found, as a factual matter, that the United States abandoned the practice of model zeroing in original investigations in which the weighted average-to-weighted average comparison methodology is used as from 22 February 2007.<sup>222</sup> In other words, in aggregating model-specific comparisons, the USDOC currently takes into account all the results regardless of whether the weighted average export price is above or below the weighted average normal value for each model. If the individual weighted average dumping margin for a particular exporter thus calculated is zero, or below *de minimis* levels, that exporter is not found to be dumping and the investigation is terminated in relation to it. If, however, the weighted average dumping margin is above *de minimis* levels, the exporter is found to be dumping and is liable for payment of anti-dumping duties.

160. The second stage of the United States' system is the assessment of the final liability for anti-dumping duties for specific entries of the subject product by individual importers. The United States' system of duty assessment operates on a retrospective basis under which liability attaches at the time of entry, but duties are not actually assessed at that time. Instead, the United States collects at the time of entry cash deposits in the amount determined for each exporter during the original investigation stage of the process. Subsequently, once a year during the anniversary month of the

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<sup>221</sup>United States' other appellant's submission, para 10 (referring to *United States Code*, Section 1673e(a)(3) (Panel Exhibit US-1)).

<sup>222</sup>Panel Report, para. 3.1(a).

anti-dumping duty order, interested parties—including importers, domestic interested parties, foreign producers and exporters—may request the USDOC to conduct a periodic review ("administrative review") to determine the final amount of anti-dumping duties owed on entries that occurred during the previous year, as well as to determine a new cash deposit rate for future entries. If no review is requested, the cash deposits made on the entries during the previous year are automatically assessed as the final duties. The results of this "assessment review" are published in a Notice of Final Results of Antidumping Duty Administrative Reviews.

161. When calculating the magnitude of any margin of dumping for the purpose of assessing an importer's final liability for paying anti-dumping duties and any future cash deposit rates, the United States normally uses the average-to-transaction methodology and applies what has been referred to as "simple zeroing". Under this methodology, when comparing the monthly weighted average normal value with the price of each individual export transaction, the USDOC considers the amount by which the normal value exceeds the export price to be the "dumped amount" for that transaction. If the export price exceeds the normal value, the dumped amount for that export transaction is considered to be zero. The "duty assessment rate" for each importer is then determined by aggregating the results of each comparison for which the average normal value exceeds the export price.<sup>223</sup> The same zeroing methodology is also reflected in the going-forward cash deposit rate for all future entries of the subject merchandise from the exporter concerned.

162. Once the Notice of Final Results of Antidumping Duty Administrative Reviews is published, the USDOC communicates the results of its determination to the United States Customs and Border Protection ("Customs") by issuing "assessment instructions". The instructions inform Customs of the "assessment rate", and thus the final amount of anti-dumping duty to be paid by each importer on all entries made during the relevant period.<sup>224</sup> Customs then instructs the United States ports of entry to "liquidate" the relevant entries of subject imports at the established rates.<sup>225</sup> When Customs liquidates an entry, the importer of record (or its authorized 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 the same as the amount due at liquidation; (ii) a notice and an invoice, if the cash deposit amount collected at entry is less than the amount due at liquidation; or (iii) a notice

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<sup>223</sup>The USDOC includes the value of all import transactions in the denominator of the fraction used to calculate the importer's liability, but the results of the comparisons for which export prices exceed the average normal value are excluded from the numerator of that fraction. (See Panel Report, para. 2.6)

<sup>224</sup>*United States Code of Federal Regulations*, Title 19, Section 351.212(b).

<sup>225</sup>See Panel Report, para. 2.7.

and a refund cheque, if the cash deposit amount collected at entry is more than the amount due at liquidation.<sup>226</sup>

163. 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.<sup>227</sup> The anti-dumping duty order is revoked unless both the USDOC and the USITC make affirmative "likelihood" determinations.<sup>228</sup>

## V. Panel Composition

164. We address first the issue of whether the Panel erred in refraining from ruling on the European Communities' claim that the Panel was improperly composed.

165. In the original proceedings, the European Communities and the United States agreed, on 27 October 2004, that Mr. Crawford Falconer, Mr. Hans-Friedrich Beseler, and Mr. William Davey would compose the panel. This panel was chaired by Mr. Falconer. Mr. Beseler is a national of a country that is a member of the European Communities and Mr. Davey is a national of the United States. Mr. Beseler and Mr. Davey were allowed to serve on the original panel as agreed by the parties under Article 8.3 of the DSU.<sup>229</sup>

166. On 13 September 2007, the European Communities requested the establishment of a panel pursuant to Article 21.5 of the DSU concerning the alleged failure of the United States to implement the recommendations and rulings of the DSB in the original proceedings. At its meeting on 25 September 2007, the DSB decided, in accordance with Article 21.5, to refer this matter, if possible, to the original panel. Article 21.5 provides that compliance disputes should be decided "through recourse ... wherever possible ... to the original panel". In an exchange of views relating to the composition of the compliance panel, the WTO Secretariat indicated to the parties that two members of the original panel, Mr. Falconer and Mr. Davey, were not available to serve on the compliance panel.<sup>230</sup> In a letter to the WTO Secretariat dated 1 October 2007, the European Communities expressed the view that, as Mr. Beseler was available, he should not be excluded from serving on the compliance panel.<sup>231</sup> On 28 November 2007, the European Communities requested the

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<sup>226</sup>See Panel Report, footnote 7 to para. 2.7.

<sup>227</sup>Panel Report, para. 2.8.

<sup>228</sup>Panel Report, para. 2.9.

<sup>229</sup>Original Panel Report, para. 1.5.

<sup>230</sup>Panel Report, para. 5.64.

<sup>231</sup>Panel Report, para. 5.64.

Director-General of the WTO to determine the composition of the compliance panel under Article 8.7 of the DSU. On 30 November 2007, the Director-General appointed Mr. Felipe Jaramillo as chairperson of the Panel, and Ms. Usha Dwarka-Canabady and Mr. Scott Gallacher as the two other members of the Panel.<sup>232</sup>

167. The European Communities requested the Panel to find that it was improperly composed under Articles 8.3 and 21.5 of the DSU. According to the European Communities, the Panel had an inherent jurisdiction to rule on the question of whether it was properly composed, as well as the duty to examine this issue *ex officio* by providing a proper interpretation of the DSU.<sup>233</sup>

168. Addressing the European Communities' claim, the Panel underscored that Article 8.7 of the DSU establishes that, whenever there is no agreement between the parties, the ultimate power to compose the panel rests with the Director-General.<sup>234</sup> According to the Panel, there is no provision of the DSU that would give it the authority to make a finding or ruling with respect to the application, by the Director-General, of the provisions of the DSU regarding panel composition contained in Article 8.7.<sup>235</sup> The Panel pointed out that, should it agree with the contentions of the European Communities, it would have to conclude that it had no jurisdiction to examine and rule on the European Communities' other claims in this dispute.<sup>236</sup> In the light of these considerations, the Panel refrained from ruling on the substance of the claim of the European Communities with respect to its composition.

169. On appeal, the European Communities alleges that the Panel acted inconsistently with the basic requirements of due process and the full exercise of the judicial function by failing to address properly its claim that the Panel was composed in a manner inconsistent with Articles 8.3 and 21.5 of the DSU.<sup>237</sup> The European Communities submits that, because panels, and ultimately the

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<sup>232</sup>Panel Report, para. 1.6. None of these panelists are nationals of any of the parties to the dispute.

<sup>233</sup>Panel Report, para. 8.9.

<sup>234</sup>Panel Report, para. 8.17.

<sup>235</sup>Panel Report, para. 8.16. Article 8.7 of the DSU stipulates:

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.

<sup>236</sup>Panel Report, para. 8.13.

<sup>237</sup>European Communities' appellant's submission, para. 25.

Appellate Body, have the authority and the obligation to rule on the correct interpretation of the DSU<sup>238</sup>, defects that could arise during panel composition are subject to judicial review by them.<sup>239</sup> The European Communities requests the Appellate Body to complete the analysis and to find that the Panel's composition in this case was inconsistent with Articles 8.3 and 21.5 of the DSU.<sup>240</sup>

170. The United States responds that the European Communities' claim on the Panel's composition did not fall within the Panel's jurisdiction. The United States argues that Article 21.5 does not discipline the process of panel composition when recourse to the original panel is not possible. Moreover, according to the United States, an improperly composed panel would not have the authority to make findings on the merits of the European Communities' claims, including on claims related to its own composition.

171. Before examining the European Communities' appeal, we address first a preliminary matter that was brought by the United States at the oral hearing concerning Exhibit EC-62, an exchange of e-mails. Exhibit EC-62 was submitted to the Appellate Body as an attachment to a document reflecting the opening statement made by the European Communities at the oral hearing. The United States objected to the submission of Exhibit EC-62 and claimed that it is a new piece of evidence that cannot be considered in the appellate proceedings. The European Communities responded that Exhibit EC-62 had already been transmitted to the Appellate Body as part of the record of the Panel proceedings because, under Rule 25(2) of the *Working Procedures for Appellate Review*, "[t]he complete record of the panel proceeding includes ... the correspondence relating to the panel dispute between the panel or the WTO Secretariat and the parties to the dispute or the third parties". Having examined the record of the Panel proceedings, transmitted to the Appellate Body under Rule 25(1) of the *Working Procedures*, we have found that it does not contain the exchange of e-mails referred to in Exhibit EC-62. Accordingly, we conclude that Exhibit-62 is new evidence that cannot be considered at the appellate stage.

172. On the substance of the European Communities' appeal, we note that, on 28 November 2007, the Director-General was requested to determine the composition of the compliance panel under Article 8.7 of the DSU. In our view, Article 8.7 confers on the Director-General the discretion to compose panels, which was properly exercised in this case. We therefore *find* that the Panel did not err in refraining, in paragraphs 8.17 and 9.1(a) of the Panel Report, from making a finding on whether

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<sup>238</sup>European Communities' appellant's submission, para. 25.

<sup>239</sup>European Communities' appellant's submission, paras. 31 and 32.

<sup>240</sup>European Communities' appellant's submission, para. 37.

it was improperly composed. In the light of this conclusion, we do not consider it necessary to address the other arguments made by the parties on this matter.

## VI. The Panel's Terms of Reference

173. We turn next to the issues raised on appeal by the European Communities and by the United States in its other appeal relating to the Panel's findings on whether certain subsequent administrative, changed circumstances, and sunset reviews (collectively, the "subsequent reviews") following the 15 original investigations and the 16 administrative reviews at issue in the original proceedings fell within the Panel's terms of reference under Article 21.5 of the DSU.

174. Before the Panel, the United States made a request for a preliminary ruling on the grounds that certain claims made by the European Communities in relation to the subsequent reviews (and respective assessment instructions) were not within the Panel's terms of reference. The United States argued that the recommendations and rulings of the DSB covered only the 15 original investigations and the 16 administrative reviews that were at issue in the original proceedings. Therefore, determinations made in the context of administrative, changed circumstances, and sunset reviews that followed those specific measures were not "measures taken to comply" with the recommendations and rulings of the DSB within the meaning of Article 21.5 of the DSU.<sup>241</sup>

175. The European Communities responded that all of the subsequent reviews listed in its request for the establishment of a panel under Article 21.5 fell within the Panel's terms of reference either as "*amendments*" to the original investigations and administrative reviews at issue in the original proceedings, or as "*omissions*" or "*deficiencies*" in the United States' implementation of the recommendations and rulings of the DSB. Alternatively, the European Communities argued that the subsequent reviews fell within the Panel's terms of reference in the light of the close nexus that existed between those subsequent reviews, the measures at issue in the original proceedings, and the recommendations and rulings of the DSB.<sup>242</sup>

176. The Panel rejected the European Communities' claim that the subsequent reviews fell within its terms of reference as "*amendments*" to the original measures at issue.<sup>243</sup> The Panel did not rule on whether the subsequent reviews fell within its terms of reference as "*omissions*" or "*deficiencies*" in the United States' implementation obligations<sup>244</sup>, and found that only the subsequent reviews that came into effect *after* the adoption of the DSB's recommendations and rulings had a sufficiently close

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<sup>241</sup>Panel Report, paras. 8.18 and 8.33.

<sup>242</sup>Panel Report, para. 8.59.

<sup>243</sup>Panel Report, para. 8.80.

<sup>244</sup>Panel Report, para. 8.86.

nexus with the original measures at issue and the recommendations and rulings of the DSB so as to fall within its terms of reference under Article 21.5.<sup>245</sup> As a result of these findings, of the 56 subsequent reviews challenged by the European Communities, the Panel concluded that only nine administrative reviews and five sunset reviews fell within its terms of reference.

177. On appeal, the European Communities claims that the Panel erred in so ruling. In particular, the European Communities argues that the Panel erred: (i) in finding that the subsequent reviews did not fall within its terms of reference as "amendments" to the original measures at issue; (ii) in finding that the subsequent reviews that *pre-dated* the adoption of the recommendations and rulings of the DSB did not fall within its terms of reference because they did not have a sufficiently close nexus with the original measures at issue and the recommendations and rulings of the DSB; and (iii) in failing to address the European Communities' claim that the subsequent reviews fell within the scope of the compliance proceedings as "omissions" or "deficiencies" in the United States' implementation of the recommendations and rulings of the DSB. The European Communities requests the Appellate Body to reverse these findings and to find instead that all the subsequent reviews listed in its panel request fell within the Panel's terms of reference under Article 21.5 of the DSU.

178. In its other appeal, the United States claims that the Panel erred in finding that the 2004-2005 administrative reviews in *Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands* (Case 1) and *Stainless Steel Wire Rod from Sweden* (Case 6) (both issued after the end of the reasonable period of time) had a sufficiently close nexus with the original measures at issue and the recommendations and rulings of the DSB so as to fall within the Panel's terms of reference. The United States requests the Appellate Body to reverse this finding and to declare without legal effect the Panel's finding that the United States failed to comply with the DSB's recommendations and rulings and acted inconsistently with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 in respect of those two specific administrative reviews.

179. We examine below the participants' allegations of error in turn. We begin in Section A with the European Communities' appeal of the Panel's finding that the subsequent reviews did not fall within its terms of reference under Article 21.5 of the DSU as "amendments" to the measures at issue in the original proceedings. In Section B, we address the European Communities' and the United States' challenges against different aspects of the Panel's findings that certain of the subsequent reviews had a sufficiently close nexus with the original measures at issue and with the recommendations and rulings of the DSB so as to fall within its terms of reference under Article 21.5 of the DSU. Finally, in Section C, we turn to the European Communities' appeal of the Panel's

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<sup>245</sup>Panel Report, paras. 8.115 and 8.121.



decision not to rule on the European Communities' claim that the subsequent reviews fell within the Panel's terms of reference as "omissions" or "deficiencies" in the United States' implementation of the recommendations and rulings of the DSB.

A. *"Amendments" to the Original Measures at Issue*

180. The European Communities' first ground of appeal raises the question of whether the references in the original panel and Appellate Body reports and in the European Communities' panel request in the original proceedings to "any amendments" to the original measures at issue encompass any subsequent reviews enacted in the context of the anti-dumping duty orders covered in the original proceedings. Before the Panel, the European Communities claimed that the recommendations and rulings of the DSB in the original proceedings also covered amendments to the 15 original investigations and the 16 administrative reviews at issue in those proceedings, and that the subsequent reviews listed in its panel request under Article 21.5 fell within the Panel's terms of reference as such "amendments".<sup>246</sup>

181. The Panel rejected the European Communities' argument and reasoned that references by the original panel and the Appellate Body to "amendments" could not be read so broadly as to encompass any subsequent determinations issued under the relevant anti-dumping duty orders in the form of subsequent reviews.<sup>247</sup> Rather, the Panel read the references to "amendments" to the original measures at issue as referring to either corrections of clerical errors in the specific determinations covered in the original proceedings, or to amendments to those specific determinations as a result of litigation in United States courts.<sup>248</sup>

182. In addition, the Panel noted that the manner in which the European Communities framed its claims before the original panel indicated that its challenge focused on specific original investigations and administrative reviews, including various "aspects" of those determinations, but did not include any subsequent determinations issued by the USDOC in the context of the same anti-dumping duty order.<sup>249</sup> In this respect, the Panel noted that the European Communities' panel request in the original proceedings identified successive administrative reviews issued under the same anti-dumping duty order as separate and distinct measures, and not as "amendments" to other measures listed in the panel request.<sup>250</sup>

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<sup>246</sup>Panel Report, para. 8.61.

<sup>247</sup>Panel Report, para. 8.71.

<sup>248</sup>Panel Report, para. 8.72.

<sup>249</sup>Panel Report, para. 8.73.

<sup>250</sup>Panel Report, paras. 8.75 and 8.76.

183. On appeal, the European Communities claims that the Panel erred in finding that the subsequent reviews did not fall under its terms of reference under Article 21.5 as "amendments" to the measures at issue in the original proceedings. The European Communities argues that the Panel improperly narrowed the context in which the term "any amendments" was used in the original proceedings by focusing on the manner in which the European Communities framed its claims in its original panel request.<sup>251</sup> According to the European Communities, an examination of how the measures at issue had been identified in the course of the original proceedings indicates that "any amendments" to the 15 original investigations and the 16 administrative reviews would be covered by the recommendations and rulings of the DSB.<sup>252</sup>

184. The United States responds that the Panel was correct in finding that the 56 subsequent reviews identified in the European Communities' panel request were not "amendments" to the 15 original investigations and the 16 administrative reviews at issue in the original proceedings. The United States suggests that subsequent reviews cannot be properly characterized as "amendments" to the original measure at issue, because they cover different imports over a different period of time.<sup>253</sup> Therefore, a subsequent review cannot be considered to be the same measure, unchanged in its essence from the original investigation or a prior assessment review, that "merely clarifies" the original measure at issue.<sup>254</sup> The United States underscores further that the European Communities' original panel request did not refer to subsequent reviews as "amendments".

185. Initially, we observe that the European Communities is correct in noting that the original panel and the Appellate Body described the measures at issue in the original proceedings as including "any amendments" to those measures. The original panel described the 15 original investigations challenged by the European Communities 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."<sup>255</sup> Subsequently, in the "Findings" section of its report, the original panel described the 15 original investigations at issue with reference to Panel Exhibits EC-1 through EC-15,

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<sup>251</sup>European Communities' appellant's submission, paras. 62 and 71.

<sup>252</sup>European Communities' appellant's submission, paras. 64-70.

<sup>253</sup>United States' appellee's submission, para. 25.

<sup>254</sup>United States' appellee's submission, para. 25.

<sup>255</sup>Panel Report, para. 8.63 (quoting Original Panel Report, para. 2.6). (underlining added by the Panel)

and clarified that "[t]he measures at issue also include the anti-dumping duty order *and any amendments*, including the assessment instructions, and the USITC injury determination".<sup>256</sup>

186. Similarly, the original panel described the 16 administrative reviews challenged by the European Communities 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."<sup>257</sup> In the "Findings" section of its report, the original panel described the 16 administrative reviews challenged by the European Communities with reference to Panel Exhibits EC-16 through EC-31, and noted 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."<sup>258</sup>

187. Having defined the specific measures challenged by the European Communities in this manner, the original panel consistently identified the 15 original investigations and the 16 administrative reviews at issue in the original proceedings by referring to the description outlined above, including when making its findings and when issuing its final conclusions and recommendations.<sup>259</sup>

188. The Appellate Body, in turn, also described the 15 original investigations and the 16 administrative reviews at issue with reference to Panel Exhibits EC-1 through EC-15 and EC-16 through EC-31, respectively.<sup>260</sup>

189. The European Communities' allegation of error on appeal raises the question of whether the references in the original panel and Appellate Body reports to "any amendments" can be read so broadly as to encompass subsequent reviews issued under the specific anti-dumping duty orders at issue in the original proceedings.

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<sup>256</sup>Panel Report, para. 8.65 (quoting Original Panel Report, para. 7.9 and footnote 119 thereto). (emphasis added)

<sup>257</sup>Panel Report, para. 8.63 (quoting Original Panel Report, para. 2.6). (emphasis added by Panel)

<sup>258</sup>Panel Report, para. 8.67 (quoting Original Panel Report, para. 7.110 and footnote 202 thereto). (underlining added by Panel)

<sup>259</sup>See Panel Report, paras. 8.66 and 8.67 (referring to Original Panel Report, paras. 7.32, 7.142 and footnote 235 thereto, 7.223 and footnote 305 thereto, 7.224 and footnote 306 thereto, 7.248 and footnote 335 thereto, 7.284 and footnote 372 thereto, 7.286 and footnote 375 thereto, and 8.1(a), (d), and (f)).

<sup>260</sup>See Appellate Body Report, *US – Zeroing (EC)*, footnote 9 to para. 2(b) and footnote 11 to para. 2(c).

190. In *Chile – Price Band System*, the Appellate Body sought to determine whether an amendment to Chile's price band system was part of the measure at issue in that dispute. First, the Appellate Body observed that Argentina's panel request referred to the particular measures at issue "and/or amendments".<sup>261</sup> The Appellate Body reasoned that the "broad scope of the Panel request suggests that Argentina intended the request to cover the measure even as amended."<sup>262</sup> Secondly, the Appellate Body observed that the amendment of the measure at issue "[did] not change the price band system into a measure *different* from the price band system that was in force before the [a]mendment."<sup>263</sup> The Appellate Body reasoned that, despite subsequent modifications, Chile's price band system "remain[ed] essentially the same" after the amendment, because the amendment modified Chile's price band system "without *changing its essence*".<sup>264</sup>

191. Like the Appellate Body in *Chile – Price Band System*, we read references by the European Communities, the original panel, and the Appellate Body in this dispute to "any amendments" to the specific measures at issue in the original proceedings as addressing situations where subsequent legal instruments would modify these measures without changing their essence or effects.<sup>265</sup> In our view, if a subsequent modification were to change the essence or substance of the measures challenged in the original proceedings, this would transform those measures into measures that were different from the original measures.

192. In this respect, we consider that successive administrative, changed circumstances, and sunset review determinations issued in connection with the measures at issue in the original proceedings constitute separate and distinct measures, which therefore cannot be properly characterized as mere "amendments" to those measures. We note that the Appellate Body recently held in *US – Continued Zeroing* that "[t]he *successive determinations* by which duties are maintained are connected stages ... involving imposition, assessment, and collection of duties under the same anti-dumping order."<sup>266</sup> Although the Appellate Body recognized that subsequent reviews are "connected stages" under the

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<sup>261</sup> Appellate Body Report, *Chile – Price Band System*, para. 135. (emphasis added by Appellate Body removed)

<sup>262</sup> Appellate Body Report, *Chile – Price Band System*, para. 135.

<sup>263</sup> Appellate Body Report, *Chile – Price Band System*, para. 137. (original emphasis) The Appellate Body also cited with approval the reasoning of the panel in *Argentina – Footwear (EC)*, which decided to examine modifications made to the measure at issue in that dispute because they were "*modifications of the legal form of the original definitive measure, which remains in force in substance and which is the subject of the complaint.*" (See *ibid.*, para. 138 (quoting Panel Report, *Argentina – Footwear (EC)*, para. 8.45) (emphasis added by the Appellate Body))

<sup>264</sup> Appellate Body Report, *Chile – Price Band System*, para. 139. (original emphasis)

<sup>265</sup> In *Chile – Price Band System*, the Appellate Body addressed the question of whether amendments to Chile's price band system that were issued during the course of the panel proceedings were part of the measure at issue in that appeal.

<sup>266</sup> Appellate Body Report, *US – Continued Zeroing*, para. 181.

same anti-dumping duty order, it also made clear that subsequent reviews involve "successive determinations". Such successive determinations, in our view, do not constitute mere "amendments" to the immediately preceding measure, because they constitute *distinct* determinations.

193. Moreover, as the Panel correctly observed, the European Communities itself seemed to identify, before the original panel, determinations made in the subsequent reviews issued under the same anti-dumping duty order as distinct measures.<sup>267</sup> Indeed, the European Communities' original panel request identifies as separate "Cases" administrative reviews that superseded the original investigations at issue in three instances.<sup>268</sup> It also identified as separate "Cases" successive administrative reviews under the same anti-dumping duty order in five instances.<sup>269</sup> The European Communities argues that it decided to separate original investigations and administrative reviews into different "Cases" in order to allow for a separate examination of those measures and due to the structure of its claims (separate "as such" and "as applied" claims in relation to original investigations and administrative reviews, respectively). We are not persuaded. If the European Communities' references to "any amendments" also encompassed successive administrative reviews issued under the same anti-dumping duty order, it would not have been necessary for the European Communities to list successive reviews under the same anti-dumping duty order as separate "Cases", because the Panel's findings in relation to the original measure would automatically cover subsequent administrative reviews.

194. In view of the above considerations, we see no error in the Panel's conclusion that references to "any amendments" to the specific measures at issue in the original proceedings "must be read as referring to amendments ... to correct the original investigation and administrative review

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<sup>267</sup>Panel Report, paras. 8.74-8.76.

<sup>268</sup>The 2000-2001 administrative review in *Certain Stainless Steel Plate in Coils from Belgium* (Case 18), the 1999-2000 and 2000-2001 administrative reviews in *Stainless Steel Sheet and Strip in Coils from France* (Cases 25 and 26), and the 1999-2000 and 2000-2001 administrative reviews in *Stainless Steel Sheet and Strip in Coils from Italy* (Cases 21 and 22) were all identified as separate "Cases", even though they had been issued in connection with original investigations that were also challenged by the European Communities (Cases 9, 10, and 11, respectively).

<sup>269</sup>Cases 19 and 20 concern the 1999-2000 and 2000-2001 administrative reviews in *Certain Pasta from Italy*; Cases 21 and 22 concern the 1999-2000 and 2000-2001 administrative reviews in *Stainless Steel Sheet and Strip in Coils from Italy*; Cases 23 and 24 concern the 1999-2000 and 2000-2001 administrative reviews in *Granular Polytetrafluoroethylene Resin from Italy*; Cases 25 and 26 concern the 1999-2000 and 2000-2001 administrative reviews in *Stainless Steel Sheet and Strip in Coils from France*; and Cases 27 and 28 concern the 1999-2000 and 2000-2001 administrative reviews in *Stainless Steel Sheet and Strip in Coils from Germany*.

determinations specifically identified by the European Communities ... for ministerial or similar errors or, in some cases, to amend the determination following US court rulings."<sup>270</sup>

195. For these reasons, we *uphold* the Panel's finding, in paragraph 8.80 of the Panel Report, that the subsequent reviews identified in the European Communities' panel request did not fall within the Panel's terms of reference under Article 21.5 of the DSU as "amendments" to the original measures at issue.

B. *Close Nexus Analysis*

196. We turn next to the European Communities' and the United States' challenges to different aspects of the Panel's finding as to which of the subsequent reviews identified in the European Communities' panel request fell within its terms of reference under Article 21.5 of the DSU by virtue of their close nexus, in terms of *nature*, *effects*, and *timing*, with the original measures at issue and with the recommendations and rulings of the DSB.

1. Scope of Compliance Proceedings under Article 21.5 of the DSU

197. Both the European Communities' appeal and the United States' other appeal raise the question of whether and to what extent subsequent administrative, changed circumstances, and sunset review determinations that followed the specific 15 original investigations and the 16 administrative reviews at issue in the original proceedings could have fallen within the Panel's terms of reference under Article 21.5 of the DSU.

198. Article 21.5 of the DSU provides, in relevant part:

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 whenever possible resort to the original panel. (emphasis added)

199. The text of Article 21.5 indicates that proceedings under that provision concern 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 in the original proceedings. Thus, the mandate of panels acting pursuant to Article 21.5 of the DSU encompasses, in principle, the specific

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<sup>270</sup>Panel Report, para. 8.72. (footnote omitted) This reading is confirmed by the ordinary meaning of the word "amendment"—defined as "removal of fault or errors", "reformation", "correction", "emendation". (See *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), Vol. 1, p. 65)

measures "taken to comply" with the recommendations and rulings of the DSB and measures that should have been taken to achieve compliance. As the Appellate Body explained in *Canada – Aircraft (Article 21.5 – Brazil)*:

Proceedings under Article 21.5 do not concern just *any* measure 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. 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.<sup>271</sup> (original emphasis)

200. The first sentence of Article 21.5 establishes an "express link" between the measures taken to comply and the recommendations and rulings of the DSB.<sup>272</sup> For this reason, a panel's determination of the scope of measures "taken to comply" under Article 21.5 "must also involve examination of the recommendations and rulings contained in the original report(s) adopted by the DSB."<sup>273</sup> These recommendations and rulings, in turn, must be interpreted in the light of the particular factual and legal circumstances in the original proceedings, including the original measures at issue. As the Appellate Body noted, "[b]ecause such recommendations and rulings are directed at the measures found to be inconsistent in the original proceedings, such an examination necessarily involves consideration of those original measures."<sup>274</sup>

201. Thus, on its face, Article 21.5 seems to suggest that the mandate of a compliance panel is limited to reviewing the existence or consistency with the covered agreements of measures taken "in the direction of, or for the purpose of achieving, compliance"<sup>275</sup> by the implementing Member. The scope of the measures "taken to comply", in turn, should be determined with reference to the recommendations and rulings of the DSB in the original proceedings and to the original measures at issue.

202. However, the Appellate Body also expressed the view that a panel's mandate under Article 21.5 of the DSU is not necessarily limited to measures that the implementing Member maintains are taken "in the direction of" or "for the purpose of achieving" compliance with the recommendations and rulings of the DSB. Rather, the Appellate Body considered that a panel's mandate under Article 21.5 may extend to measures that the implementing Member maintains are *not*

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<sup>271</sup> Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 36.

<sup>272</sup> Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 68.

<sup>273</sup> Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 68.

<sup>274</sup> Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 68. (footnote omitted)

<sup>275</sup> Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 66. (original emphasis)

"taken to comply" with the recommendations and rulings of the DSB. Indeed, the Appellate Body explained in *US – Softwood Lumber IV (Article 21.5 – Canada)* that, under its interpretation of Article 21.5:

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 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".<sup>276</sup> (original emphasis)

203. On the basis of this interpretation, the Appellate Body concluded that a panel's mandate under Article 21.5 is not limited to the measures that an implementing Member maintains are "taken to comply" with the recommendations and rulings of the DSB. Although a Member's designation of a measure as one "taken to comply" will always be relevant, the Appellate Body explained 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.<sup>277</sup> (emphasis added)

204. Thus, the Appellate Body confirmed that a Member's designation of a measure as one "taken to comply" with the recommendations and rulings of the DSB is not determinative of the panel's mandate under Article 21.5 of the DSU. The Appellate Body also held that measures with a "particularly close relationship" with the declared measure "taken to comply", and to the recommendations and rulings of the DSB, may also fall within the purview of a compliance panel. This is because Article 21.5 mandates a panel to examine the existence and consistency with the covered agreements of measures taken to comply, which suggests that the effects of another measure may be relevant in determining whether it falls within the scope of Article 21.5 proceedings. According to the Appellate Body, a panel's determination of whether such a "close relationship" exists

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<sup>276</sup> Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 67.

<sup>277</sup> Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77.



will depend upon the particular factual and legal background, and may call for an examination of the timing, nature, and effects of the various measures before the panel.

205. A panel's determination of whether a particular measure falls within the scope of Article 21.5 proceedings is an objective inquiry and must necessarily involve an examination of any measure designated as one "taken to comply", and of the recommendations and rulings of the DSB, in the light of the particular factual and legal background in which they are adopted. In determining the scope of its jurisdiction, the compliance panel may also be called upon to determine whether no measure taken to comply exists, as the 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*."<sup>278</sup> Therefore, if measures to comply with the DSB's recommendations and rulings were not taken, that omission will also fall within the scope of the compliance proceedings.

206. Where a compliance panel determines that measures taken to comply do exist, it should then seek to determine whether such measures fully implement the recommendations and rulings of the DSB. Pursuant to Article 19.1 of the DSU, these recommendations and rulings require the Member concerned to bring the measures found to be inconsistent with a covered agreement into conformity with that agreement. Therefore, the compliance panel should seek to determine whether the measures taken to comply achieve full or partial compliance "in situations where the measures taken to comply, through omissions or otherwise, may achieve only partial compliance."<sup>279</sup> Article 21.5 also requires the compliance panel to examine, in the light of the claims raised, whether the measures taken to comply are consistent with the relevant covered agreement, as the word "consistency" in Article 21.5 "implies that panels acting pursuant to Article 21.5 must objectively assess whether new measures are, in fact, consistent with relevant obligations under the covered agreements."<sup>280</sup>

207. Furthermore, a party seeking recourse to Article 21.5 of the DSU may request the compliance panel to examine measures that the implementing Member maintains are *not* measures "taken to comply". In that event, the compliance panel should seek to determine whether such distinct measures are particularly closely connected to the measures the implementing Members asserts are "taken to comply", and to the recommendations and rulings of the DSB, so as to fall within the

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<sup>278</sup>Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 67. (original emphasis)

<sup>279</sup>Appellate Body Report, *US – FSC (Article 21.5 – EC II)*, para. 60.

<sup>280</sup>Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 67. Similarly, the Appellate Body held in *EC – Bed Linen (Article 21.5 – India)* that "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." (Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 79 (original emphasis))

purview of the compliance panel.<sup>281</sup> Determining whether this is the case may call for an examination of the timing, nature, and effects of the various measures.<sup>282</sup> Once a compliance panel determines that such closely connected measures fall within its terms of reference, Article 21.5 directs it to examine these measures for consistency with the relevant provisions of the covered agreements in the light of the claims raised.

2. Application of Article 21.5 of the DSU by the Panel

208. In applying this analytical framework, we examine whether the Panel in this case erred in determining the scope of measures that should fall within its terms of reference under Article 21.5 of the DSU. We begin with an examination of the recommendations and rulings of the DSB in the original proceedings, as reflected in the original panel and Appellate Body reports. Those reports contained, *inter alia*, the following findings, as relevant for the purposes of these proceedings.

- The zeroing methodology, as it relates to original investigations in which the weighted average-to-weighted average comparison methodology ("model zeroing"<sup>283</sup>) is used to calculate margins of dumping, is inconsistent "as such" with Article 2.4.2 of the *Anti-Dumping Agreement*.<sup>284</sup>
- The United States acted inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement* by applying zeroing in the weighted average-to-weighted average comparison methodology (model zeroing) in 15 specific original investigations.<sup>285</sup>
- The United States acted inconsistently with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 by applying zeroing in the weighted average-to-transaction comparison methodology ("simple zeroing"<sup>286</sup>) in 16 specific administrative reviews.<sup>287</sup>

209. Following the adoption of the recommendations and rulings of the DSB on 9 May 2006, the United States took the following actions, as relevant for the purposes of these proceedings.

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<sup>281</sup>We observe that, in *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, the Appellate Body found that the fact that the "Understanding on Bananas" was itself a measure "taken to comply" did not require the panel to determine whether it had a "particularly close relationship" to the declared measure taken to comply and the DSB's recommendations and rulings. (See Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 252)

<sup>282</sup>Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77.

<sup>283</sup>For a description of the "model zeroing" methodology, see *supra*, para. 159.

<sup>284</sup>Appellate Body Report, *US – Zeroing (EC)*, paras. 222 and 263(b).

<sup>285</sup>Original Panel Report, paras. 7.32 and 8.1(a).

<sup>286</sup>For a description of the "simple zeroing" methodology, see *supra*, para. 161.

<sup>287</sup>Appellate Body Report, *US – Zeroing (EC)*, paras. 135 and 263(a)(i).

- On 27 December 2006, the United States announced that it would terminate the use of "model zeroing" in original 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.<sup>288</sup>
- On 1 March 2007, the USDOC initiated proceedings pursuant to Section 129 of the Uruguay Round Agreements Act<sup>289</sup> (the "URAA") covering 12 of the 15 original investigations at issue in the original proceedings (three anti-dumping duty orders had been previously revoked). On 9 April 2007, the USDOC issued Section 129 determinations in which it recalculated, without zeroing, the margins of dumping for 11 of the original investigations at issue in the original proceedings. The results of those Section 129 determinations became effective on 23 April 2007. The remaining Section 129 determination was issued on 20 August 2007, effective on 31 August 2007. The recalculation without zeroing of the margins of dumping for the exporters concerned led to the revocation of two anti-dumping duty orders. For the remaining 10 original anti-dumping duty orders, margins of dumping recalculated without zeroing continued to be applied (as the new cash deposit rate) with respect to imports made subsequent to the date the respective Section 129 determination came into effect.<sup>290</sup>
- With respect to the 16 administrative reviews at issue in the original proceedings, the United States considered that the cash deposit rates calculated in those proceedings—with one exception—were no longer in effect because they had been superseded by subsequent administrative reviews. Therefore, the United States considered that no further action was required in order to implement the DSB's recommendations and rulings in relation to those administrative reviews.<sup>291</sup>
- The United States also issued sunset review determinations with respect to some of the measures at issue in the original proceedings. On 7 March 2007, following negative likelihood of continuation or recurrence of injury determinations by the USITC, the USDOC revoked anti-dumping duty orders in four Cases.<sup>292</sup>

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<sup>288</sup>Panel Report, para. 3.1(a).

<sup>289</sup>Section 129 of the Uruguay Round Agreements Act, Public Law No. 103-465, 108 Stat. 4836, *United States Code*, Title 19, Section 3538 (2000).

<sup>290</sup>Panel Report, para. 3.1(b) (referring to European Communities' first written submission to the Panel, para. 41).

<sup>291</sup>Panel Report, para. 3.1(d) (referring to United States' first written submission to the Panel, para. 21; and Panel Exhibit US-17).

<sup>292</sup>Panel Report, para. 3.1(e).

210. Given the above, the United States claimed before the Panel to have achieved full compliance with the recommendations and rulings of the DSB in relation to the 15 original investigations at issue in the original proceedings by issuing Section 129 determinations in which it recalculated, without zeroing, the margins of dumping for those original investigations for which, at that time, anti-dumping duty orders had not been revoked for reasons other than zeroing. With respect to the recommendations and rulings of the DSB as they relate to the 16 administrative reviews at issue in the original proceedings, the United States asserted that the cash deposit rates established in those reviews "were no longer in effect because they had been superseded by subsequent administrative reviews", with the result that "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."<sup>293</sup> In support of this allegation, the United States provided the Panel with a list of the subsequent reviews that superseded the reviews challenged in the original proceedings.<sup>294</sup>

211. However, the European Communities sought to include in the Panel's terms of reference 40 administrative review determinations and 16 sunset review determinations issued subsequent to the 15 original investigations and 16 administrative reviews covered in the original proceedings.<sup>295</sup> These are measures that the United States maintains were *not* "taken to comply" with the recommendations and rulings of the DSB.<sup>296</sup> The European Communities argued that these subsequent reviews should nevertheless fall within the Panel's terms of reference by virtue of their "close nexus" with the original measures at issue and the recommendations and rulings of the DSB. The European Communities argues that these reviews "perpetuate the WTO-inconsistent anti-dumping measure[s] beyond the end of the reasonable period of time".<sup>297</sup>

212. The Panel found that the subsequent reviews identified by the European Communities in its panel request potentially fell within the scope of the compliance proceedings because of their close nexus, in terms of *nature* and *effects*, with the original measures at issue and the recommendations

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<sup>293</sup>Panel Report, para. 3.1(d) (referring to United States' first written submission to the Panel, para. 21; and Panel Exhibit US-17).

<sup>294</sup>Panel Report, footnote 44 to para. 3.1(d) (referring to Panel Exhibit US-17).

<sup>295</sup>See Annex A to Request for the Establishment of a Panel by the European Communities, WT/DS294/25, Panel Report, Annex A-1. See also Panel Report, para. 8.58. The European Communities also challenged two changed circumstances review determinations issued subsequently to Cases 17 and 24 before the original panel. Such changed circumstances reviews were not specifically addressed by the Panel, because the Panel considered them to be of "limited relevance" in its assessment of the United States' implementation of the recommendations and rulings of the DSB, to the extent that their only effect was to "change the company whose exports are subject to the anti-dumping duties". (See Panel Report, footnote 660 to para. 8.107)

<sup>296</sup>Panel Report, para. 8.33.

<sup>297</sup>European Communities' appellee's submission, para. 34. (emphasis and footnote omitted)

and rulings of the DSB.<sup>298</sup> The Panel noted that successive determinations of different types are made in the context of a single trade remedy proceeding, involving the imposition and assessment of duties on imports of a particular subject product, from the same country, and under a particular anti-dumping duty order. These determinations form part of a continuum of events that are all "inextricably linked".<sup>299</sup> The Panel reasoned that zeroing was the only aspect of the subsequent reviews that was challenged by the European Communities, which was also the precise issue that was challenged in the original proceedings and the subject of the recommendations and rulings by the DSB.<sup>300</sup> According to the Panel, while the original panel's and 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 covered agreements, in particular, Article VI:1 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement*.<sup>301</sup> The Panel added 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."<sup>302</sup>

213. However, the Panel found that the subsequent reviews that took place *before* the adoption of the DSB's recommendations and rulings in the original proceedings did not have a sufficiently close nexus, in terms of *timing*, with the original measures at issue and with the recommendations and rulings of the DSB, and therefore did not fall within its terms of reference.<sup>303</sup> The Panel reasoned that, "as a matter of logic ... 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."<sup>304</sup>

214. On this basis, the Panel concluded that only the subsequent reviews issued after the date of the adoption of the recommendations and rulings of the DSB would have a sufficiently close nexus, in terms of nature, effects, and timing, with the original measures at issue and the recommendations and rulings of the DSB. As a result, the Panel concluded that, out of the 56 subsequent determinations

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<sup>298</sup>Panel Report, para. 8.118. In its analysis, the Panel referred to the "nexus-based" analysis developed by the panels in *Australia – Salmon (Article 21.5 – Canada)*, *Australia – Leather II (Article 21.5 – US)*, and *US – Upland Cotton (Article 21.5 – Brazil)*, as well as by the Appellate Body in *US – Softwood Lumber IV (Article 21.5 – Canada)*. (See *ibid.*, para. 8.97)

<sup>299</sup>Panel Report, para. 8.103.

<sup>300</sup>Panel Report, para. 8.104.

<sup>301</sup>Panel Report, para. 8.106.

<sup>302</sup>Panel Report, para. 8.118(b).

<sup>303</sup>Panel Report, para. 8.119.

<sup>304</sup>Panel Report, para. 8.115. (footnote omitted)

challenged by the European Communities, only nine administrative reviews and five sunset reviews fell within its terms of reference under Article 21.5 of the DSU.<sup>305</sup>

215. On appeal, the European Communities submits that the Panel erred in excluding from its terms of reference the subsequent reviews that were issued *before* the adoption of the DSB's recommendations and rulings. In its other appeal, the United States challenges the Panel's finding that the 2004-2005 administrative reviews in *Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands* (Case 1) and *Stainless Steel Wire Rod from Sweden* (Case 6) (both issued after the end of the reasonable period of time) fell within its terms of reference by virtue of their close nexus with the original measures at issue and the recommendations and rulings of the DSB in the original proceedings.

216. Both the European Communities and the United States claim that the Panel erred in its application of the "nexus-based test" as outlined above to the facts of this dispute. We address in turn the allegations of error made by each party in relation to the Panel's analysis of the links, in terms of *nature, effects, and timing*, between the subsequent reviews, the declared measures taken to comply, and the recommendations and rulings of the DSB. We begin by examining the European Communities' claim that the Panel erred in finding that the subsequent reviews that *pre-dated* the adoption of the DSB's recommendations and rulings did not fall within its terms of reference because they did not have a sufficiently close nexus, in terms of *timing*, with the recommendations and rulings of the DSB. Subsequently, we address the United States' other appeal of the Panel's finding that the 2004-2005 administrative reviews in Cases 1 and 6 (both issued after the end of the reasonable period of time) fell within its terms of reference based on the links, in terms of *nature, effects, and timing*, between these two measures, the declared measures taken to comply, and the recommendations and rulings of the DSB.

### 3. The European Communities' Appeal of the Panel's "Close Nexus" Analysis

#### (a) Timing

217. We begin with the European Communities' claim that the Panel erred in excluding certain subsequent reviews from the scope of these compliance proceedings on the basis that they *pre-dated* the adoption of the recommendations and rulings of the DSB made on 9 May 2006.

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<sup>305</sup>Panel Report, para. 8.126.

218. Both the European Communities and the United States agree that the timing of a measure is not determinative of whether there is a sufficiently close nexus between such measure, the declared measure "taken to comply", and the recommendations and rulings of the DSB.<sup>306</sup>

219. However, the participants diverge as to the significance of the timing of the subsequent reviews for the Panel's "close nexus" analysis. The European Communities suggests that the Panel erred in mechanistically excluding from its terms of reference the subsequent reviews issued *before* the adoption of the recommendations and rulings of the DSB, because the challenged subsequent reviews "*perpetuate[d]*" the WTO-inconsistent measures beyond the end of the reasonable period of time.<sup>307</sup>

220. The United States responds that the Panel correctly excluded the subsequent reviews that pre-dated the adoption of the recommendations and rulings of the DSB from its terms of reference, because these reviews were not "taken to comply" with recommendations and rulings that did not yet exist.<sup>308</sup> The United States adds that the Panel erred in *including* in its terms of reference the 2004-2005 administrative reviews in Cases 1 and 6, simply because they were issued *after* the adoption of the recommendations and rulings of the DSB. According to the United States, timing alone cannot justify the inclusion of the 2004-2005 administrative reviews in the Panel's terms of reference, because "it will always be the case that administrative reviews following modifications to original investigations made in order to comply with DSB recommendations and rulings will be issued after the adoption of the DSB recommendations and rulings."<sup>309</sup>

221. The Panel justified its decision to exclude from its terms of reference the subsequent reviews challenged by the European Communities that were issued before the adoption of the DSB's recommendations and rulings as follows:

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. 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. The European Communities has not convinced us that a different conclusion is warranted in the present dispute.

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<sup>306</sup>European Communities' appellant's submission, para. 91; United States' other appellant's submission, para. 83.

<sup>307</sup>European Communities' appellee's submission, para. 34. (original emphasis)

<sup>308</sup>United States' appellee's submission, para. 40.

<sup>309</sup>United States' other appellant's submission, para. 83.

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. 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.<sup>310</sup> (footnotes omitted)

222. At the outset, we agree with the Panel that measures taken to comply with recommendations and rulings of the DSB ordinarily post-date the adoption of the recommendations and rulings.<sup>311</sup> As the Appellate Body noted in *US – Softwood Lumber IV (Article 21.5 – Canada)*, "[a]s a whole, Article 21 deals with events *subsequent* to the DSB's adoption of recommendations and rulings in a particular dispute."<sup>312</sup>

223. However, the Panel's finding 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"<sup>313</sup> seems premised on the notion that a panel's mandate under Article 21.5 is limited to those measures taken "in the direction of" or "for the purposes of achieving" compliance with the recommendations and rulings of the DSB. As we have noted earlier, in the Appellate Body's interpretation, "[t]he 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*."<sup>314</sup> For this reason, measures with a "particularly close relationship" with the declared measures "taken to comply", and to the recommendations and rulings of the DSB, may also fall within the scope of a panel proceeding under Article 21.5 of the DSU, even though such measures are not, strictly speaking, measures taken with the purpose of achieving compliance with those recommendations and rulings.

224. In this respect, we agree with the European Communities and the United States that the *timing* of a measure cannot be determinative of whether it bears a sufficiently close nexus with a Member's implementation of the recommendations and rulings of the DSB so as to fall within the scope of an

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<sup>310</sup>Panel Report, paras. 8.115 and 8.116.

<sup>311</sup>Panel Report, para. 8.115.

<sup>312</sup>Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 70. (original emphasis)

<sup>313</sup>Panel Report, para. 8.115. (footnote omitted)

<sup>314</sup>Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 67. (original emphasis)



Article 21.5 proceeding.<sup>315</sup> Since compliance with the recommendations and rulings of DSB can be achieved *before* the recommendations and rulings of the DSB are adopted<sup>316</sup>, a compliance panel may have to review events pre-dating the adoption of those recommendations and rulings in order to resolve a disagreement as to the "existence" or "consistency with a covered agreement" of such measures. Indeed, the United States argued before the Panel that it did not have to take further action to implement the recommendations and rulings of the DSB in respect of the administrative reviews at issue in the original proceedings, because they were superseded by subsequent administrative reviews that pre-dated the adoption of the DSB's recommendations and rulings.<sup>317</sup> We also note the United States' argument that, where a measure is withdrawn prior to the DSB's recommendations and rulings, a Member may not need to take any further measures to comply with those recommendations and rulings after they are adopted.<sup>318</sup> We do not see why a compliance panel should be unable to take such prior withdrawal into account.

225. We consider that the timing of a measure remains a relevant factor in determining whether they are sufficiently closely connected to a Member's implementation of the recommendations and rulings of the DSB.<sup>319</sup> Indeed, the fact that a measure is adopted simultaneously with, shortly before, or shortly after specific actions introduced by Members with a view to implementing the recommendations and rulings of the DSB may provide support for a finding that those measures are closely connected. Conversely, there might be situations where the fact that the alleged "closely connected" measure was taken a considerable time before the adoption of the recommendations and rulings of the DSB will be sufficient to sever the connection between that measure and a Member's implementation obligations.

226. In our view, the Panel's formalistic reliance on the date of issuance of the subsequent reviews in ascertaining whether these reviews had a close nexus with the recommendations and rulings of the DSB was in error. The relevant inquiry was not whether the subsequent reviews were taken with the intention to comply with the recommendations and rulings of the DSB; rather, in our view, the relevant inquiry was whether the subsequent reviews, despite the fact that they were issued before the

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<sup>315</sup>European Communities' appellant's submission, para. 91; United States' other appellant's submission, para. 83.

<sup>316</sup>In that vein, we note the statement by the United States in *US – Gambling (Article 21.5 – Antigua and Barbuda)* that "compliance need not necessarily occur subsequent to the DSB recommendation and rulings, as a WTO Member might modify or remove measures at issue after establishment of a panel but prior to adoption of the panel or Appellate Body report." (Panel Report, *US – Gambling (Article 21.5 – Antigua and Barbuda)*, para. 5.11)

<sup>317</sup>See Panel Exhibit US-17.

<sup>318</sup>United States' appellee's submission, para. 41.

<sup>319</sup>See Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 84; Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.10(22); and Panel Report, *Australia – Automotive Leather II (Article 21.5 – US)*, para. 6.5.

adoption of the recommendations and rulings of the DSB, still bore a sufficiently close nexus, in terms of *nature, effects, and timing*, with those recommendations and rulings, and with the declared measures "taken to comply", so as to fall within the scope of Article 21.5 proceedings.

227. Accordingly, we *reverse* the Panel's finding, in paragraph 8.119 of the Panel Report, that "none of the subsequent reviews challenged by the European Communities that were decided before the adoption of the DSB's recommendations and rulings fall within our terms of reference".<sup>320</sup>

228. Having reversed the Panel's finding that the subsequent reviews that were issued *before* the adoption of the DSB's recommendations and rulings did not have a sufficiently close nexus with those recommendations and rulings, and with the declared measures "taken to comply", so as to fall within its terms of reference under Article 21.5 of the DSU, we examine next whether any of those reviews fall within the scope of these compliance proceedings.

229. As we have noted earlier, in determining whether measures that are ostensibly *not* "taken to comply" with the recommendations and rulings of the DSB have a particularly close connection to the declared measure "taken to comply", and to the recommendations and rulings of the DSB, a panel is required to scrutinize the links, in terms of *nature, effects, and timing*, between those measures, the declared measures "taken to comply", and the recommendations and rulings of the DSB. Only then is a panel in a position to determine whether there are sufficiently close links for it to characterize such other measures as "taken to comply" and, consequently, to assess their consistency with the covered agreements.<sup>321</sup> Accordingly, we examine the links, in terms of *nature, effects, and timing*, between the subsequent reviews excluded by the Panel from its terms of reference ("the excluded subsequent reviews"), the declared measures "taken to comply", and the recommendations and rulings of the DSB.

230. In our view, the use of zeroing in the excluded subsequent reviews provides the necessary link, in terms of *nature* or subject matter, between such measures, the declared measures "taken to comply", and the recommendations and rulings of the DSB. All the excluded subsequent reviews were issued under the same respective anti-dumping duty order as the measures challenged in the original proceedings, and therefore constituted "connected stages ... involving the imposition, assessment and collection of duties under the same anti-dumping order".<sup>322</sup> Moreover, as the Panel correctly noted, the issue of zeroing was the precise subject of the recommendations and rulings of the DSB, the only aspect of the original measures that was modified by the United States in its

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<sup>320</sup>Underlining and footnote omitted.

<sup>321</sup>Appellate Body Report, *US – Softwood Lumber IV (Article 21.5- Canada)*, para. 77.

<sup>322</sup>Appellate Body Report, *US – Continued Zeroing*, para. 181.

Section 129 determinations, and is the only aspect of the excluded subsequent reviews challenged by the European Communities in these proceedings.<sup>323</sup> These pervasive links, in our view, weigh in favour of a sufficiently close nexus, in terms of *nature* or subject matter, between the excluded subsequent reviews, the declared measures "taken to comply", and the recommendations and rulings of the DSB, insofar as the use of zeroing is concerned.

231. With respect to the links, in terms of *effects*, between the excluded subsequent reviews, the declared measures "taken to comply", and the recommendations and rulings of the DSB, we have a more mixed picture. Many of the excluded subsequent reviews are administrative reviews that generated assessment rates calculated with zeroing, and replaced the cash deposit rates that were found to be WTO-inconsistent in the original proceedings, either as a result of an original investigation or an administrative review, with cash deposit rates calculated with zeroing in such subsequent reviews. Therefore, to the extent that these administrative reviews generated assessment rates and cash deposit rates calculated with zeroing that replaced those found to be WTO-inconsistent in the original proceedings with the effects of assessment rates and cash deposit rates that continued to reflect the zeroing methodology, this would provide a sufficient link, in terms of *effects*, between those administrative reviews and the recommendations and rulings of the DSB, insofar as the requirement to cease using the zeroing methodology is concerned.

232. However, with respect to the 15 original investigations subject to the recommendations and rulings of the DSB, the United States issued Section 129 determinations in which it recalculated margins of dumping without zeroing that served as the basis for the going-forward cash deposit rates for the relevant anti-dumping duty orders. This recalculation without zeroing replaced the effects of the cash deposits calculated with zeroing in previous administrative reviews with the effects of cash deposits calculated *without* zeroing. Consequently, to the extent that the effects of the administrative and sunset reviews excluded from the Panel's terms of reference were replaced with those of a subsequent Section 129 determination in which zeroing was not applied, those subsequent reviews would generally not have the necessary link, in terms of *effects*, with the declared measures "taken to comply", and with the recommendations and rulings of the DSB, so as to fall within the Panel's terms of reference.

233. Likewise, with respect to the 16 administrative reviews covered in the original proceedings, subsequent administrative reviews provided assessment rates calculated with zeroing, and generated cash deposit rates based on zeroing that replaced the effects of the administrative reviews found to be WTO-inconsistent in those proceedings. As we have noted earlier, such assessment rates and cash

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<sup>323</sup>See Panel Report, para. 8.104.

deposit rates calculated with zeroing provided a sufficiently close link, in terms of *effects*, between such subsequent reviews and the recommendations and rulings of the DSB, insofar as the requirement to cease using the zeroing methodology is concerned. Administrative reviews could also have an effect on the United States' implementation of the recommendations and rulings of the DSB after the end of the reasonable period of time to the extent that the respective anti-dumping duty orders had been continued as a result of a sunset review in each of those Cases. Accordingly, to the extent that sunset review determinations led to the continuation of the relevant anti-dumping duty orders, which in turn provided the legal basis for the continued imposition of assessment rates and cash deposits calculated with zeroing in subsequent administrative reviews with continued effects after 9 April 2007, these sunset reviews had a sufficiently close link, in terms of *effects*, with the recommendations and rulings of the DSB. These are the sunset reviews in *Granular Polytetrafluoroethylene Resin from Italy* (Case 24), *Stainless Steel Sheet and Strip in Coils from Germany* (Case 28), *Ball Bearings and Parts Thereof from France* (Case 29), *Ball Bearings and Parts Thereof from Italy* (Case 30), and *Ball Bearings and Parts Thereof from the United Kingdom* (Case 31).<sup>324</sup>

234. Finally, with respect to the links, in terms of *timing*, between the excluded subsequent reviews, the declared measures "taken to comply", and the recommendations and rulings of the DSB, we have articulated above the reasons for which we do not consider the fact that they were issued before the adoption of the recommendations and rulings of the DSB to be determinative. In particular, the fact that the likelihood-of-dumping determinations in the sunset reviews listed above pre-date the adoption of the recommendations and rulings of the DSB is not sufficient to sever the pervasive links that we have found to exist, in terms of *nature* and *effects*, between such sunset reviews, the recommendations and rulings of the DSB, and the declared measures "taken to comply".

235. Accordingly, we *find* that the sunset reviews in Cases 24, 28, 29, 30, and 31 had a sufficiently close nexus with the declared measures "taken to comply", and with the recommendations and rulings of the DSB, so as to fall within the Panel's terms of reference under Article 21.5 of the DSU.

#### 4. The United States' Other Appeal of the Panel's "Close Nexus" Analysis

##### (a) Nature

236. In its other appeal, the United States argues that the Panel erred in finding that there are sufficiently close links, in terms of *nature*, between the original investigations at issue in the original

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<sup>324</sup>These sunset reviews were excluded from the scope of these compliance proceedings because the relevant likelihood-of-dumping determinations by the USDOC had been made before the adoption of the DSB's recommendations and rulings in the original proceedings.

proceedings and the 2004-2005 administrative reviews in Cases 1 and 6. We recall that these administrative reviews were issued on 22 June 2007 and 9 May 2007 respectively, that is, *after* the reasonable period of time had expired on 9 April 2007.

237. The United States argues that the Panel erred in finding that successive determinations of different types made in the context of a single trade remedy proceeding "form part of a continuum of events and measures that are all inextricably linked".<sup>325</sup> For the United States, a "closer connection between the declared measure taken to comply and the alleged additional measure"<sup>326</sup> must exist for the latter to fall within the scope of Article 21.5 proceedings, because by definition administrative reviews will usually have the same product and country coverage as the original investigation. In addition, the United States argues that the recommendations and rulings of the DSB with regard to zeroing in original investigations are different from the recommendations and rulings made by the DSB in relation to zeroing in administrative reviews. The United States contends that the Panel ignored the fact that the recommendations and rulings of the DSB concerning Cases 1 and 6 apply exclusively to the use of zeroing in aggregating weighted average-to-weighted average comparisons in original investigations. The United States emphasizes that there are no DSB recommendations and rulings related to the use of zeroing in weighted average-to-transaction comparisons "as applied" in the 2004-2005 administrative reviews in Cases 1 and 6.<sup>327</sup>

238. The European Communities responds that the Panel correctly limited its analysis "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 ... to the findings of the panel and Appellate Body in the original dispute so as to warrant ... consideration of that precise aspect of the subsequent reviews".<sup>328</sup> Thus, according to the European Communities, the use of zeroing is the element closely connecting the subsequent reviews with the original measures and the recommendations and rulings of the DSB. Moreover, the European Communities dispels concerns raised by the United States that the recommendations and rulings of the DSB in this dispute only applied to the use of weighted average-to-weighted average zeroing in the original investigations in Cases 1 and 6. The European Communities submits that zeroing under different comparison methodologies and in different stages of anti-dumping proceedings simply reflect "different manifestations of a single rule or norm."<sup>329</sup> The European Communities underscores that the use of zeroing in subsequent administrative reviews

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<sup>325</sup>Panel Report, para. 8.103.

<sup>326</sup>United States' other appellant's submission, para. 76.

<sup>327</sup>United States' other appellant's submission, para. 78.

<sup>328</sup>European Communities' appellee's submission, para. 24 (quoting Panel Report, para. 8.101).

<sup>329</sup>European Communities' appellee's submission, para. 27 (quoting Appellate Body Report, *US – Zeroing (Japan)*, para. 88).

would undermine the United States' implementation of the recommendations and rulings of the DSB with respect to the original investigations in Cases 1 and 6.

239. At the outset, we agree with the United States that identity in terms of product and country coverage alone would be an insufficient basis for determining that the 2004-2005 administrative reviews in Cases 1 and 6 have a sufficiently close nexus, in terms of nature, with the recommendations and rulings of the DSB with respect to the original investigations in those Cases. The Appellate Body recognized in *US – Softwood Lumber IV (Article 21.5 – Canada)* that not "every assessment review will necessarily fall within the jurisdiction of an Article 21.5 panel."<sup>330</sup> However, in this particular case, we consider that the use of zeroing in the 2004-2005 administrative reviews in Cases 1 and 6 establishes a link in terms of nature or subject matter between those reviews, the recommendations and rulings of the DSB, and the declared measures "taken to comply"—that is, the Section 129 determinations in those Cases.

240. Both the original investigations and the 2004-2005 administrative reviews in Cases 1 and 6 involve the same products from the same countries; they occurred under the same anti-dumping duty orders, and thus form part of a continuum of events under the provisions of the *Anti-Dumping Agreement* and pursuant to the municipal law of the United States. Each of these proceedings involved the calculation of a margin of dumping, either for the purposes of establishing the existence of dumping and the initial cash deposit rate of the estimated dumping duty liability, or for the final assessment of dumping duty liability on past entries.<sup>331</sup> In each instance, the use of the zeroing methodology arose in the context of calculating estimated margins of dumping for particular exporters, or assessment rates for particular importers.

241. We see no error in the Panel's finding that the use of zeroing in the calculation of margins of dumping "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."<sup>332</sup> We also agree with the Panel's statement that, where the Appellate Body made findings of inconsistency under different legal provisions in the original proceedings, they were premised on the same fundamental obligations under the *Anti-Dumping Agreement*, following from the definition of the term "margin of dumping" in Article 2.1 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.<sup>333</sup>

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<sup>330</sup> Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 93.

<sup>331</sup> The 2004-2005 administrative reviews in Cases 1 and 6 did not establish cash deposit rates because the anti-dumping duty orders were revoked.

<sup>332</sup> Panel Report, para. 8.104.

<sup>333</sup> Panel Report, para. 8.106.

242. We find significant that the use of zeroing was the only aspect of the original measures at issue that was corrected by the United States in response to the recommendations and rulings of the DSB. Indeed, the Section 129 determinations in Cases 1 and 6, which are the United States' declared measures "taken to comply", simply recalculated—without zeroing—the margins of dumping calculated in the original proceedings. This, in our view, tends to confirm the close nexus, in terms of subject matter and nature, between the declared measures "taken to comply", the recommendations and rulings of the DSB in the original proceedings, and the use of zeroing in the 2004-2005 administrative reviews in Cases 1 and 6.

243. The United States distinguishes the facts in *US – Softwood Lumber IV (Article 21.5 – Canada)* from those in these proceedings, alleging that in that dispute the same "pass-through" methodology was applied in the original measure at issue, the Section 129 determination, and the first assessment review. By contrast, in the present proceedings, the recommendations and rulings of the DSB applied exclusively to the use of zeroing in weighted average-to-weighted average comparisons in the original investigations in Cases 1 and 6, and did not contain "as applied" findings in relation to the application of zeroing in weighted average-to-transaction comparisons in the 2004-2005 administrative reviews in Cases 1 and 6.

244. Whilst the distinctions between comparison methodologies are not insignificant, we do not consider them to be decisive as to the links, in terms of nature or subject matter, between these reviews, the declared measures "taken to comply", and the recommendations and rulings of the DSB. In our view, the use of zeroing in the original investigations and in the 2004-2005 administrative reviews in Cases 1 and 6 similarly involved treating as zero the results of comparisons for which the export price(s) exceeded the normal value when these results were aggregated. We also note the Appellate Body's statement in *US – Softwood Lumber IV (Article 21.5 – Canada)* that differences between original investigations and administrative reviews in countervailing duty cases do not prevent the latter from falling within the scope of compliance proceedings, and that municipal law classifications and differences in legal bases for original investigations and assessment reviews are not determinative in WTO dispute settlement.<sup>334</sup>

245. We note, furthermore, the Appellate Body's finding in *US – Continued Zeroing* that the use of zeroing in "successive determinations" under the same anti-dumping duty order constitutes a measure that is challengeable in WTO dispute settlement. If the zeroing methodology in "successive determinations" "involving the imposition, assessment and collection of duties under the same anti-dumping duty order" in original investigations, administrative reviews, and sunset reviews is

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<sup>334</sup>See Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 82.

challengeable as a measure in original proceedings, this suggests that the subsequent reviews at issue in this case, in which that zeroing methodology is applied, are sufficiently connected in nature or subject matter so as to fall within the scope of these Article 21.5 proceedings.<sup>335</sup>

246. These considerations, in our view, weigh in favour of a sufficiently close nexus, in terms of nature, between the 2004-2005 administrative review determinations in Cases 1 and 6, the declared measures taken to comply, and the recommendations and rulings of the DSB, insofar as the use of zeroing is concerned.

(b) Effects

247. The United States also argues that the Panel erred in finding that the 2004-2005 administrative reviews in Cases 1 and 6 had a sufficiently close nexus, in terms of *effects*, with the original measures at issue and the recommendations and rulings of the DSB so as to fall within the Panel's terms of reference under Article 21.5 of the DSU. The United States' challenge in this respect focuses on the following statement by the Panel concerning the effect of the subsequent reviews:

[T]he 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.<sup>336</sup> (footnote omitted)

248. The United States argues that this finding is in error, for two reasons: first, because the Panel treated zeroing as a "unitary phenomenon", despite the fact that the recommendations and rulings of the DSB did not apply to the 2004-2005 administrative reviews in Cases 1 and 6; and, secondly, because the results of the 2004-2005 administrative reviews in Cases 1 and 6 had no effect on the "continued validity and effect"<sup>337</sup> of the United States' declared measures "taken to comply". The United States explains that the Section 129 determinations in Cases 1 and 6 led to the revocation of the underlying anti-dumping duty orders on 23 April 2007, with the result that the supervening 2004-2005 administrative reviews did not establish cash deposit rates applicable to entries occurring

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<sup>335</sup> Appellate Body Report, *US – Continued Zeroing*, para. 181.

<sup>336</sup> Panel Report, para. 8.108.

<sup>337</sup> United States' other appellant's submission, paras. 63 and 64.



after that date. Therefore, the United States submits that the 2004-2005 administrative reviews in Cases 1 and 6 did not undermine the "existence" of the measures taken to comply, within the meaning of Article 21.5 of the DSU.

249. The European Communities responds that the calculation of assessment rates based on zeroing *after* the end of the reasonable period of time in the 2004-2005 administrative reviews in Cases 1 and 6 demonstrates that these reviews had an effect on the United States' implementation, because they "perpetuate the WTO-inconsistent anti-dumping measure beyond the end of the reasonable period of time."<sup>338</sup>

250. With respect to the first allegation of error advanced by the United States, we articulated above the reasons why we do not attribute the same significance that the United States does to the fact that the recommendations and rulings of the DSB did not extend to the 2004-2005 administrative reviews in Cases 1 and 6. The 2004-2005 administrative reviews in Cases 1 and 6, as well as the original investigations in those two Cases, involved zeroing, albeit in the context of a distinct anti-dumping proceeding. In addition, the effects of the application of zeroing in those distinct proceedings did not vary significantly: in disregarding the results of comparisons for which the export price(s) exceeded the normal value, the use of zeroing led to an inflation of the margins of dumping calculated in those proceedings either to derive the estimated cash deposit rates for the exporters, or the assessment rates for the importers. Thus, the use of zeroing in subsequent determinations could undermine implementation in respect of original investigations. Although the Appellate Body noted in *US – Softwood Lumber IV (Article 21.5 – Canada)* that there are some limits on the scope of compliance proceedings, "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."<sup>339</sup>

251. In respect of the United States' arguments that original investigations and administrative reviews are distinct proceedings and serve distinct purposes, we recall that the Appellate Body has considered that successive determinations under a single anti-dumping duty order form part of a continuum of events.<sup>340</sup> The Appellate Body has also clarified that "zeroing ... under different comparison methodologies, and in different stages of anti-dumping proceedings ... simply reflect[s]

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<sup>338</sup>European Communities' appellee's submission, para. 34. (emphasis and footnote omitted)

<sup>339</sup>Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 71.

<sup>340</sup>See Appellate Body Report, *US – Zeroing (EC)*, paras. 132 and 133. We agree with the Panel that, where the Appellate Body made findings in the original dispute under different legal provisions, they were premised on the same fundamental obligations under the *Anti-Dumping Agreement*, following from the definition of the term "margin of dumping" in Article 2.1 of that Agreement and Article VI:2 of the GATT 1994. (Panel Report, para. 8.106)

different manifestations of a single rule or norm."<sup>341</sup> Although weighted average-to-weighted average, weighted average-to-transaction, and transaction-to-transaction comparison methodologies are distinct and used in different contexts involving different calculations, and may be used for different finalities, they have in common that they lead to inflated amounts if negative comparison results are disregarded or treated as zero when these comparison results are aggregated in the calculation of margins of dumping, cash deposit rates, and assessment rates. What the DSB found to be inconsistent in the original proceedings was the treatment of negative comparison results as zero; the use of the weighted average-to-weighted average comparison methodology was not found to be inconsistent. Indeed, the *Anti-Dumping Agreement* refers to various comparison methodologies (for example, weighted average-to-weighted average, transaction-to-transaction, and weighted average-to-transaction) and their use was not found to be inconsistent in the original proceedings. Therefore, the analysis of compliance with the DSB's recommendations and rulings should focus on what was found to be inconsistent (that is, zeroing) and not on what was not found to be inconsistent (that is, the use of a particular comparison methodology in a particular stage of the proceedings). In any event, we fail to see how a subsequent administrative review using zeroing could not be relevant for assessing, in an Article 21.5 proceeding, whether an original investigation found to be inconsistent due to zeroing has been brought into conformity. In our view, whether negative comparison results have been disregarded in subsequent reviews may have an effect on determining whether the original measure, which was found to be inconsistent because such comparison results were disregarded, has been brought into conformity.

252. Neither are we persuaded by the United States' argument that the 2004-2005 administrative reviews in Cases 1 and 6 had no bearing on the compliance achieved by the United States in those two Cases. Even though the United States is correct in pointing out that the Section 129 determinations in Cases 1 and 6 led to the revocation of the underlying anti-dumping duty orders for entries after 23 April 2007, the fact remains that the 2004-2005 administrative reviews established assessment rates calculated with zeroing, despite the fact that they were issued on 22 June 2007 and 9 May 2007, respectively, that is, *after* the expiration of the reasonable period of time on 9 April 2007. In our view, the use of zeroing to calculate assessment rates in administrative reviews issued after the end of the reasonable period of time is an indication that these reviews could undermine the compliance allegedly achieved by the United States. Indeed, the Section 129 determinations do not apply to entries prior to the end of the reasonable period of time and thus do not relate to compliance with respect to administrative reviews issued after the end of the reasonable period covering imports occurring before that date.

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<sup>341</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 88.

253. We note that, in *US – Stainless Steel (Mexico)*, the Appellate Body noted that "permit[ting] simple zeroing in periodic reviews would allow WTO Members to circumvent the prohibition of zeroing in original investigations".<sup>342</sup> This was so because, in the first periodic review after an original investigation, the duty assessment rate for each importer would take effect from the date of the original imposition of anti-dumping duties. Thus, "[w]hen the initial cash deposit rate is calculated in the original investigation without using zeroing, this means that the mere act of conducting a periodic review would introduce zeroing following imposition of the anti-dumping duty order."<sup>343</sup> The Appellate Body, therefore, made it clear that the use of zeroing in subsequent administrative reviews would allow Members to circumvent the prohibition of zeroing in original investigations.

254. In this respect, we observe that the United States' argument that the 2004-2005 administrative reviews in Cases 1 and 6 had no effect on its implementation of the recommendations and rulings of the DSB is predicated on the United States having achieved full compliance with the recommendations and rulings of the DSB with the issuance of the Section 129 determinations in those Cases, an allegation that the European Communities contests. According to the European Communities, the United States' implementation obligations were not limited to imports taking place after the end of the reasonable period of time, but also encompassed "any positive acts" after that date, such as the final collection of duties on unliquidated entries made before the end of the reasonable period of time. Thus, following the United States' logic, the Panel would not have been in a position to determine whether the 2004-2005 administrative reviews in Cases 1 and 6 fell within its terms of reference without determining, first, whether the Section 129 determinations achieved substantive compliance with the recommendations and rulings of the DSB.

255. The United States distinguishes the facts of this case from the facts in *US – Softwood Lumber IV (Article 21.5 – Canada)*, where the panel and Appellate Body found it significant that (i) the administrative review resulted in a cash deposit rate that *superseded* the revised cash deposit rate established in the Section 129 determination, and (ii) a particular aspect of the analysis in the administrative review was made "in view of" the recommendations and rulings of the DSB in the original proceedings in relation to that type of analysis. The United States submits that neither of those elements is present in this dispute.<sup>344</sup>

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<sup>342</sup> Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 109.

<sup>343</sup> Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 109.

<sup>344</sup> United States' other appellant's submission, para. 58.

256. In our view, the United States misinterprets the findings of the Appellate Body in *US – Softwood Lumber IV (Article 21.5 – Canada)* as requiring that the "closely connected" measures *actually* undermine the compliance otherwise achieved by the implementing Member. We consider that, at the time of the jurisdictional inquiry into its terms of reference, a panel might not be in a position to determine whether this is the case, because it will not be possible to determine whether the "connected" measures potentially undermine compliance without determining first whether the declared measures "taken to comply" fully achieved compliance with the recommendations and rulings of the DSB. We note in this respect that the Section 129 determinations apply to entries occurring *after* 23 April 2007; they do not cover entries occurring before that date. Therefore, administrative review determinations issued after the end of the reasonable period of time covering entries made prior to that date are relevant for assessing compliance with the DSB's recommendations and rulings, even though they do not concern those entries to which the Section 129 determinations will apply. To find otherwise would limit compliance proceeding to examining whether closely connected measures affect compliance achieved by the declared measures "taken to comply"; situations where a Member has taken measures achieving only partial compliance, or has omitted to take measures, would be excluded from scrutiny. As we have found earlier, the scope of Article 21.5 proceedings is not limited in such a way. Therefore, our review under Article 21.5 of the 2004-2005 administrative reviews in Cases 1 and 6 is not constrained by the fact that these reviews did not set going-forward cash deposit rates<sup>345</sup>, because this does not change the fact that the 2004-2005 administrative reviews assess final anti-dumping liability with zeroing after the end of the reasonable period of time.

257. We address in section VIII of this Report the question of whether the 2004-2005 administrative reviews in Cases 1 and 6 constituted a failure by the United States to comply with the recommendations and rulings of the DSB. At the jurisdictional level, however, we consider that the fact that these reviews were issued after the end of the reasonable period of time and led to the assessment of duties with zeroing indicates that these reviews had effects after the end of the reasonable period of time, and that those effects could have undermined the United States' implementation of the recommendations and rulings of the DSB with respect to Cases 1 and 6.

258. Given the above, we consider that the 2004-2005 administrative reviews in Cases 1 and 6 had a sufficiently close nexus, in terms of nature, effects, and timing, with the declared measures "taken to comply", and with the recommendations and rulings of the DSB, so as to fall within the Panel's terms of reference under Article 21.5 of the DSU. Accordingly, we *uphold* the Panel's findings, in

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<sup>345</sup>As noted above, to the extent that the Section 129 determinations set cash deposit rates for certain exporters, these apply only to entries after 23 April 2007.

paragraph 8.126(i) and (v) of the Panel Report, that the 2004-2005 administrative reviews in Cases 1 and 6 fell within the Panel's terms of reference.

5. Separate Opinion

259. One Member of the Division wishes to set out a separate opinion concerning the United States' appeal of the Panel's finding that the 2004-2005 administrative reviews in Cases 1 and 6 fell within its terms of reference under Article 21.5 of the DSU by virtue of their close nexus, in terms of nature, effects, and timing, with the declared measures taken to comply, and the recommendations and rulings of the DSB.

260. For Cases 1 and 6, the recommendations and rulings of the DSB relate to the use, in the context of original investigations, of a methodology referred to by the European Communities as "model zeroing" which the panel and the Appellate Body found to be inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*. The European Communities' challenge in the original proceedings was limited to claims against the original investigations of dumping made in these two Cases. Importantly, these DSB recommendations and rulings did not extend to the use, in the context of administrative reviews, of a different methodology, referred to by the European Communities as "simple zeroing" that the Appellate Body found to be inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994. As such, the compliance obligation of the United States with respect to the recommendations and rulings of the DSB in relation to Cases 1 and 6 was to cease applying the "model zeroing" methodology whenever it conducts original investigations to determine the existence of dumping and to establish initial cash deposit rates.

261. In order to implement the recommendations and rulings of the DSB in Cases 1 and 6, the United States initiated proceedings under Section 129 of the URAA in which the USDOC recalculated the margin of dumping challenged in the original investigation without using the "model zeroing" methodology. As a result of the recalculation, the anti-dumping duty order in these two cases was revoked. The recalculation of the margins of dumping made in the Section 129 determination and the consequent revocation of the anti-dumping duty order constitute the declared measures "taken to comply" by the United States and, at least in appearance, these actions of the United States respond to the recommendations and rulings of the DSB.

262. However, the analysis does not necessarily end at an examination of these "declared" measures if, in certain circumstances, there exist other measures taken by the responding WTO Member that share a particularly close nexus to these declared measures and which may undermine or

negate their impact on compliance with the recommendations and rulings of the DSB. As the Appellate Body noted in *US – Softwood Lumber IV (Article 21.5 – Canada)*:

Some 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.

In my view, the "close nexus test" needs to be applied with some circumspection by panels, at the risk of overly broadening the scope of proceedings under Article 21.5 of the DSU and the compliance obligations related thereto to measures that share only a limited link to the recommendations and rulings of the DSB, and to the measures that a Member takes to implement those rulings. This is particularly so because Article 21.5 of the DSU requires panels to examine the measures taken to comply for consistency with the covered agreements. The "close nexus" analysis also needs to be applied in a holistic manner, so that a panel comes to a conclusion based on a careful weighing and balancing of all of the close nexus factors—nature, effects, and timing—so as to reach an overall finding that these other measures do indeed have a sufficiently close link to the declared measures "taken to comply", and to the recommendations and rulings of the DSB, so as to justify their inclusion within the scope of Article 21.5 proceedings.

263. Here, the issue is whether the 2004-2005 and the 2005-2006 administrative reviews and their use of "simple zeroing" have a sufficiently close nexus, in terms of nature, effects, and timing, with the Section 129 determinations recalculating original dumping determinations without "model zeroing" such that those administrative reviews may undermine or negate the compliance achieved by the Section 129 determinations. The examination, as called for in *US – Softwood Lumber IV (Article 21.5 – Canada)* of the "factual and legal background" of the Section 129 determinations, begins with appraising the system in which these two types of determinations are made and the two methodologies of zeroing are applied.

264. In examining the connection between the declared measures to comply (Section 129 determinations), the other measures (the administrative reviews), and the recommendations and rulings of the DSB regarding the methodology of zeroing, the central overlap is that both involve the use of zeroing—that is the treatment of export prices that exceed normal values as zero rather than as a negative number. However, because the "model zeroing" applied in original investigations involves aggregating the results of weighted average normal value to weighted average export price

comparisons done across different models of the product, while the "simple zeroing" involves aggregating transaction specific comparisons across individual importers, the comparisons involve different types of calculations. As such, while there are some similarities in the two methodologies, there are also significant differences. "Model zeroing" and "simple zeroing" are also used in different contexts (original investigations versus administrative reviews) and are subject to different legal obligations of the *Anti-Dumping Agreement* (Article 2.4.2 versus Article 9.3). Moreover, eliminating "model zeroing" involves, as a remedy, a basic recalculation to establish new dumping margins, while eliminating "simple zeroing" may involve redistributing the effects of dumping calculations among the importers found to be dumping from those found to have "negative" margins, suggesting that the effect of the two methodologies is different as well.

265. In examining the two measures at issue—the original investigation that the Section 129 determination mirrors and the administrative reviews, it appears that they are distinct proceedings that serve different purposes. Whereas, pursuant to Article 5.1 of the *Anti-Dumping Agreement*, the original investigation aims "to determine the existence, degree and effect of any alleged dumping", the main purpose of an administrative review is to assess the final anti-dumping duty liability, consistent with Article 9.3 of the *Anti-Dumping Agreement*.<sup>346</sup> In the anti-dumping system of the United States, no duty liability is assessed in the context of the original investigation and, in this respect, assessment reviews and original investigations are fundamentally different.

266. Although "simple zeroing" and "model zeroing" are distinct methodologies used in different contexts involving different calculations and pursuing different finalities, they have in common that both inflate the margins of dumping by disregarding negative comparison results. In *US – Stainless Steel (Mexico)*, the Appellate Body established a link between "simple zeroing" in administrative reviews and "model zeroing" in original investigations through the calculation and the application of cash deposits:

[A] reading of Article 9.3 of the *Anti-Dumping Agreement* that permits simple zeroing in periodic reviews would allow WTO Members to circumvent the prohibition of zeroing in original investigations that applies under the first sentence of Article 2.4.2 of the *Anti-Dumping Agreement*. This is because, in the first periodic review after an original investigation, the duty assessment rate for each importer will take effect from the date of the original imposition of anti-dumping duties. Consequently, zeroing would be introduced although it is not permissible in original investigations. We further note that, if no periodic review is requested, the final anti-dumping duty liability for all importers will be assessed at the cash deposit rate applicable to the relevant exporter. When the initial cash deposit rate

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<sup>346</sup>United States' other appellant's submission, paras. 35 and 36.

is calculated in the original investigation without using zeroing, this means that the mere act of conducting a periodic review would introduce zeroing following imposition of the anti-dumping duty order.<sup>347</sup>

Thus, the reasoning of the Appellate Body in *US – Stainless Steel (Mexico)*, notwithstanding the fact that it was not an Article 21.5 compliance proceeding, suggests that the benefits for exporters and importers of cash deposit rates calculated in an original investigation without zeroing could be undermined or negated if zeroing were used in subsequent administrative reviews for establishing new going-forward cash deposit rates.

267. This is *not* however the situation in Cases 1 and 6. In Case 1, the final duty liability for entries in the period 2004-2005 was assessed in an administrative review, the final results of which were issued on 22 June 2007. The anti-dumping duty order, however, was revoked pursuant to a Section 129 determination issued on 9 April 2007 and effective as of 23 April 2007. As a result, no forward cash deposit rates were established in the 2004-2005 administrative review. In addition, the 2005-2006 administrative review was rescinded on 30 March 2007, with the implication that it did not result in the issuance of new going-forward cash deposit rates. With respect to Case 6, the final duty liability for entries in the period 2004-2005 was assessed in an administrative review that was concluded on 9 May 2007 by the publication of amended final results. The anti-dumping duty order was, however, revoked pursuant to the Section 129 determination issued on 9 April 2007 and effective as of 23 April 2007. Consequently, as the Panel found, cash deposits paid on imports of stainless steel wire rod from Sweden made on or after 23 April 2007 were refunded, and no cash deposit was imposed on imports of stainless steel wire rod from Sweden following the issuance of the amended final results of the 2004-2005 administrative review. For both Cases 1 and 6, since no cash deposit rates reflecting zeroing were set further to the 2004-2005 administrative reviews (as well as the rescission of the 2005-2006 administrative review in Case 1), their final results cannot, in my opinion, undermine or negate the impact of the declared measure taken to comply, that is, the Section 129 determination and the consequent revocation of the anti-dumping duty order.

268. In *US – Softwood Lumber IV (Article 21.5 – Canada)*, the Appellate Body focused on the effects of the first assessment review in the cash deposit rate that was calculated in the Section 129 determination taken by the United States to implement the DSB's recommendations and rulings. The Appellate Body reasoned that:

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<sup>347</sup>Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 109.



[t]he First Assessment Review also directly affected the Section 129 Determination because the cash deposit rate resulting from the Section 129 Determination (which reflected a small reduction due to pass-through analysis contained therein) was "updated", or "superseded", by the cash deposit rate resulting from the First Assessment Review (which reflected no reduction from the pass-through analysis contained therein). Even if, as the United States argues, modification of the cash deposit rate was not the *purpose* of the First Assessment Review, it was undeniably *an effect*.<sup>348</sup> (original emphasis)

Thus, to the extent that the Section 129 determinations led to the revocation of the underlying anti-dumping duty orders, the 2004-2005 administrative reviews in Cases 1 and 6 had no bearing on the cash deposit rates that they would have otherwise "updated" or "superseded" in those Cases. Rather, the results of the 2004-2005 administrative reviews merely had a retrospective effect, which was the establishment of final anti-dumping duty liability for importers on entries taking place long before the end of the reasonable period of time.

269. In reasoning that "the fact remains that the 2004-2005 administrative reviews established assessment rates calculated with zeroing despite the fact that they were issued"<sup>349</sup> after the end of the reasonable period of time, the majority overlooks the fact that the revocation of the anti-dumping duty orders in Cases 1 and 6 demonstrates that those measures have been terminated, and that the results of the 2004-2005 administrative reviews in those cases does not affect imports taking place subsequent to their termination. The fact that assessment rates in Cases 1 and 6 will be issued after the end of the reasonable period of time is merely a natural consequence of the fact that, in the United States' retrospective system for assessment of anti-dumping duties, the importers' final liability for anti-dumping duties is established following a detailed review process that necessarily occurs sometime after the date of importation. Moreover, I recall that, with respect to Cases 1 and 6, the recommendations and rulings of the DSB concern original investigations in which, contrary to administrative reviews, no anti-dumping duties are assessed. Given that there are no cash deposits linking the administrative reviews to the recommendations and rulings of the DSB, or the Section 129 determinations, I do not see how assessment rates applied to a set of past entries can establish a close nexus between the administrative reviews and the recommendations and rulings of the DSB or the declared measures "taken to comply".

270. Accordingly, I do not see how it can be concluded, in the light of the Appellate Body Reports in *US – Softwood Lumber IV (Article 21.5 – Canada)* and *US – Stainless Steel (Mexico)*, that the

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<sup>348</sup> Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 85.

<sup>349</sup> See *supra*, para. 252.

administrative reviews in Cases 1 and 6 (including the rescission of the 2005-2006 administrative review in Case 1) have a close nexus with the recommendations and rulings of the DSB or the declared measures "taken to comply", and fall within the Panel's terms of reference. Since I do not consider that the scope of these Article 21.5 proceedings can properly be expanded to include compliance obligations with respect to measures for which there were no recommendations and rulings by the DSB, I do not consider it appropriate to make further findings with respect to Cases 1 and 6.

C. *"Omissions" or "Deficiencies" in the United States' Implementation*

271. The Division turns next to the European Communities' challenge against the Panel's exercise of judicial economy in relation to its claim that the subsequent reviews fell within the Panel's terms of reference as "omissions" or "deficiencies" in the United States' implementation of the recommendations and rulings of the DSB.

272. Before the Panel, the European Communities argued that the subsequent reviews identified in its panel request fell within the Panel's terms of reference under Article 21.5 of the DSU as "omissions" or "deficiencies" in the United States' implementation of the DSB's recommendations and rulings.

273. The Panel did not consider it necessary to address the European Communities' argument separately in the context of its jurisdictional analysis. The Panel reasoned that its analysis of whether the subsequent reviews were measures taken to comply because they were closely connected with the original measures at issue and the DSB's recommendations and rulings was conducted "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*."<sup>350</sup> Consequently, for the Panel, "any 'omission' or 'deficiency' of the United States *in the form of a subsequent review* would be captured in the [close nexus] analysis".<sup>351</sup> The Panel did not consider that the European Communities' characterization of its claims as challenging omissions and deficiencies in the United States' implementation could "broaden the scope of this proceeding to *measures* which we otherwise determine not to fall within our terms of reference" and emphasized that it was addressing, at that stage, 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

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<sup>350</sup>Panel Report, para. 8.86. (original emphasis)

<sup>351</sup>Panel Report, para. 8.86. (original emphasis)

comply', and not the substantive question of whether the United States has omitted to comply" with the DSB's recommendations and rulings.<sup>352</sup>

274. On appeal, the European Communities claims that this finding is in error for two reasons. First, the European Communities argues that the Panel "disregarded its mandate"<sup>353</sup> and acted inconsistently with Article 11 of the DSU when it ignored the conditional order of the European Communities' claims. The European Communities explains that its "close nexus" claim was made *in the alternative*, subject to the condition that the Panel first rejected its "main" claims that the subsequent reviews fell within the Panel's terms of reference either as "amendments" to the original measures, or as "omissions" in the United States' implementation of the recommendations and rulings of the DSB. Therefore, the Panel erred in finding that it was not necessary to address the European Communities' main "omissions" claim in the light of findings made with respect to its alternative "close nexus" claim.<sup>354</sup>

275. The United States responds that the European Communities is incorrect in arguing that the Panel was bound by the "sequencing order of the legal claims"<sup>355</sup> raised by the European Communities. The United States submits that, in any event, the Panel did address the European Communities' claims in the order proposed. The United States further suggests that the European Communities failed to substantiate its claim that the Panel failed to comply with its mandate under Article 11 of the DSU in structuring its analysis.

276. The European Communities' first allegation of error raises the question of whether panels are "bound" by the "sequencing order" of legal claims made by the complaining party, whenever that order does not pose particular interpretative problems.<sup>356</sup> In support of its allegation in this respect, the European Communities points us to the report of the panel in *EC – Sardines*, where the panel held that "it would not constitute an error of law" to observe the order of legal claims set in Peru's submission because "such sequential examination would not affect the interpretation of the other provisions."<sup>357</sup> The European Communities also refers us to the Appellate Body's finding in *US – Shrimp*, where the Appellate Body found that the sequence of the panel's analysis under Article XX of the GATT 1994 (first chapeau then subparagraphs) posed particular interpretative problems.<sup>358</sup>

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<sup>352</sup>Panel Report, para. 8.86. (original emphasis)

<sup>353</sup>European Communities' appellant's submission, para. 82.

<sup>354</sup>European Communities' appellant's submission, para. 79.

<sup>355</sup>United States' appellee's submission, para. 36 (quoting European Communities' appellant's submission, para. 79).

<sup>356</sup>European Communities' appellant's submission, para. 79.

<sup>357</sup>Panel Report, *EC – Sardines*, para. 7.18.

<sup>358</sup>Appellate Body Report, *US – Shrimp*, para. 120.

277. In our view, these decisions do not support the proposition that panels are "bound" by the order of claims made by the complaining party. To the contrary, they confirm that, although panels may decide to follow the particular order of legal claims suggested by the complaining party, they may also follow a different order of analysis so as to apply the correct interpretation of the WTO law at issue. Indeed, we consider that, in fulfilling its duties under Article 11 of the DSU, a panel may depart from the sequential order suggested by the complaining party, in particular, when this is required by the correct interpretation or application of the legal provisions at issue.

278. In the *US – Continued Suspension / Canada – Continued Suspension* disputes, the European Communities similarly argued that the panel erroneously disregarded the conditional order of its legal claims when it examined the European Communities' alternative claim that the measure at issue was consistent with the *Agreement on the Application of Sanitary and Phytosanitary Measures* (the "*SPS Agreement*"), having found earlier, in response to one of the European Communities' main claims, that the United States and Canada had acted inconsistently with Articles 23.1 and 23.2(a) of the DSU. The Appellate Body rejected this argument, and reasoned that the fact that the European Communities described its claims that the measures at issue achieved substantive compliance with the relevant provisions of the *SPS Agreement* as "alternative claims" did not preclude the panel from evaluating those claims, because this was required by the correct interpretation of Article 22.8 of the DSU.<sup>359</sup>

279. Accordingly, we *find* that the Panel did not exceed its mandate, and act inconsistently with Article 11 of the DSU, in addressing the European Communities' alternative "close nexus" claim without first addressing the European Communities' "omissions" claim.

280. Secondly, the European Communities charges the Panel with exercising false judicial economy, because the only "omission" addressed in the Panel's "close nexus" analysis was the United States' failure to stop collecting cash deposits calculated with zeroing after the end of the reasonable period of time. The European Communities underscores that the scope of the "omissions" it challenged in relation to the subsequent reviews included: (i) the United States' failure to stop collecting duties calculated with zeroing on entries not finally liquidated by the end of the reasonable period of time; and (ii) the United States' failure to recalculate, without zeroing, margins of dumping used in sunset reviews issued in connection with any of the original measures at issue.<sup>360</sup>

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<sup>359</sup>Appellate Body Reports, *US – Continued Suspension* and *Canada – Continued Suspension*, para. 325.

<sup>360</sup>European Communities' appellant's submission, paras. 74 and 80. See also Panel Report, footnote 629 to para. 8.85.

281. The United States responds that the Panel did not err in exercising judicial economy in relation to the European Communities' claims that the subsequent reviews fell within the Panel's terms of reference as "omissions" or "deficiencies" in the United States' implementation of the recommendations and rulings of the DSB. The United States submits that the Panel's exercise of judicial economy in this respect did not affect the Panel's ability to consider in its substantive analysis all the alleged "omissions" or "deficiencies" challenged by the European Communities. The United States argues further that the European Communities failed to substantiate its claims that the Panel failed to comply with its functions as required by Article 11 of the DSU in reaching its findings.<sup>361</sup>

282. At the outset, we observe that the Panel was correct in noting that its authority under Article 21.5 of the DSU "extends not only to those acts which the United States has taken to comply ... but also to those acts which the United States allegedly *should have taken to bring itself into compliance*."<sup>362</sup> In resolving a disagreement as to the "existence" or "consistency with the covered agreements" of measures taken to comply within the meaning of Article 21.5 of the DSU, panels acting under that provision are required to determine whether measures taken to comply exist, and whether such measures achieve full compliance with the recommendations and rulings of the DSB. As the Appellate Body noted in *US – Softwood Lumber IV (Article 21.5 – Canada)*, "[t]he word 'existence' suggests that measures falling within the scope of Article 21.5 encompass not only positive acts, but also *omissions*."<sup>363</sup> Therefore, "an Article 21.5 panel may be called upon to examine either the 'existence' of 'measures taken to comply' with DSB recommendations and rulings, or, when such measures exist, the 'consistency' of those measures with the covered agreements, or a combination of both, in situations where the measures taken to comply, through omissions or otherwise, may achieve only partial compliance."<sup>364</sup>

283. Consistently with this reading of Article 21.5 of the DSU, the Panel did not disregard, in ascertaining whether the United States has failed to comply with the DSB's recommendations and rulings, the particular "omissions" challenged by the European Communities, in the form of cash deposits, final assessment and liquidation of duties that remained unliquidated by the end of the reasonable period of time<sup>365</sup>, and the United States' failure to recalculate margins of dumping upon which sunset reviews rely.<sup>366</sup> Rather, the Panel correctly noted that its jurisdictional findings "[did]

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<sup>361</sup>United States' appellee's submission, paras. 35 and 37.

<sup>362</sup>Panel Report, para. 8.86. (original emphasis)

<sup>363</sup>Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 67. (original emphasis)

<sup>364</sup>Appellate Body Report, *US – FSC (Article 21.5 – EC II)*, para. 60.

<sup>365</sup>See Panel Report, para. 8.164-8.222.

<sup>366</sup>See Panel Report, para. 8.130-8.141.

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".<sup>367</sup>

284. Having said that, we have reservations about the Panel's statement that any omissions or deficiencies of the United States in the form of a subsequent review would be "captured" in the Panel's "close nexus" analysis.<sup>368</sup> As the Panel's substantive analysis demonstrated, the Panel only examined the specific "omissions" challenged by the European Communities with respect to the specific subsequent reviews that the Panel later found to have fallen within its terms of reference, in the light of their "close nexus" with the recommendations and rulings of the DSB. Indeed, the Panel examined only whether the United States had failed to implement the recommendations and rulings of the DSB by imposing cash deposits, assessing and liquidating duties, and by failing to recalculate margins of dumping in the context of sunset reviews, for the subsequent reviews which it later determined to have a sufficiently close nexus with the recommendations and rulings of the DSB. This, in our view, could have led to a partial resolution of the dispute, insofar as it could have resulted in the Panel disregarding particular "omissions" in the United States' implementation with respect to subsequent reviews that the Panel later determined not to fall within its terms of reference.

285. However, to the extent that the Panel's error in this regard would stem from its erroneous application of the "close nexus" analysis to the subsequent reviews challenged by the European Communities, which we have reversed above, we do not consider it necessary to make additional findings in relation to the European Communities' claim that the Panel erred in declining to rule on its claim that the subsequent reviews fell within the Panel's terms of reference as "omissions" or "deficiencies" in the United States' implementation of the recommendations and rulings of the DSB.

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<sup>367</sup>Panel Report, para. 8.127. (original emphasis) The Panel also noted 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.

<sup>368</sup>Panel Report, para. 8.86.

## VII. The Scope of the United States' Compliance Obligations

286. We now turn to the question of the scope of the United States' obligation to comply with DSB recommendations and rulings and recall that, in this case, the recommendations and rulings of the DSB concern the use by the United States in its retrospective anti-dumping system of "model zeroing" in original investigations and "simple zeroing" in the assessment and collection of anti-dumping duties.

287. In the recommendations and rulings of the DSB, the use of zeroing in original investigations, when aggregating results of weighted average-to-weighted average comparisons of export price and normal value, was found to be inconsistent "as such" with Article 2.4.2 of the *Anti-Dumping Agreement*.<sup>369</sup> This methodology was also found to be WTO-inconsistent "as applied" in Cases 1 through 15.<sup>370</sup> In addition, the DSB adopted findings 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 used zeroing in weighted average-to-transaction comparisons to assess duties and set cash deposit rates in Cases 16 through 31. These "as applied" findings were made in the context of the 16 administrative reviews at issue in the original proceedings and related to the operation of the retrospective system by which the United States assesses anti-dumping duties and sets cash deposit rates.<sup>371</sup>

288. In this section, we address the United States' compliance obligations resulting from these recommendations and rulings of the DSB and the appeal by the European Communities, as well as the United States' position, with respect to the Panel's findings on these issues. The European Communities does not disagree with the Panel's interpretation that any administrative review

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<sup>369</sup>See notably, Original Panel Report, para. 8.1(c), which reads:

The United States' zeroing methodology, as it relates to original investigations, is a norm which, as such, is inconsistent with Article 2.4.2 of the [*Anti-Dumping*] *Agreement*. (footnote omitted)

<sup>370</sup>See notably, Original Panel Report, para. 8.1(a), which reads:

The United States acted inconsistently with Article 2.4.2 of the [*Anti-Dumping*] *Agreement* when in the anti-dumping investigations listed in Exhibits EC-1 to EC-15 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. (footnote omitted)

<sup>371</sup>See notably, Appellate Body Report, *US – Zeroing (EC)*, para. 135, which reads in relevant part:

[W]e reverse the Panel's finding, in paragraphs 7.288 and 8.1(f) of the Panel Report, that the United States did not act inconsistently with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 in the administrative reviews at issue, and find, instead, that the United States acted inconsistently with those provisions.

determination issued after the end of the reasonable period of time must not reflect zeroing.<sup>372</sup> However, the European Communities appeals the Panel's findings that the United States' compliance obligations do not extend to assessment instructions and final liquidation of anti-dumping duties in relation to administrative reviews made prior to the end of the reasonable period of time. In the next section, we discuss the European Communities' and the United States' appeals of certain aspects of the Panel's findings regarding Cases 1 and 6 and the European Communities' appeal of a finding by the Panel regarding Case 31, as well as the Panel's decision not to make specific findings with respect to 11 other Cases.<sup>373</sup> Before turning to the general issues regarding the United States' compliance obligations, we observe that the European Communities, in its appeal, and the United States, in its other appeal, have not appealed the findings the Panel made in relation to the application after the end of the reasonable period of time of cash deposits calculated with zeroing.<sup>374</sup>

A. *The Panel's Findings*

289. The Panel began its analysis by observing that the disagreement between the parties concerned the prospective implementation of DSB recommendations and rulings in a retrospective duty assessment system in which duties are calculated, assessed, and collected after imports have entered.<sup>375</sup> The Panel noted that the parties disagreed on the nature of the relevant event to which the Member's obligation to implement DSB recommendations and rulings attaches.<sup>376</sup>

290. The Panel recalled that the *Anti-Dumping Agreement* disciplines measures adopted by a Member or actions taken by such Member, and that, in the case of a dispute under the *Anti-Dumping Agreement*, those actions and measures necessarily concern the imposition of anti-dumping measures against imports from another Member. For the Panel, the relevant date for implementation of DSB recommendations and rulings concerning anti-dumping duties by a Member operating a retrospective duty assessment system, such as the one of the United States, is the date of the determination of final liability for anti-dumping duties, that is, the date of the final determination in the administrative review proceeding (the date of the issuance of the final results of the administrative review), or the date on which the right to request such a review has lapsed. Accordingly, the Panel considered that any definitive duty determination made after the end of the reasonable period of time must be

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<sup>372</sup>The Panel clarified that it referred to the date of the final determination in the administrative review proceeding, as well as the date on which the right to request such a review has lapsed. (Panel Report, para. 8.174)

<sup>373</sup>The relationship between the implementation obligations of the United States and subsequent sunset reviews is addressed in section IX of this Report.

<sup>374</sup>Panel Report, para. 8.218.

<sup>375</sup>Panel Report, para. 8.167.

<sup>376</sup>Panel Report, para. 8.165.



consistent with the provisions of the *Anti-Dumping Agreement* and with the recommendations and rulings of the DSB. The Panel maintained that 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*.<sup>377</sup> The Panel emphasized that this did 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 was "eminently prospective in nature".<sup>378</sup>

291. According to the Panel, to implement the recommendations and rulings of the DSB, the United States was 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 margins of dumping made after the end of the reasonable period of time with respect to imports entered *before* that date. The Panel added that the fact that the imports concerned pre-date the expiry of the reasonable period of time does not excuse the United States from acting inconsistently with the provisions of the *Anti-Dumping Agreement* after the end of the reasonable period of time.<sup>379</sup>

292. The Panel endorsed the view expressed by the panels and the Appellate Body in *US – Shrimp (Thailand)* and *US – Customs Bond Directive* that, in a retrospective duty assessment system, the final 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 when it is determined that duties will be assessed on the basis of the cash deposits collected.<sup>380</sup> The Panel explained that, accordingly, 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.<sup>381</sup>

293. The Panel also discussed the European Communities' contention that any action after the end of the reasonable period of time must not be based on zeroing, including actions to collect or liquidate duties resulting from administrative reviews concluded before the end of the reasonable period of

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<sup>377</sup>Panel Report, para. 8.174.

<sup>378</sup>Panel Report, para. 8.175.

<sup>379</sup>Panel Report, para. 8.175.

<sup>380</sup>Panel Report, para. 8.178 (referring to Appellate Body Report, *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 222).

<sup>381</sup>Panel Report, para. 8.180.

time<sup>382</sup>. The Panel rejected this contention and reiterated that the date that is relevant for the United States' implementation of the recommendations and rulings of the DSB is that of the determination of final duty liability in the administrative review proceeding (either the date of the issuance of the final results of the administrative review or the date on which the right to request such a review has lapsed).<sup>383</sup> For the Panel, the 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. The Panel observed that the issue raised by the European Communities concerns essentially delays in the actual collection of anti-dumping duties that are the consequence of judicial proceedings initiated by private parties and challenging the final duty liability determination.<sup>384</sup> In support of its position, the Panel explained that the European Communities' claims in the original proceedings, as well as the findings of the original panel and the Appellate Body, concerned the calculation of margins of dumping, and that under the United States' system, the final amount of duties to be paid is determined on the basis of margins of dumping calculated at the time of the assessment review.<sup>385</sup> For the Panel, it is the administrative review determination, not the actual liquidation, that is the final action undertaken by the United States' authorities to determine the duty liability applicable to particular imports.<sup>386</sup> Furthermore, the Panel reasoned that, where the liquidation after the end of the reasonable period of time relates to an administrative review concluded before that date, the European Communities' approach would lead to the "undesirable result" that the United States' authorities would have to "revisit" the final assessment of duties performed in the administrative review when the actual liquidation of entries has been suspended as a result of legal challenges that are ultimately unsuccessful or unrelated to the issue of zeroing.<sup>387</sup>

294. The Panel addressed the European Communities' contentions that the United States failed to comply with the DSB's recommendations and rulings in the original proceedings because it did not fully revoke the original investigation orders contested in the original proceedings and because the administrative reviews at issue in the original proceedings have not been superseded. The Panel considered that these contentions were subsumed in, or attached to, other claims analyzed by the

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<sup>382</sup>These include USDOC assessment instructions and Customs liquidation instructions. Assessment instructions can be delayed by challenges before United States courts and liquidation instructions can be delayed by protests to Customs. (See Panel Report, para. 8.189 and footnote 724 to para. 8.149) According to Annex A to the European Communities' response to Panel Question 5, there were unliquidated entries as of the end of the reasonable period of time in seven Cases out of 31, namely, Cases 1, 5, 22, 28, 29, 30, and 31.

<sup>383</sup>Panel Report, para. 8.191.

<sup>384</sup>Panel Report, paras. 8.191 and 8.192.

<sup>385</sup>Panel Report, para. 8.191.

<sup>386</sup>Panel Report, para. 8.192.

<sup>387</sup>Panel Report, paras. 8.191-8.193.

Panel and on which it made findings. Accordingly, the Panel considered it was unnecessary to make specific findings with respect to them.<sup>388</sup>

B. *Claims and Arguments on Appeal*

295. On appeal, the European Communities claims that the Panel erred in rejecting its claims that certain actions or omissions by the United States based on zeroing after the expiry of the reasonable period of time were inconsistent with the United States' obligation to comply with the rulings and recommendations of the DSB, and with various provisions of the *Anti-Dumping Agreement* and the DSU, and Article VI of the GATT 1994.<sup>389</sup> For the European Communities, a failure to comply with the recommendations and rulings of the DSB by the end of the reasonable period of time can be found with respect to any action taken or measure issued by the responding Member after the expiry of that period of time, including the determination of final duty liability in an assessment review, assessment instructions issued by the USDOC to Customs, liquidation instructions issued by Customs to local customs authorities ("port authorities") to liquidate the import entries at the rate established by the USDOC, and the collection of duties or the actual liquidation of entries. The European Communities submits that several interpretative considerations in the *Anti-Dumping Agreement* and the DSU provide support for the principle that immediate compliance by the end of the reasonable period of time precludes all actions or omissions based on zeroing after the end of the reasonable period of time.<sup>390</sup>

296. In response, the United States argues that an anti-dumping duty is a border measure, and that, in disputes involving border measures, compliance is achieved when the measure is withdrawn or rendered WTO-consistent for goods entered after the reasonable period of time.<sup>391</sup> The United States contends that, by withdrawing the border measures or applying new WTO-consistent border measures to entries occurring after the end of the reasonable period of time subject to the 31 measures covered by the recommendations and rulings of the DSB, it brought itself into compliance with those recommendations and rulings.<sup>392</sup> Accordingly, the United States rejects the European Communities' view that the recommendations and rulings of the DSB encompass the liquidation after the end of the reasonable period of time of entries that were made before or during the reasonable period of time, if for any reason those entries remained unliquidated at the end of the reasonable period of time.<sup>393</sup> The

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<sup>388</sup>Panel Report, paras. 8.219-8.222.

<sup>389</sup>European Communities' appellant's submission, paras. 5 and 121.

<sup>390</sup>European Communities' appellant's submission, para. 168. The arguments advanced by the European Communities in support of its appeal are summarized in Section II.A.3 of this Report.

<sup>391</sup>United States' appellee's submission, paras. 62 and 72.

<sup>392</sup>United States' appellee's submission, para. 62.

<sup>393</sup>United States' appellee's submission, para. 63.

United States considers that, to ensure a "level playing field" among Members with retrospective systems, prospective *ad valorem* systems, and prospective normal value systems, prospective implementation requires that duties levied on imports occurring on or after the date of implementation be consistent with the recommendations and rulings of the DSB.<sup>394</sup>

C. *Analysis*

297. We begin our analysis by recalling provisions of the DSU that are of relevance to the issues we have to address on appeal. Under the DSU, panel and Appellate Body reports adopted by the DSB have to be unconditionally accepted by the parties to the dispute.<sup>395</sup> Article 19.1 of the DSU requires the Member concerned to bring its measure found to be inconsistent with a covered agreement into conformity with that agreement. Article 3.7 of the DSU provides that "the first objective of the dispute settlement system is usually to secure the withdrawal" of the inconsistent measure. The Appellate Body has recognized that the implementing Member may bring an inconsistent measure into compliance also "by modifying or replacing it with a revised measure".<sup>396</sup> Article 21.1 of the DSU provides that prompt compliance with the recommendations and rulings of the DSB is essential to the effective resolution of disputes. Article 21.3 implies that compliance should be immediate, but also provides that the implementing Member may obtain in certain circumstances a reasonable period of time in which to comply:

If it is impracticable to comply immediately with the [DSB] recommendations and rulings, the Member concerned shall have a reasonable period of time *in which to do so*. (emphasis added)

The implementing Member may obtain a reasonable period of time in which to comply by: (i) DSB approval; (ii) agreement among the parties; or (iii) arbitration under Article 21.3 of the DSU.

298. The parties agree that the fact that Article 21.3 may provide a Member with a reasonable period of time to bring itself into compliance with DSB recommendations and rulings does not mean that the Member is not subject to the underlying WTO obligation during that period.<sup>397</sup> They also

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<sup>394</sup>United States' appellee's submission, para. 98. The arguments put forward by the United States in support of its position are summarized in Section II.B.3 of this Report.

<sup>395</sup>Article 17.14 of the DSU.

<sup>396</sup>Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, footnote 367 to para. 173.

<sup>397</sup>European Communities' appellant's submission, paras. 134 and 143; United States' appellee's submission, para. 68.

agree that Article 28 of the *Vienna Convention*<sup>398</sup> is inapplicable to the present dispute because DSB recommendations and rulings do not create new WTO obligations.<sup>399</sup> The European Communities states that DSB recommendations and rulings are not treaty-making by WTO Members but, rather, constitute judicial activity involving the clarification, interpretation, and application of provisions of the covered agreements.<sup>400</sup> The United States notes that recommendations and rulings by the DSB do not create an obligation to comply with the covered agreements, as that obligation already exists in the covered agreements themselves; rather, it is the right to a remedy against a breach of the covered agreements (such as compensation or suspension of concessions or other obligations) that arises only after a Member fails to comply with the DSB's recommendations and rulings within the reasonable period of time.<sup>401</sup> According to Article 22.1 of the DSU, compensation and suspension of concessions are temporary measures available in the event that the DSB's recommendations and rulings are not implemented within the reasonable period of time. Thus, as the United States puts it, a Member is not "permitted"<sup>402</sup> to breach the covered agreements during the reasonable period of time; instead, that Member is merely not subject to the remedies contemplated in Article 22 of the DSU for such breaches. Like the parties, we therefore disagree with the analogy drawn by the Panel between, on the one hand, Article 28 of the *Vienna Convention* on the "non-retroactivity of treaties" and, on the other hand, "non-retroactive" or "non-retrospective" remedies under the DSU, in its description of what prospective compliance with DSB recommendations and rulings requires the implementing Member to do.<sup>403</sup>

299. Thus, the reasonable period of time allows a Member sufficient time to bring itself into conformity with its WTO obligations without being required to provide compensation or being subject to the suspension of concessions or other obligations.<sup>404</sup> Given that the responding WTO Member is required to bring the measure found to be inconsistent into conformity with the relevant covered agreement within the reasonable period of time (where immediate compliance is impracticable), a failure to comply fully with, or an omission in the implementation of, the DSB's recommendations

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<sup>398</sup>Article 28 of the *Vienna Convention* reads:

*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.

<sup>399</sup>United States' appellee's submission, paras. 67-69; European Communities' appellant's submission, paras. 134, 135, and 143.

<sup>400</sup>European Communities' appellant's submission, paras. 134 and 135.

<sup>401</sup>United States' appellee's submission, para. 69.

<sup>402</sup>United States' appellee's submission, para. 71.

<sup>403</sup>Panel Report, paras. 8.168 and 8.169.

<sup>404</sup>United States' appellee's submission, para. 68.

and rulings cannot be found before the end of the reasonable period of time.<sup>405</sup> When a reasonable period of time for implementation has been determined, Article 21.3 of the DSU implies that the obligation to comply with the recommendations and rulings of the DSB has to be fulfilled by the end of the reasonable period of time at the latest, and that the WTO-inconsistency has to cease by the end of the reasonable period of time with prospective effect.<sup>406</sup> Thus, in this dispute, with respect to the "as applied" findings of the panel and/or the Appellate Body in the original proceedings, the United States was required to ensure that the use of the "zeroing" methodology in the 31 Cases at issue in the original proceedings ceased by the end of the reasonable period of time.

300. Whereas there is no debate between the parties that a failure to comply with the recommendations and rulings of the DSB cannot be found before the end of the reasonable period of time for implementation (which is, in this dispute, 9 April 2007), there is a plurality of views on the type of events that may trigger such a failure to comply in the United States' retrospective anti-dumping system. The United States considers that the critical event is the importation ("entry") of products subject to the duty, and that no failure to comply can be found in relation to imports made before the expiry of the reasonable period of time. For its part, the European Communities maintains that a failure to implement fully DSB recommendations and rulings can be found with respect to any inconsistent action taken by the responding Member after the expiry of the reasonable period of time. As we have explained above, the Panel developed a different approach. On the one hand, the Panel was of the view that 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 recommendations and rulings of the DSB. On the other hand, the Panel considered that a failure to comply could not be found with respect to actions occurring after the expiry of the reasonable period of time, such as assessment instructions by the USDOC to Customs, liquidation instructions by Customs to local port authorities, or actions to collect or liquidate duties, to the extent that these actions resulted from administrative reviews concluded *before* the end of the reasonable period of time. The Panel also stated that the United States was required to implement the recommendations and rulings of the DSB with respect to cash deposits applied after the end of the reasonable period of time even though the rates of these cash deposits were derived from margins of dumping calculated in an administrative review or an original investigation that occurred before that date.

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<sup>405</sup>We add that, ordinarily, the complaining WTO Member will avail itself of a remedy in the form of compensation or suspension of concessions or other obligations only after the expiry of the reasonable period of time, in the event that compliance measures have been found to be WTO-inconsistent, or omissions in compliance with the DSB's recommendations or rulings have been established in Article 21.5 proceedings.

<sup>406</sup>As the Appellate Body indicated in *US – Upland Cotton (Article 21.5 – Brazil)*, the recommendations and rulings of the DSB create implementation obligations with prospective effect. (Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, footnote 494 to para. 243)

301. The task of a panel under Article 21.5 of the DSU is to examine the questions of the existence or consistency with the covered agreements of measures taken to comply with the recommendations and rulings of the DSB. This examination will cover the instruments or actions that the responding Member has identified as measures "taken to comply". However, other closely connected measures or omissions in compliance by the responding Member fall within the scope of compliance proceedings and will be examined by the compliance panel in order to determine whether such actions or omissions undermine or negate the compliance achieved by the declared measures "taken to comply", or establish inexistent or insufficient compliance.

302. Thus, it appears to us that the starting point of an analysis of whether the responding Member has fulfilled its implementation obligations should be the recommendations and rulings of the DSB, with which that Member must comply. As noted above, these recommendations and rulings of the DSB concerned the use of zeroing "as such" and "as applied" in 15 original investigations (Cases 1 through 15) and "as applied" in 16 administrative reviews (Cases 16 through 31). In order to comply with the DSB's recommendations and rulings concerning the use of zeroing in the original investigations (Cases 1 through 15), the United States took the following actions. On 1 March 2007, the USDOC initiated proceedings pursuant to Section 129 of the URAA covering 12 original investigations at issue in the original proceedings. The remaining three anti-dumping duty orders had been previously revoked (Cases 10, 12, and 13). In the Section 129 determinations, the USDOC recalculated, without zeroing, the relevant margins of dumping for each exporter or foreign producer investigated. The USDOC issued 11 of the Section 129 determinations on 9 April 2007. These 11 Section 129 determinations became effective on 23 April 2007.<sup>407</sup> The results in the remaining Section 129 determination were issued on 20 August 2007 and became effective on 31 August

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<sup>407</sup>See Panel Exhibit EC-2 (preliminary results of Section 129 determinations), USDOC, Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margins in Antidumping Investigations; Change in Effective Date of Final Modification, *United States Federal Register*, Vol. 72, No. 17 (26 January 2007) 3783; Panel Exhibit EC-5 (notice of final results of Section 129 determinations), USDOC, Implementation of the Findings of the WTO Panel in US-Zeroing (EC): Notice of Determinations Under Section 129 of the Uruguay Round Agreements Act and Revocations and Partial Revocations of Certain Antidumping Duty Orders, *United States Federal Register*, Vol. 72, No. 86 (4 May 2007) 25261; Panel Exhibit EC-7, USDOC Issues and Decision Memorandum, Final Results for the Section 129 Determinations: Certain Hot-Rolled Carbon Steel from the Netherlands, Stainless Steel Bar from France, Stainless Steel Bar from Germany, Stainless Steel Bar from Italy, Stainless Steel Bar from the United Kingdom, Stainless Steel Wire Rod from Sweden, Stainless Steel Wire Rod from Spain, Stainless Steel Wire Rod from Italy, Certain Stainless Steel Plate in Coils from Belgium, Stainless Steel Sheet and Strip in Coils from Italy, Certain Cut-to-Length Carbon-Quality Steel Plate Products from Italy, Certain Pasta from Italy (9 April 2007); and United States' first written submission to the Panel, para. 19.

2007.<sup>408</sup> As a result of these recalculations: two original anti-dumping duty orders were revoked (the recalculation resulting in zero or *de minimis* margins for all exporters or producers concerned); 10 original anti-dumping duty orders were partially 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).

303. We note that the Section 129 determinations took effect on 23 April/31 August 2007, that is, after the reasonable period of time expired on 9 April 2007. The European Communities has brought a distinct claim with respect to this implementation delay, which we address in section X of this Report. Leaving this issue aside, we note that, in response to the WTO-inconsistencies that were covered by the recommendations and rulings of the DSB relating to the 15 original investigations, the United States, in 12 Cases, recalculated the margins of dumping without zeroing in the Section 129 determinations, with the consequent revocation—full or partial—of the anti-dumping duty orders. In the three remaining Cases, the anti-dumping duty orders were revoked for reasons unrelated to the zeroing issue.<sup>409</sup> The recalculations of margins of dumping without zeroing under the Section 129 determinations, the full or partial revocation of orders, as well as the establishment for the concerned exporters of new cash deposit rates set without zeroing are not WTO-inconsistent.<sup>410</sup> On the face of it, by issuing these Section 129 determinations, the United States has responded to the recommendations and rulings of the DSB relating to Cases 1 through 15. We recall, however, that, as the Appellate Body noted in *US – Softwood Lumber IV (Article 21.5 – Canada)*<sup>411</sup>, the examination under Article 21.5 of the DSU extends beyond the analysis of the consistency of the declared measures taken to comply, because the compliance panel may have to determine whether other closely connected measures taken by the responding WTO Member undermine or negate the compliance achieved by the declared measures taken to comply. We observe, in this respect, that the Section 129

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<sup>408</sup>See Panel Exhibit EC-6 (notice of the Section 129 determinations), USDOC, Implementation of the Findings of the WTO Panel in US-Zeroing (EC): Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Duty Order on Stainless Steel Sheet and Strip from Italy, *United States Federal Register*, Vol. 72, No. 186 (26 September 2007) 54640; and Panel Exhibit EC-8, USDOC Issues and Decision Memorandum, Final Results for the Section 129 Determinations: Stainless Steel Sheet and Strip from Italy (Italy SSSS) (20 August 2007).

<sup>409</sup>In July 2004 for Cases 10 and 12, and in February 2005 for Case 13.

<sup>410</sup>We address the European Communities' claims regarding an alleged arithmetical error in Case 11 and the calculation of certain "all others" rates in sections XI and XII of this Report.

<sup>411</sup>Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, paras. 80-88.



determinations do not relate to administrative reviews completed after the end of the reasonable period of time but covering entries prior to that date.

304. The DSB also adopted recommendations and rulings that referred to "as applied" findings by the Appellate Body in the original proceedings, according to which the determinations made in 16 specific administrative reviews, identified by the European Communities as Cases 16 through 31, were inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994. We note that these recommendations and rulings of the DSB concern the use of zeroing in the assessment of final duty liability as well as the setting of cash deposit rates with respect to specific products from specific countries that have been subject to anti-dumping duty orders. In relation to the 16 administrative reviews at issue in the original proceedings, the United States argued that they have been superseded by subsequent administrative reviews. Therefore, the United States considered that no further action was required in order to implement the DSB's recommendations and rulings in relation to those administrative reviews. We disagree. Although the "as applied" findings of the Appellate Body were made in relation to 16 administrative reviews identified by the European Communities in the original proceedings, this does not mean, in our opinion, that compliance by the United States with the recommendations and rulings of the DSB does not have to be prospective as of the end of the reasonable period of time. Due to its prospective nature, compliance is not confined by the limited duration of the original measures at issue, especially when a subsequent measure replaces or supersedes the measure at issue in the original proceedings.<sup>412</sup>

305. Under the DSU, compliance has to be accomplished at the latest from the end of the reasonable period of time with prospective effect. In the instant case, we do not see how such prospective compliance could be achieved and assessed in an Article 21.5 proceeding if such analysis were constrained by the limited duration of the 16 administrative reviews at issue in the original proceedings, given that, in principle, entries covered by these 16 administrative reviews will have been liquidated before the end of the reasonable period of time, and cash deposit rates established in those reviews will have been superseded by the results of subsequent administrative reviews concluded before the expiry of the reasonable period of time.

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<sup>412</sup>We observe that the United States argues that the administrative reviews at issue in the original proceedings were superseded by subsequent administrative reviews. (See Panel Report, para. 3.1; and also para. 5.105, which refers to Panel Exhibit US-17) As we understand it, once a definitive anti-dumping duty order is imposed, the United States' retrospective assessment system contemplates a continuum of successive administrative reviews during the lifetime of that order. If no such review is requested in a particular year, entries occurring during that period are liquidated at the cash deposit rate and the margin calculated in a previous review will continue to serve as the going-forward cash deposit rate until an administrative review is requested. This may continue during the lifetime of the order or longer if a sunset review initiated at the fifth anniversary of that order results in a continuation order.

306. Given the scope of the recommendations and rulings of the DSB, in order to achieve compliance, the United States had to cease using zeroing in the assessment of duties with respect to Cases 16 through 31 by the end of the reasonable period of time. Having said that, we consider that these compliance obligations are not limited to the cessation of zeroing in the calculation of assessment rates; rather, by implication, these obligations also extend to connected and consequent measures that are simply "mechanically" derived from the results of an assessment review and applied in the ordinary course of the imposition of anti-dumping duties.

307. In particular, the United States fails to achieve compliance if it assessed final duty liability and applied cash deposits on the basis of zeroing after the end of the reasonable period of time. Given that, in the United States, final duty liability is assessed and cash deposit rates are set in administrative reviews<sup>413</sup>, administrative review determinations that are issued after the end of the reasonable period of time must not reflect zeroing.<sup>414</sup> The United States would not comply with the recommendations and rulings of the DSB if the administrative review determinations issued after the end of the reasonable period of time were based on zeroing or, in the event that no administrative review is requested, if the duties were assessed, after the end of the reasonable period of time, on the basis of cash deposit rates that were calculated with zeroing. As the Panel stated, "[t]o 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*."<sup>415</sup>

308. A subsequent administrative review determination issued after the end of the reasonable period of time falls within the scope of the implementation obligations of the United States, even though, in that review, duty liability has been assessed for entries that occurred before the end of the reasonable period of time. The United States considers that no failure to comply can be found in relation to such an administrative review determination because, under the DSU, implementation does not have retroactive reach. The United States reasons that the anti-dumping duty liability attaches to the entry, and arises at the time of importation. For the United States, the implementation obligations would apply retroactively if it were required to assess anti-dumping duty liability in the light of the

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<sup>413</sup>As the Appellate Body indicated in *US – Shrimp (Thailand) / US – Customs Bond Directive*, in the retrospective duty liability assessment system used by the United States, the determination of the final liability for payment of anti-dumping duties is made at the time of the assessment review or, when no administrative review is requested, at the time when it is determined that duties will be assessed on the basis of the cash deposit rate required upon entry. (See Appellate Body Report, *US – Shrimp (Thailand) / US – Customs Bond Directive*, footnote 268 to para. 226)

<sup>414</sup>The effective date of the administrative review determination is the date of publication of the final results of the administrative review in the *United States Federal Register*, or, where applicable, the date of publication of the amended results of the administrative review.

<sup>415</sup>Panel Report, para. 8.174.

legal regime in place at the end of the reasonable period of time (which would incorporate the prohibition of using zeroing in the assessment of duties), as opposed to the legal regime in effect at the time of importation, when the anti-dumping duty liability arose.

309. We disagree with the United States. We observe, first, that an administrative review determination issued after the end of the reasonable period of time in which duty liability has been assessed for entries that occurred before that date also has an impact on entries taking place after the end of the reasonable period of time, because this determination sets going-forward cash deposit rates that apply to future entries. Under the United States' approach, prospective implementation would imply that cash deposit rates on entries after the end of the reasonable period of time do not reflect zeroing. Moreover, because compliance with the recommendations and rulings of the DSB implies cessation of zeroing in the assessment of final duty liability, and in the measures that, in the ordinary course of the imposition of anti-dumping duties, derive mechanically from the assessment of duties, whether the implementation is prospective or retroactive should not be determined by reference to the date when liability arises, but rather by reference to the time when final dumping duty liabilities are assessed or when measures that result mechanically from the assessment of duties occur. We consider that the obligation to cease using zeroing in the assessment of anti-dumping duty liability at the latest as of the end of the reasonable period of time "is eminently prospective in nature".<sup>416</sup> By contrast, the approach based on the date of entry advocated by the United States would allow a WTO Member operating a retrospective duty assessment system to resort to a methodology for assessing duty liability that has been found WTO-inconsistent beyond the end of the reasonable period of time. Thus, the implementing Member would be able to extend the reasonable period of time and delay compliance depending on when it chooses to undertake final duty assessment. Such a result would deprive of meaning the notion of "reasonable period of time" in which a Member shall comply, as provided for in Article 21.3 of the DSU, and be contrary to the implementation mechanism of the DSU.

310. We move to the European Communities' claim on appeal that the Panel erred in concluding that the implementation obligations of the United States do not extend to the collection (or liquidation) of duties, assessment instructions, or liquidation instructions issued after the end of the reasonable period of time, when such actions result from determinations of final duty liability made before that date.<sup>417</sup> As we have explained above, we are of the view that, by implication, compliance with the recommendations and rulings of the DSB with respect to Cases 16 through 31 implies not only cessation of zeroing in the assessment of duties, but also in consequent measures

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<sup>416</sup>Panel Report, para. 8.175. (footnote omitted)

<sup>417</sup>Panel Report, paras. 8.191-8.193 and 8.199-8.201.

that, in the ordinary course of the imposition of anti-dumping duties, derive *mechanically* from the assessment of duties. Accordingly, to the extent that a measure of this kind would be based on zeroing, the United States would fail to comply with the recommendations and rulings of the DSB regarding Cases 16 through 31 if it were to apply that measure after the end of the reasonable period of time.

311. In the light of the above considerations, we agree with the Panel that "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."<sup>418</sup> We also agree with the Panel's statement that "[t]o 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."<sup>419</sup> In other words, in relation to the Cases at issue in the original proceedings, we consider that a subsequent administrative review determination issued after the end of the reasonable period of time in which zeroing is used, or, if no such review is requested, a determination issued after the end of the reasonable period of time by which anti-dumping liability is assessed on the basis of cash deposit rates calculated with zeroing, would establish a failure to comply with the recommendations and rulings of the DSB. However, we disagree with the Panel's view regarding measures that are consequent to assessment reviews in the Cases at issue in the original proceedings. We consider that measures that, in the ordinary course of the imposition of anti-dumping duties, derive *mechanically* from the assessment of duties would establish a failure to comply with the recommendations and rulings of the DSB to the extent that they are based on zeroing and that they are applied after the end of the reasonable period of time. Accordingly, we *reverse* the Panel's interpretation, in paragraph 8.199 of the Panel Report, that the United States' obligation to implement the recommendations and rulings of the DSB does not extend to the actual collection and liquidation of duties, and to the issuance of assessment or liquidation instructions, when these actions result from administrative review determinations made before the end of the reasonable period of time.

312. We move to the European Communities' appeal concerning the Panel's finding that the European Communities has not established that the United States failed to comply with the recommendations and rulings of the DSB by liquidating, after the end of the reasonable period of time, duties that were assessed with zeroing pursuant to administrative review determinations issued

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<sup>418</sup>Panel Report, para. 8.174.

<sup>419</sup>Panel Report, para. 8.175.

before the end of the reasonable period of time.<sup>420</sup> We observe that this finding of the Panel is based on its position that actions to liquidate entries are outside the scope of the implementation obligations of the United States merely because they result from assessments made before the end of the reasonable period of time.<sup>421</sup> We have explained above why we reject this approach. Resting upon an erroneous reasoning, this finding of the Panel, in paragraphs 8.200 and 9.1(b)(iii) of the Panel Report, *is moot and has no legal effect*.

313. Having said that, we observe that the unliquidated entries as of the end of the reasonable period of time to which the European Communities refers<sup>422</sup> are derived from administrative reviews that are outside the Panel's terms of reference, with the exception of the unliquidated duties assessed in the 2004-2005 administrative review in Case 1.<sup>423</sup> Accordingly, it is not necessary for us to make findings with respect to those unliquidated entries.

314. We do not express any opinion on the question of whether actions to liquidate duties that are based on administrative review determinations issued before the end of the reasonable period of time, and that have been delayed as a result of judicial proceedings, fall within the scope of the implementation obligations of the United States, as we do not need to do so in the context of our analysis of this issue in this case.

### **VIII. Specific Cases Covered by the Appeal and the Other Appeal**

315. We move to the claims raised in the European Communities' appeal and the United States' other appeal with respect to subsequent administrative reviews in specific Cases, as well as cash deposits applied or duties liquidated after the end of the reasonable period of time in specific Cases. We examine in turn Cases 1, 6, and 31 with respect to which the Panel made specific findings. We then discuss the European Communities' appeal concerning Cases 18 through 24 and 27 through 30 with respect to which the Panel did not make substantive findings, and we address the question of whether we can complete the analysis.

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<sup>420</sup>Panel Report, paras. 8.200 and 9.1(b)(iii).

<sup>421</sup>Panel Report, para. 8.191.

<sup>422</sup>European Communities' response to Panel Question 5, Annex A. According to the Annex, there were unliquidated entries as of the end of the reasonable period of time in seven Cases out of 31, namely, Cases 1, 5, 22, 28, 29, 30, and 31.

<sup>423</sup>The appeal and the other appeal relating to Case 1 are discussed in the next section of this Report. In any event, we observe that, in Case 1, the 2004-2005 administrative review was concluded *after* the expiry of the reasonable period of time. In our view, the analysis of whether the United States has complied or not with the recommendations and rulings of the DSB should focus on the results of the 2004-2005 administrative review. For purposes of proceedings under Article 21.5 of the DSU, we do not see what a separate review of unliquidated entries relating to the 2004-2005 administrative review would add to the analysis of the results of that review.

A. *Case 1: Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands*

316. Case 1 involved the use of zeroing by the USDOC when aggregating results of weighted average-to-weighted average comparisons of normal value and export prices in the original investigation of certain hot-rolled carbon steel flat products from the Netherlands.<sup>424</sup> In the original proceedings with respect to Case 1, the original panel and the Appellate Body found that zeroing, "as applied" in this original investigation, was inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*.<sup>425</sup> The original proceedings did not involve subsequent administrative reviews relating to certain hot-rolled carbon steel flat products from the Netherlands where zeroing was used in weighted average-to-transaction comparisons of normal value and export prices.

317. Before the Panel, the European Communities made two claims regarding Case 1. First, it challenged the determination made in the 2004-2005 administrative review, as well as the consequent instructions to Customs. In this administrative review, zeroing was used.<sup>426</sup> The final results of the 2004-2005 administrative review, as well as assessment instructions, were issued on 22 June 2007. The second claim of the European Communities concerned the administrative review covering imports from 1 November 2005 to 31 October 2006. This administrative review was rescinded on 30 March 2007. As a consequence, assessment instructions were issued on 16 April 2007. On 23 April 2007, Customs instructed the ports of entry to liquidate the relevant entries.<sup>427</sup>

318. In the Section 129 determination with respect to Case 1, the United States recalculated without zeroing the margin of dumping on the basis of weighted average-to-weighted average comparisons. As a result of the recalculation, no dumping was found and the original anti-dumping duty order was revoked. Issued on 9 April 2007, the Section 129 determination took effect on 23 April 2007.<sup>428</sup>

319. Regarding the first claim, the Panel observed that the results of the 2004-2005 administrative review and the consequent assessment instructions were issued after the reasonable period of time for implementation had expired on 9 April 2007. Applying its interpretation of the temporal scope of the United States' implementation obligations it had set out previously, the Panel found that the United States acted inconsistently with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 because it used zeroing in its determination in the 2004-2005 administrative review and

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<sup>424</sup>USDOC, Antidumping Duty Order: Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands, *United States Federal Register*, Vol. 66, No. 230 (29 November 2001) 59565.

<sup>425</sup>Original Panel Report, para. 8.1(a).

<sup>426</sup>Panel Report, para. 8.208.

<sup>427</sup>Panel Report, para. 8.205.

<sup>428</sup>Panel Report, para. 3.1.

in issuing the consequent assessment instructions.<sup>429</sup> The Panel thus concluded that the United States had failed to comply with the recommendations and rulings of the DSB in relation to Case 1.<sup>430</sup>

320. Moving to the second claim, the Panel considered 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 on 30 March 2007, when the 2005-2006 administrative review was rescinded.<sup>431</sup> Applying its interpretation of the temporal scope of implementation obligations, the Panel found that, as the determination of final anti-dumping duty liability with the use of zeroing was made prior to the end of the reasonable period of time, the assessment instructions issued on 16 April 2007, and the liquidation instructions issued on 23 April 2007, did not constitute failures on the part of the United States to comply with the recommendations and rulings of the DSB.<sup>432</sup>

321. Although the European Communities agrees with the findings of the Panel regarding the results of the 2004-2005 administrative review in Case 1, it considers that the Panel erred in its approach to the temporal scope of the implementation obligations of the United States. The same approach, the European Communities contends, also led the Panel to the erroneous conclusion that the assessment instructions and the liquidation instructions issued further to the rescission of the 2005-2006 administrative review did not constitute failures on the part of the United States to comply with the recommendations and rulings of the DSB.<sup>433</sup>

322. In its other appeal, the United States claims that the Panel erred in its analysis of Case 1, because it ignored the fact that the DSB's recommendations and rulings in this Case relate to the use of zeroing in the weighted average-to-weighted average comparison methodology and do not extend to the use of zeroing in the weighted average-to-transaction comparison methodology in administrative reviews.<sup>434</sup> According to the United States, it complied with the recommendations and rulings of the DSB in Case 1 relating to the use of zeroing in the original investigation in which

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<sup>429</sup>According to the Panel, the United States did not contest that the USDOC had used zeroing in calculating the margin of dumping for the sole respondent, Corus Engineering Steels Ltd., and the USDOC Issues and Decision Memorandum confirms that zeroing was used in that Case. (Panel Report, para. 8.208 (referring to USDOC, Issues and Decision Memorandum for the 2004-2005 Administrative Review of Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Antidumping Duty Administrative Review, published together with Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Antidumping Duty Administrative Review, at pp. 12-14 (published in *United States Federal Register*, Vol. 72 (22 May 2007) 28676 (Panel Exhibit EC-12)))

<sup>430</sup>Panel Report, para. 8.208.

<sup>431</sup>Panel Report, para. 8.209 and footnote 769 to para. 8.174.

<sup>432</sup>Panel Report, para. 8.209.

<sup>433</sup>European Communities' appellant's submission, para. 186.

<sup>434</sup>United States' other appellant's submission, para. 34.

weighted average-to-weighted average comparisons were made by recalculating these margins and withdrawing the order in accordance with the results of this recalculation.<sup>435</sup> Furthermore, the United States contends that, in finding that the United States failed to comply with the recommendations and rulings of the DSB by using zeroing in the 2004-2005 and 2005-2006 administrative reviews, the Panel applied a retroactive remedy that is not permissible in the WTO system, because these reviews covered entries occurring prior to the end of the reasonable period of time.<sup>436</sup> We addressed the United States' other appeal earlier when we explained why we are of the view that these two administrative reviews fell within the Panel's terms of reference<sup>437</sup>, as well as in the previous section, where we dealt with the scope of the United States' compliance obligations.

323. In section VI of this Report, we have found that the 2004-2005 administrative review in Case 1 fell within the Panel's terms of reference because of its close nexus to the Section 129 determination and the DSB's recommendations and rulings in the original proceedings. Accordingly, we examine first whether the 2004-2005 administrative review is inconsistent with the *Anti-Dumping Agreement* or Article VI of the GATT 1994 and undermines the compliance achieved with the recalculation of the margins of dumping in the Section 129 determination, and the consequent revocation of the anti-dumping duty order.

324. According to the Appellate Body, whereas original investigations and administrative reviews are distinct proceedings and serve distinct purposes, they form part of a continuum of events under a single anti-dumping duty order. We recall that, in *US – Stainless Steel (Mexico)*, the Appellate Body noted that "permit[ting] simple zeroing in periodic reviews would allow WTO Members to circumvent the prohibition of zeroing in original investigations".<sup>438</sup> This was so because, in the first periodic review after an original investigation, the duty assessment rate for each importer would take effect from the date of the original imposition of anti-dumping duties. Thus, "[w]hen the initial cash deposit rate is calculated in the original investigation without using zeroing, this means that the mere act of conducting a periodic review would introduce zeroing following imposition of the anti-dumping duty order."<sup>439</sup> In relation to the administrative reviews at issue here, however, cash deposits calculated with zeroing have been collected and final duty liability has been assessed with zeroing.

325. As we have noted earlier<sup>440</sup>, in relation to the Cases at issue in the original proceedings, a subsequent administrative review determination issued after the end of the reasonable period of time

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<sup>435</sup>United States' other appellant's submission, paras. 38 and 39.

<sup>436</sup>United States' other appellant's submission, para. 42.

<sup>437</sup>*Supra*, paras. 236-258.

<sup>438</sup>Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 109.

<sup>439</sup>Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 109.

<sup>440</sup>*Supra*, para. 311.



in which zeroing is used, or, if no such review is requested, a determination after the end of the reasonable period of time by which anti-dumping liability is assessed on the basis of cash deposit rates calculated with zeroing, establishes a failure to comply with the recommendations and rulings of the DSB. We have further noted above that measures that derive *mechanically* from the assessment of duties, and that are taken in the ordinary course of the imposition of anti-dumping duties, establish a failure to comply with the recommendations and rulings of the DSB to the extent that they are based on zeroing and applied after the end of the reasonable period of time, even if such a measure is consequent to an administrative review determination issued before the end of that period.

326. In Case 1, the final duty liability for entries in the period 2004-2005 was assessed in an administrative review, the final results of which were issued on 22 June 2007, which is after the expiration of the reasonable period of time on 9 April 2007. The anti-dumping duty order was revoked pursuant to a Section 129 determination issued on 9 April 2007 and effective as of 23 April 2007. The Panel noted that it is uncontested that the USDOC used zeroing in the calculation of the margin of dumping for the sole respondent, Corus Engineering Steels Ltd. 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."<sup>441</sup> As a result, the final duty liability was assessed with the use of zeroing after the end of the reasonable period of time for the period 2004-2005 when cash deposits set with zeroing had been collected. The Appellate Body has found zeroing to be inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, regardless of whether zeroing was used *only* in the calculation of the final duty assessment rates or *also* in the calculation of going-forward cash deposit rates.<sup>442</sup> The fact that no going-forward cash deposit rate was set pursuant to the 2004-2005 administrative review in Case 1 does not change the fact that the final assessment of duty liability was done with zeroing. As a result, the United States assessed and collected duties calculated using zeroing in violation of Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, and failed to comply with its obligations with respect to the 2004-2005 administrative review determination issued on 22 June 2007, as well as the assessment and liquidation instructions, related to the 2005-2006 administrative review that was rescinded, issued on 16 and 23 April 2007 respectively. As we have noted earlier, these measures derive mechanically from the assessment of duties, and were applied in the ordinary course of the

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<sup>441</sup>USDOC, Issues and Decision Memorandum for the 2004-2005 Administrative Review of Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Antidumping Duty Administrative Review, published together with Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Antidumping Duty Administrative Review, at pp. 12-14 (published in *United States Federal Register*, Vol. 72 (22 May 2007) 28676 (Panel Exhibit EC-12). (Panel Report, para. 8.208)

<sup>442</sup>See Appellate Body Report, *US – Zeroing (EC)*, para. 263(a)(i).

imposition of anti-dumping duties, with the implication that they are also covered by the compliance obligations of the United States.

327. In the light of the above considerations, we *uphold* the Panel findings, in paragraphs 8.208 and 9.1(b)(i) of the Panel Report, 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 determination in the 2004-2005 administrative review and in issuing the consequent assessment instructions; and that, as a result of the final results of this administrative review, the United States failed to comply with the recommendations and rulings of the DSB to bring the original investigation in *Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands* (Case 1) into conformity.

328. As regards the rescission of the 2005-2006 administrative review, as well as the consequent assessment and liquidation instructions, we note that the USDOC issued a notice of rescission on 30 March 2007, and that the final liability for anti-dumping duties was assessed on the basis of cash deposits previously calculated with zeroing.<sup>443</sup> Assessment instructions were issued on 16 April 2007, and liquidation instructions on 23 April 2007, that is, after the end of the reasonable period of time. Such assessment and liquidation instructions are measures "mechanically derived" from the final assessment of anti-dumping duties, in the ordinary course of the imposition of such duties.

329. In the light of these considerations, we *reverse* the Panel's finding, in paragraphs 8.209 and 9.1(b)(iv) of the Panel Report, that the assessment instructions issued on 16 April 2007 and the liquidation instructions issued on 23 April 2007 do not establish that the United States has failed to comply with the recommendations and rulings of the DSB to bring the original investigation in *Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands* (Case 1) into conformity with its obligations under the covered agreements by virtue of those instructions. We *find*, instead, that these instructions, derived mechanically from the assessment of final duty liability in the ordinary course of the imposition of anti-dumping duties, are measures that were adopted after the end of the reasonable period of time, and thus establish a failure to comply by the United States.

B. *Case 6: Stainless Steel Wire Rod from Sweden*

330. Case 6 concerned the use of zeroing in the USDOC's original investigation of stainless steel wire rod from Sweden.<sup>444</sup> With respect to this Case, the USDOC published, on 9 May 2007, the amended final results of the 2004-2005 administrative review covering entries from 1 September 2004

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<sup>443</sup>European Communities' appellant's submission, para. 186 and footnote 269 thereto.

<sup>444</sup>USDOC, Notice of Antidumping Duty Order: Stainless Steel Wire Rod From Sweden, *United States Federal Register*, Vol. 63, No. 178 (15 September 1998) 49329.

to 31 August 2005. In these results, the USDOC, on the basis of a margin of dumping calculated with zeroing, instructed Customs to collect anti-dumping duties at a rate of 19.36 per cent. It also notified Customs of the revised cash deposit rate for the exporter concerned, which was calculated on the basis of zeroing. A Section 129 determination, effective as of 23 April 2007, revoked the original order. On 10 May 2007, the USDOC issued instructions to Customs informing it of the revocation resulting from the Section 129 determination. These instructions also informed Customs that any cash deposits paid on imports 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.<sup>445</sup>

331. Given the evidence provided by the United States that no cash deposit was imposed on imports covered by the anti-dumping duty order in this Case following the 2004-2005 administrative review, and the absence of rebuttal of this evidence by the European Communities, the Panel found that the European Communities failed to establish that the United States has not complied with the recommendations and rulings of the DSB by virtue of having imposed new cash deposit requirements with respect to Case 6.<sup>446</sup>

332. However, because zeroing was used in the assessment of duties pursuant to the 2004-2005 administrative review, the Panel found 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 determination in the 2004-2005 administrative review, and in issuing the consequent assessment instructions, and that, as a result, the United States failed to comply with the recommendations and rulings of the DSB to bring the original investigation in Case 6 into conformity with the covered agreements.<sup>447</sup>

333. On appeal, the European Communities claims that the Panel erred in ignoring that: between 9 April and 23 April 2007, imports of stainless steel wire rod from Sweden were subject to cash deposit requirements that reflected the methodology of zeroing; that these cash deposits were not refunded; and that the imports that occurred during this period would be subject to a final assessment of anti-dumping duties based on zeroing.<sup>448</sup>

334. With respect to the results of the 2004-2005 administrative review and the assessment of duties pursuant to that review, the European Communities agrees with the Panel's conclusions regarding the results of the 2004-2005 administrative review and the issuance of the assessment instructions, but contests aspects of the reasoning that led to these conclusions, more specially the

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<sup>445</sup>Panel Report, paras. 8.210 and 8.211.

<sup>446</sup>Panel Report, para. 8.212.

<sup>447</sup>Panel Report, para. 8.213.

<sup>448</sup>European Communities' appellant's submission, para. 187.

Panel's approach regarding the temporal scope of the implementation obligations of the United States.<sup>449</sup> The European Communities also contends that the Panel erred in failing to specifically address its claims with respect to final liquidations.<sup>450</sup>

335. In its other appeal, the United States claims that the Panel erred in its analysis of Case 6, because it ignored the fact that, as regards that Case, the recommendations and rulings of the DSB do not extend to the use of the methodology of "simple zeroing" in administrative reviews.<sup>451</sup> The United States contends that it complied with the DSB's recommendations and rulings by recalculating without zeroing the margins challenged in the original investigation, and withdrawing the order in accordance with the results of this recalculation.<sup>452</sup> Furthermore, the United States argues that, in finding a failure on the part of the United States to comply with the DSB's recommendations and rulings by using zeroing in the 2004-2005 administrative review, the Panel applied a retroactive remedy that is not permissible in the WTO system.<sup>453</sup> We addressed the United States' other appeal earlier when we explained why we are of the view that this review fell within the Panel's terms of reference<sup>454</sup>, as well as in the previous section where we dealt with the scope of the United States' compliance obligations.

336. The European Communities' claim on appeal relates to imports of stainless steel wire rod from Sweden between 9 April 2007 (the expiry of the reasonable period of time) and 23 April 2007 (the date on which the revocation of the anti-dumping duty order became effective). This claim is a specific application of the European Communities' appeal regarding the alleged non-existence of measures taken to comply between 9 April 2007 and 23 April/31 August 2007, which we address in section X of this Report.

337. In Case 6, the final duty liability for entries in the period 2004-2005 was assessed in an administrative review that was concluded on 9 May 2007 by the publication of amended final results. The anti-dumping duty order was revoked pursuant to a Section 129 determination issued on 9 April 2007 and effective 23 April 2007. Consequently, as the Panel found, cash deposits paid on imports of stainless steel wire rod from Sweden made on or after 23 April 2007 were refunded, and no cash deposits were imposed on imports of stainless steel wire rod from Sweden following the issuance of the amended final results of the 2004-2005 administrative review. However, as the Panel noted with respect to the assessment of duties pursuant to the 2004-2005 administrative review, the United States

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<sup>449</sup>European Communities' appellant's submission, para. 188.

<sup>450</sup>European Communities' appellant's submission, para. 209.

<sup>451</sup>United States' other appellant's submission, para. 34.

<sup>452</sup>United States' other appellant's submission, paras. 38 and 39.

<sup>453</sup>United States' other appellant's submission, para. 42.

<sup>454</sup>*Supra*, paras. 236-258.

has not contested that it used zeroing in the calculation of the margin of dumping for Fagersta (the sole exporter concerned by the review).<sup>455</sup> As a result, cash deposit rates established with the use of zeroing were applied to entries between 9 April 2007 (the expiry of the reasonable period of time) and 23 April 2007 (the date on which the revocation of the anti-dumping duty order became effective).

338. Accordingly, we *uphold* the Panel's finding, in paragraphs 8.213 and 9.1(b)(i) of the Panel Report, that the United States acted inconsistently with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 in issuing the results of the 2004-2005 administrative review on 9 May 2007, as well as the consequential assessment and liquidation instructions. We also *uphold* the Panel's finding, in paragraphs 8.213 and 9.1(b)(i) of the Panel Report, that the United States failed to comply with the recommendations and rulings of the DSB to bring the original investigation in *Stainless Steel Wire Rod from Sweden* (Case 6) into conformity with its WTO obligations.

339. We note that, apart from the alleged non-existence of measures taken to comply between 9 April 2007 and 23 April/31 August 2007, the European Communities does not appeal the Panel's finding, in paragraphs 8.212 and 9.1(b)(v) of the Panel Report, that the United States has not failed to comply with the recommendations and rulings of the DSB in the original proceedings 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 *Stainless Steel Wire Rod from Sweden*, because, due to the revocation of the anti-dumping duty order, no cash deposit requirement was actually imposed after 23 April 2007.

C. *Case 31: Ball Bearings and Parts Thereof from the United Kingdom*

340. This Case concerned the assessment of duties and the establishment of cash deposit rates on ball bearings and parts thereof from the United Kingdom<sup>456</sup>, produced and exported by NSK Bearings Europe Ltd. ("NSK") and the Barden Corporation UK. In the original proceedings, the use of "simple zeroing" was found to be inconsistent "as applied" with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, in the context of an administrative review covering entries from 1 May 2000 through 30 April 2001.

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<sup>455</sup>Panel Report, para. 8.213.

<sup>456</sup>USDOC, Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews, *United States Federal Register*, Vol. 67, No. 169 (30 August 2002) 55780.

341. With respect to NSK, no administrative review has been requested after the 2000-2001 administrative review.<sup>457</sup> Consequently, the cash deposit rate applied after the expiry of the reasonable period of time to imports from NSK reflected the margin of dumping calculated with zeroing in the 2000-2001 administrative review.<sup>458</sup> The Panel noted that 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."<sup>459</sup>

342. The Panel found that the United States failed to comply with the recommendations and rulings of the DSB to bring its measure into conformity with the covered agreements, as it has continued to apply to imports the cash deposit rate established in an administrative review determination found to be WTO-inconsistent as a result of the use of zeroing in the calculation of margins of dumping.<sup>460</sup> The Panel recalled that, to implement the recommendations and rulings of the DSB, a Member must ensure that the actions it undertakes after the end of the reasonable period of time are consistent with its obligations under the covered agreements. For the Panel, the continuing requirement to provide cash deposits constitutes such an action.<sup>461</sup> In response to an argument by the United States, the Panel discussed the case of a cash deposit requirement based on zeroing and applied as of the end of the reasonable period of time, but resulting from a determination that was not found to be inconsistent in the original proceedings, such as a determination resulting from a subsequent review. The Panel expressed the view that, 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 proceedings was not one that derived from a margin of dumping calculated with zeroing, even where the cash deposit rate was established as a result of an administrative review conducted subsequently to a measure at issue in the original proceedings. According to the Panel, concluding otherwise would mean that the United States is allowed to circumvent its obligation to comply with the recommendations and rulings of the DSB by the mere replacement of the cash deposit rates established in the measures challenged in the original proceedings by subsequent ones established in administrative reviews in which zeroing was again used.<sup>462</sup> The Panel refrained from making a specific finding with respect to the assessment after the end of the reasonable period of time of duty liability for imports from NSK, because it was of

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<sup>457</sup>See Annex to Request for the Establishment of a Panel by the European Communities, WT/DS294/25, Panel Report, Annex A-1.

<sup>458</sup>Panel Report, paras. 8.214 and 8.215.

<sup>459</sup>Panel Report, para. 8.215 and footnote 817 thereto.

<sup>460</sup>Panel Report, para. 8.216.

<sup>461</sup>Panel Report, footnote 820 to para. 8.218.

<sup>462</sup>Panel Report, para. 8.218.

the view that the European Communities did not identify any specific duty assessment determination after the end of the reasonable period of time.<sup>463</sup>

343. In response to questioning at the oral hearing, the European Communities confirmed that it appeals the analysis of Case 31 made by the Panel. We understand, however, that the European Communities does not appeal the Panel's findings relating to the application of cash deposit rates reflecting zeroing after the end of the reasonable period of time.<sup>464</sup> Rather, the European Communities challenges on appeal the Panel's decision not to make a specific finding with respect to the assessment after the end of the reasonable period of time of duty liability for imports from NSK.

344. We recall that, as far as Case 31 is concerned, the recommendations and rulings of the DSB cover the use of zeroing in the assessment of anti-dumping duty liability and in the establishment of cash deposit rates. In the United States, duty liability is assessed and going-forward cash deposit rates are established in an administrative review or, if no administrative review is requested, at the time when it is determined that duties will be assessed on the basis of the collected cash deposits.

345. In Case 31, no subsequent administrative review was requested by NSK after the 2000-2001 administrative review. Thus, the cash deposit rates applied on imports from NSK after the end of the reasonable period of time were derived from the latest determination in which duties were assessed on the basis of the collected cash deposits, and reflected the margin of dumping calculated with zeroing in the 2000-2001 administrative review. In Case 31, the anti-dumping duty order was published on 15 May 1989.<sup>465</sup> Under United States law, the right to request an administrative review lapses at the end of the anniversary month of the publication of the order, that is, in this Case, 31 May 2007.<sup>466</sup> When the right to request an administrative review lapsed on that date, duties were finally assessed on the basis of the collected cash deposits. We conclude that the duty liability determination on 31 May 2007 made on the basis of cash deposits previously collected constitutes a failure to comply with the recommendations and rulings of the DSB in relation to Case 31, as the assessed duties reflected a margin of dumping calculated with zeroing and the assessment took place *after* the end of the reasonable period of time.

346. On the basis of the above considerations, we *find* that the Panel erred in refraining, in paragraph 8.217 of the Panel Report, to make a specific finding with respect to the assessment after the end of the reasonable period of time of duty liability for imports from NSK in *Ball Bearings and*

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<sup>463</sup>Panel Report, para. 8.217.

<sup>464</sup>Panel Report, para. 8.218.

<sup>465</sup>*United States Federal Register*, Vol. 54 (15 May 1989) 20909.

<sup>466</sup>*United States Code of Federal Regulations*, Title 19, Section 353.53a.

*Parts Thereof from the United Kingdom* (Case 31), and that duties assessed after the end of the reasonable period of time on the basis of cash deposits reflecting zeroing establish a failure by the United States to comply with the recommendations and rulings of the DSB.

D. *Cases 18 through 24 and 27 through 30*

347. Before the Panel, the European Communities claimed that, with respect to Cases 18 through 24 and 27 through 30<sup>467</sup> (as well as Case 31 that was discussed in the previous section), duties or cash deposit rates based on zeroing remained in place on and after 9 April 2007.<sup>468</sup>

348. The Panel did not, however, examine these Cases on the grounds that it did not have before it substantive arguments or supporting materials in relation to these Cases that would have allowed it to make any additional substantive findings.<sup>469</sup>

349. The European Communities claims that the Panel erred in not reviewing these Cases and, more specifically, that the Panel failed to comply with its functions as required by Article 11 of the DSU. In the event that it prevails on this claim, the European Communities requests the Appellate Body to complete the analysis and find that, by continuing to maintain in place duties or cash deposit rates with respect to these Cases, the United States has acted inconsistently with the covered agreements, and that this constitutes a failure to comply with the rulings and recommendations of the DSB in the original proceedings.<sup>470</sup> The European Communities contends that the Panel had sufficient evidence before it to make findings on these Cases.<sup>471</sup>

350. The United States contends that the Panel correctly declined to make findings with respect to 11 of the 16 administrative reviews at issue in the original proceedings for which anti-dumping duty orders remain in place. The United States disagrees with the Panel's statement that the application, after the end of the reasonable period of time, of cash deposit rates calculated with zeroing would

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<sup>467</sup>See Annex to Request for the Establishment of a Panel by the European Communities, WT/DS294/25, Panel Report, Annex A-1.

<sup>468</sup>European Communities' appellant's submission, para. 190.

<sup>469</sup>Panel Report, para. 8.202.

<sup>470</sup>European Communities' appellant's submission, paras. 194 and 197.

<sup>471</sup>The European Communities refers to a number of extracts of its request for the establishment of a panel and various submissions it made to the Panel: Request for the Establishment of a Panel by the European Communities, WT/DS294/25, paras. 2, 4, and 7, Panel Report, Annex A-1; European Communities' first written submission to the Panel, paras. 69 and 76-83, including footnote 74 to para. 82; European Communities' second written submission to the Panel, para. 62; European Communities' opening statement at the Panel meeting, para. 44; European Communities' closing statement at the Panel meeting, para. 5; European Communities' response to Panel Question 8, para. 34; and Annex B to European Communities' response to Panel Question 6.



constitute a failure to comply with the DSB's recommendations and rulings in this dispute, and considers the Panel's statement without legal effect.<sup>472</sup>

351. The Panel considered that it did not have sufficient evidence before it and abstained from making additional substantive findings on Cases 18 through 22, 24, and 27 through 30. Concerning Case 24, the European Communities has adduced in Panel Exhibit EC-17 the USDOC Issues and Decision Memorandum and *United States Federal Register* Notice that make explicit references to the use of zeroing in the determination of margins of dumping.<sup>473</sup> Concerning Cases 18 through 22 and 27 through 30, the European Communities, in its request for the establishment of a panel, lists references to *Federal Register* Notices pertaining to the subsequent reviews it challenged.<sup>474</sup> As regards Case 23, the only piece of evidence mentioned by the European Communities was in paragraphs 81 and 82 of its first written submission to the Panel. This piece of evidence relates to a subsequent administrative review that was concluded after the establishment of the Panel, and fell outside the terms of reference of the Panel as it was not indicated in the Annex to the panel request, although it may be relevant as evidence.

352. In any event, we observe that, with respect to Cases 18 through 24 and 27 through 30, the results of the subsequent reviews listed in the Annex to the European Communities' panel request that fell within the Panel's terms of reference were issued before the expiry of the reasonable period of time.

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<sup>472</sup>United States' appellee's submission, para. 106 (referring to Panel Report, para. 8.218).

<sup>473</sup>USDOC, Issues and Decision Memorandum for the Final Results of the Administrative Review of the Antidumping Duty Order on Granular Polytetrafluoroethylene Resin from Italy (26 November 2007), at pp. 11-12 (published together with USDOC, Notice of Final Results of Antidumping Duty Administrative Review: Granular Polytetrafluoroethylene Resin from Italy, *United States Federal Register*, Vol. 72 (26 November 2007) 65939 (Panel Exhibit EC-17)).

<sup>474</sup>Annex to Request for the Establishment of a Panel by the European Communities, WT/DS294/25, Panel Report, Annex A-1. For Case 18, *Stainless Steel Plate in Coils from Belgium*: two subsequent administrative reviews (*United States Federal Register*, Vol. 70 (19 January 2005) 2999; and Vol. 70 (7 December 2005) 72789); and one sunset review (*United States Federal Register*, Vol. 70 (18 July 2005) 41202). For Cases 19 and 20, *Certain Pasta from Italy*: three subsequent administrative reviews (*United States Federal Register*, Vol. 69 (10 February 2004) 6255; Vol. 69 (27 April 2004) 22761; and Vol. 70 (9 February 2005) 6832); and one sunset review (*United States Federal Register*, Vol. 69 (27 April 2004) 22761). For Cases 21 and 22, *Stainless Steel Sheet and Strip in Coils From Italy*: two subsequent administrative reviews (*United States Federal Register*, Vol. 68 (12 December 2003) 69382; and Vol. 70 (17 March 2005) 13009); and one sunset review (*United States Federal Register*, Vol. 70 (4 August 2005) 44886). For Cases 27 and 28, *Stainless Steel Sheet and Strip in Coils From Germany*: four subsequent administrative reviews (*United States Federal Register*, Vol. 69 (10 February 2004) 6262; Vol. 69 (20 December 2004) 75930; Vol. 70 (13 December 2005) 73729; and Vol. 71 (13 December 2006) 74897); and one sunset review (*United States Federal Register*, Vol. 70 (4 August 2005) 44886). For Cases 29 and 30, *Ball Bearings and Parts Thereof from France and Italy*: five subsequent administrative reviews (*United States Federal Register*, Vol. 68 (16 June 2003) 35623; Vol. 68 (24 July 2003) 43712; Vol. 69 (15 September 2004) 55574; Vol. 70 (16 September 2005) 54711; and Vol. 71 (14 July 2006) 40064); and one sunset review (*United States Federal Register*, Vol. 71 (15 September 2006) 54469). These *Federal Register* Notices were not themselves submitted as exhibits during the Panel proceedings.

353. Given that there are insufficient undisputed facts on record, we are not in a position to complete the analysis and therefore *decline* to rule on whether the Panel did not comply with its duties under Article 11 of the DSU.

354. Having said that, we note our earlier conclusions that subsequent administrative reviews in which zeroing is used after the end of the reasonable period of time establish a failure by the United States to comply with the recommendations and rulings of the DSB. Furthermore, we note the Panel's statement that:

... 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.<sup>475</sup>

355. We share the Panel's view that the United States fails to comply with the recommendations and rulings of the DSB if it continues to apply cash deposits established on the basis of zeroing after the end of the reasonable period of time in respect of the Cases at issue here.

## **IX. The Subsequent Sunset Reviews**

356. We now turn to the European Communities' appeal of the Panel's finding that the European Communities has not demonstrated that the United States failed to comply with the DSB's recommendations and rulings in the subsequent sunset reviews at issue.

### *A. The Panel's Findings*

357. Before the Panel, the European Communities claimed that the United States had extended the measures challenged in the original proceedings pursuant to sunset review proceedings concluded before and after 9 April 2007, and which relied on dumping margins calculated with zeroing. The European Communities argued that, by relying in the subsequent sunset review proceedings on

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<sup>475</sup>Panel Report, para. 8.218. Footnote 820 to that paragraph reads: "... 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."

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 of the *Anti-Dumping Agreement*, because these margins were not based on a "fair comparison" and were not calculated for the product as a whole, and as a result the United States acted in breach of Article 11.3 of the *Anti-Dumping Agreement*.<sup>476</sup>

358. The Panel found that only those subsequent sunset reviews in which the likelihood-of-dumping determination by the USDOC had been made *after* the adoption of the DSB's recommendations and rulings fell within its terms of reference, because they potentially affected the United States' implementation of the DSB's recommendations and rulings.<sup>477</sup> The Panel therefore addressed the claims by the European Communities with respect to only the following sunset review determinations:

- (i) Preliminary likelihood-of-dumping determination by the USDOC in *Stainless Steel Bar from Germany* (Case 3) (30 May 2007)<sup>478</sup>;
- (ii) Final likelihood-of-dumping determinations by the USDOC in *Stainless Steel Bar from France* (Case 2), *Stainless Steel Bar from Italy* (Case 4), and *Stainless Steel Bar from the United Kingdom* (Case 5) (4 June 2007)<sup>479</sup>; and
- (iii) Final likelihood-of-dumping determination by the USDOC in *Certain Pasta from Italy* (Case 19) (5 February 2007).<sup>480</sup>

359. According to the Panel, "[i]t seems clear ... 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 [anti-dumping duty] order refer to dumping margins that had been calculated in administrative reviews, using zeroing."<sup>481</sup> The Panel, however, ruled that, "[e]ven 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"<sup>482</sup>, it could not make the findings requested by the

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<sup>476</sup>Panel Report, para. 8.130.

<sup>477</sup>See section VI of this Report.

<sup>478</sup>USDOC, *Stainless Steel Bar from Germany*; Preliminary Results of the Sunset Review of Antidumping Duty Order, *United States Federal Register*, Vol. 72, No. 103 (30 May 2007) 29970. (See Panel Exhibit EC-41)

<sup>479</sup>USDOC, *Stainless Steel Bar from France, Italy, South Korea and the United Kingdom*; Final Results of the Expedited Sunset Reviews of the Antidumping Duty Orders, *United States Federal Register*, Vol. 72, No. 106 (4 June 2007) 30772 (Panel Exhibit EC-40).

<sup>480</sup>USDOC, Notice of Final Results of Expedited Sunset Reviews of the Antidumping Duty Orders: *Certain Pasta from Italy and Turkey*, *United States Federal Register*, Vol. 72, No. 23 (5 February 2007) 5266 (Panel Exhibit EC-52).

<sup>481</sup>Panel Report, para. 8.138.

<sup>482</sup>Panel Report, para. 8.139.

European Communities. The Panel found that the European Communities had not demonstrated that "the USDOC determinations it challenges resulted in the continuation of the underlying [anti-dumping duty] order as of the time this Panel was established."<sup>483</sup>

360. The Panel noted that, 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" and that, in Case 19, "the proceedings had not been concluded, and thus, there was no continuation of the underlying order as of this Panel's establishment."<sup>484</sup> The Panel concluded that "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."<sup>485</sup>

361. The Panel, therefore, declined to 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" and "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 margins of dumping calculated in subsequent administrative reviews in the context of sunset review determinations."<sup>486</sup>

B. *Claims and Arguments on Appeal*

362. The European Communities claims that all the subsequent sunset reviews mentioned in the Annex to the European Communities' Article 21.5 panel request<sup>487</sup> fell within the Panel's terms of reference, including those sunset reviews where the USDOC's likelihood-of-dumping determination was issued prior to the adoption of the DSB's recommendations and rulings.<sup>488</sup>

363. The European Communities further claims that the Panel erred in finding that the European Communities has not demonstrated that the United States failed to comply with the DSB's

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<sup>483</sup>Panel Report, para. 8.139. (footnote omitted)

<sup>484</sup>Panel Report, para. 8.139. (footnote omitted)

<sup>485</sup>Panel Report, para. 8.140.

<sup>486</sup>Panel Report, para. 8.141. (footnote omitted)

<sup>487</sup>A total of 16 sunset reviews were mentioned in the Annex to the European Communities' panel request, in Cases 2, 3, 4, 5, 6, 7, 8, 14, 18, 19, 22, 24, 28, 29, 30, and 31. (See Annex to Request for the Establishment of a Panel by the European Communities, WT/DS294/25, Panel Report, Annex A-1)

<sup>488</sup>The Panel found that 11 of the sunset reviews mentioned in the Annex to the European Communities' panel request did not fall within its terms of reference, because the likelihood-of-dumping determinations by the USDOC were made *before* the adoption of the recommendations and rulings by the DSB in the original proceedings. These sunset reviews concern Cases 6, 7, 8, 14, 18, 22, 24, 28, 29, 30, and 31. (European Communities' appellant's submission, para. 100 and footnote 144 thereto)

recommendations and rulings in the subsequent sunset review proceedings<sup>489</sup> it considered to fall within its terms of reference.<sup>490</sup> According to the European Communities, "the fact that continuation orders had not yet been published with respect to some subsequent sunset reviews at the time the Panel was established *does not mean* that the USDOC's dumping determinations made in the context of those sunset review proceedings are *irrelevant* for assessing the US compliance with the DSB recommendations and rulings in the original dispute."<sup>491</sup> In the view of the European Communities, the relevant action that should serve to assess compliance by the United States is the final determination by the USDOC of likelihood of dumping, rather than the publication of the continuation order.<sup>492</sup>

364. The European Communities argues that "the Panel disregarded its mandate and failed to comply with its functions as required by Article 11 of the *DSU* when failing to address the EC claim that the United States failed to comply with the DSB recommendations in the original dispute, since certain aspects of the measures at issue in the original dispute (*i.e.*, the dumping margins based on zeroing) remained in place", and that "the United States relied on those margins for the determination of likelihood of recurrence of dumping in subsequent sunset review proceedings concerning the same anti-dumping 'measure'."<sup>493</sup>

365. The European Communities requests the Appellate Body to reverse the Panel's findings and to complete the analysis and find that, by relying in the sunset review proceedings challenged by the European Communities on margins calculated in prior proceedings using zeroing, the United States did not comply with its obligations pursuant to Articles 2.1, 2.4, 2.4.2, and 11.3 of the *Anti-Dumping Agreement* and Articles 19.1 and 21.3 of the *DSU*, and failed to comply with the DSB's recommendations and rulings in the original proceedings.<sup>494</sup>

366. The United States responds that none of the subsequent sunset reviews were within the terms of reference of the Panel, because they were not measures "taken to comply" with the recommendations and rulings of the DSB.<sup>495</sup> The United States also argues that "the Appellate Body should affirm the compliance Panel's finding that the EC failed to demonstrate that the [USDOC's]

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<sup>489</sup>The Panel found that five of the sunset reviews mentioned in the Annex to the European Communities' panel request fell within its terms of reference, because the likelihood-of-dumping determinations by the USDOC were made *after* the adoption of the recommendations and rulings by the DSB in the original proceedings. These sunset reviews concern Cases 2, 3, 4, 5, and 19. (See Panel Report, para. 8.124)

<sup>490</sup>European Communities' appellant's submission, para. 111.

<sup>491</sup>European Communities' appellant's submission, para. 112. (original emphasis)

<sup>492</sup>European Communities' appellant's submission, para. 113.

<sup>493</sup>European Communities' appellant's submission, para. 102 (referring to Panel Report, para. 8.222).

<sup>494</sup>European Communities' appellant's submission, para. 120.

<sup>495</sup>United States' appellee's submission, paras. 49 and 55.

determinations it challenged caused the continuation of the orders at the time the compliance Panel was established."<sup>496</sup>

367. The United States argues that "[t]he conclusion of the sunset review is not based solely on [the USDOC's] determination", but requires also a determination by the USITC as to "whether the revocation of the antidumping duty order would likely lead to a continuation or recurrence of material injury".<sup>497</sup> According to the United States, a *prima facie* showing that the USDOC's determination caused the continuation of the order is impossible without a final, conclusive determination to continue the order. The United States adds that "[t]his is illustrated by the fact that for five of the orders for which the Panel found a sunset review to fall within its terms of reference, four ultimately were revoked."<sup>498</sup>

368. The United States also argues that, should the Appellate Body find that the Panel wrongly excluded any subsequent reviews, including any sunset reviews, from the scope of these proceedings, the Appellate Body could not complete the analysis, because the European Communities provided no arguments to show that these measures are inconsistent with the *Anti-Dumping Agreement*, nor did it "identify the 'factual findings of the Panel [or] undisputed facts in the Panel record' that would enable the Appellate Body to complete the analysis with regard to any particular measure or claim".<sup>499</sup>

### C. *Analysis*

369. We have reversed, in section VI of this Report, the Panel's findings that certain subsequent reviews, which were concluded *before* the adoption of the recommendations and rulings of the DSB in the original proceedings, did not fall within the scope of these compliance proceedings.<sup>500</sup> The European Communities claims that the United States failed to comply with the recommendations and rulings of the DSB in all the sunset review proceedings mentioned in the Annex to the European Communities' Article 21.5 panel request and requests the Appellate Body to complete the analysis with respect to those sunset reviews that the Panel had found to fall outside its terms of reference. We, therefore, address the claims by the European Communities in respect of these sunset reviews

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<sup>496</sup>United States' appellee's submission, para. 56 (referring to Panel Report, para. 8.139).

<sup>497</sup>United States' appellee's submission, para. 58.

<sup>498</sup>United States' appellee's submission, para. 58. (footnote omitted)

<sup>499</sup>United States' appellee's submission, para. 46 (quoting Appellate Body Report, *US – Softwood Lumber IV*, para. 118).

<sup>500</sup>The subsequent sunset reviews, which we consider also to fall within the Panel's terms of reference, are in Cases 24, 28, 29, 30, and 31. These sunset reviews were excluded from the scope of these compliance proceedings because the relevant likelihood-of-dumping determinations by the USDOC had been made before the adoption of the DSB's recommendations and rulings in the original proceedings.

together with its claims in respect of the sunset reviews that the Panel considered to be within its terms of reference.

370. We begin our analysis by addressing the appeal by the European Communities against the Panel's findings regarding those sunset reviews that the Panel considered to fall within its terms of reference (that is, in Cases 2, 3, 4, 5, and 19). We then consider whether we can complete the analysis with respect to these sunset reviews and with respect to other sunset reviews that the Panel excluded from its terms of reference, but which we have found to fall within the Panel's terms of reference (that is, in Cases 24, 28, 29, 30, and 31).

1. Sunset Reviews in Cases 2, 3, 4, 5, and 19

371. We start by observing that, of the five sunset review determinations the Panel considered to be within its terms of reference, four resulted in revocation orders<sup>501</sup> (Cases 2, 3, 4, and 5) and one resulted in a continuation order<sup>502</sup> (Case 19) *after* the Panel was established. These sunset reviews fall into three subcategories in terms of the determinations that the authorities had made by the date of the establishment of the Panel (25 September 2007). The first subcategory includes Case 3, in which the USDOC had made an affirmative preliminary likelihood-of-dumping determination by the date of establishment of the Panel; the second subcategory includes Cases 2, 4, and 5, in which the USDOC had made affirmative final likelihood-of-dumping determinations by the date of establishment of the Panel; and the third subcategory includes Case 19, in which the USDOC had made an affirmative final likelihood-of-dumping determination and the USITC had made an affirmative injury determination by the date of establishment of the Panel. In all sunset reviews considered by the Panel, the USDOC had not yet issued a formal continuation order at the time the Panel was established. We address below the Panel's findings with respect to each of the three subcategories of sunset review determinations.

372. With respect to the first category of sunset review determinations, we note that in Case 3, the USDOC had made an affirmative preliminary likelihood-of-dumping determination on 30 May 2007. A final affirmative likelihood-of-dumping determination was made by the USDOC on 5 October

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<sup>501</sup>The revocation orders were issued by the USDOC on 7 February 2008, following negative injury determinations by the USITC. (USDOC, 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, *United States Federal Register*, Vol. 73, No. 26 (7 February 2008) 7258 (Panel Exhibit US-13)) These revocation orders were effective as from 7 March 2007.

<sup>502</sup>The continuation order was issued by the USDOC on 12 October 2007, following an affirmative injury determination by the USITC. (USDOC, Certain Pasta from Turkey and Italy: Continuation of Countervailing Duty and Antidumping Duty Orders, *United States Federal Register*, Vol. 72, No. 197 (12 October 2007) 58052)

2007, that is, 10 days after Panel establishment. The USITC then made a negative injury determination on 31 January 2008 and the USDOC revoked the anti-dumping duty order on 7 February 2008, and effective as of 7 March 2007.

373. We observe that, in its preliminary likelihood-of-dumping determination in Case 3, the USDOC stated that it "preliminarily determines that revocation of the antidumping duty order on [stainless steel bar] from Germany is likely to lead to continuation or recurrence of dumping" at specified margins, and invited interested parties to submit comments on the preliminary results within certain deadlines. The USDOC also explained that it would "issue a notice of final results of this sunset review, which will include the results of its analysis of issues raised in any [comments submitted by the interested parties], no later than September 29, 2007."<sup>503</sup>

374. In *US – Continued Zeroing*, the Appellate Body found that the European Communities' challenge of a preliminary determination of likelihood of dumping in a sunset review was premature, considering that such preliminary results could be modified by the final results. The Appellate Body reasoned that, due to the preliminary nature of the USDOC's determination, it failed to see how the European Communities could establish that "the USDOC would have relied on the margin calculated with zeroing in deciding to continue the duty."<sup>504</sup>

375. In our view, the evidence before the Panel in these compliance proceedings regarding the sunset review determination in Case 3 does not warrant a conclusion different from the one reached by the Appellate Body in *US – Continued Zeroing*. In view of the preliminary nature of the determination by the USDOC in Case 3, we consider that the European Communities' challenge of the USDOC's preliminary determination was premature. Therefore, we *find* that the Panel did not err in finding, in paragraph 8.140 of the Panel Report, that the European Communities has not demonstrated that the United States failed to comply with the recommendations and rulings of the DSB in respect of the sunset review in Case 3.

376. Regarding the second subcategory of sunset reviews in Cases 2, 4, and 5, the USDOC had made final likelihood-of-dumping determinations on 4 June 2007, but when the Panel was established on 25 September 2007, the sunset review proceedings were still pending before the USITC, which had not yet determined whether the expiry of the anti-dumping duty order would be likely to lead to the continuation or recurrence of injury. The USITC subsequently made negative injury determinations

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<sup>503</sup> *Supra*, footnote 478, at 29970.

<sup>504</sup> Appellate Body Report, *US – Continued Zeroing*, para. 210.



on 31 January 2008 and the USDOC revoked the anti-dumping duty order on 7 February 2008 with respect to all these Cases with an effective date of 7 March 2007.<sup>505</sup>

377. We observe that, while the USDOC's likelihood-of-dumping determinations should be consistent with Article 11.3 of the *Anti-Dumping Agreement*, a sunset review is not completed in the United States until both the USDOC and the USITC have made likelihood-of-dumping and likelihood-of-injury determinations. We further note that these are compliance proceedings and that whether or not the United States has ultimately failed to comply with the recommendations and rulings of the DSB depends on whether any allegedly WTO-inconsistent likelihood-of-dumping determinations by the USDOC have actually resulted in the continuation of the anti-dumping duty orders.

378. In *US – Continued Zeroing*, the Appellate Body dealt with challenges by the European Communities of two final likelihood-of-dumping determinations by the USDOC in sunset reviews. The Appellate Body observed that both sunset review proceedings were still pending before the USITC at the time the panel was established and that "[t]hus, the USITC had not yet determined, for either case, whether expiry of the anti-dumping duty order would be likely to lead to the continuation or recurrence of injury."<sup>506</sup> In such circumstances, the Appellate Body considered that completing the analysis as to whether these measures were inconsistent with the covered agreements would not be appropriate.

379. In the present dispute, the anti-dumping duty orders in Cases 2, 4, and 5 were revoked on 7 February 2008 by the USDOC following negative injury determinations by the USITC (these revocations were effective as from 7 March 2007, prior to the end of the reasonable period of time). The Panel declined to assess the WTO-consistency of the USDOC's affirmative final likelihood-of-dumping determinations in those sunset reviews that resulted in revocations orders after the Panel was established.<sup>507</sup>

380. As we have noted above, these are compliance proceedings and the issue before the Panel was whether the United States had failed to comply; that is, the Panel was called on to establish whether the USDOC's determinations in these sunset reviews had any impact on compliance by the United States. We consider that the USDOC's affirmative final likelihood-of-dumping determinations in these sunset reviews did not ultimately undermine compliance by the United States with the

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<sup>505</sup> *Supra*, footnote 478, at 29970.

<sup>506</sup> Appellate Body Report, *US – Continued Zeroing*, para. 211. (footnote omitted)

<sup>507</sup> The anti-dumping duty order was also revoked in Case 3 on 7 February 2008, effective 7 March 2007. We observe, however, that for different reasons we have upheld the Panel's finding concerning Case 3. Therefore, in the analysis that follows, we limit our examination to Cases 2, 4, and 5.

recommendations and rulings of the DSB, considering that the anti-dumping duty orders were revoked at the end of the sunset reviews with an effective date of 7 March 2007. We consider this to be the case even assuming that the European Communities had demonstrated that these likelihood-of-dumping determinations relied on margins of dumping calculated using zeroing. We wish to underline that we are not determining whether or not the USDOC's final likelihood-of-dumping determinations in these sunset reviews were in compliance with the recommendations and rulings of the DSB after the end of the reasonable period of time. However, we consider that these determinations do not ultimately undermine compliance by the United States, considering that the sunset reviews resulted in revocation orders and that these revocation orders became effective on a date prior to the end of the reasonable period of time.

381. Under these circumstances, we do not consider it appropriate to conclude that the United States failed to comply with the recommendations and rulings of the DSB in the original proceedings. We therefore *decline* to make a finding on whether the Panel erred in not ruling, in paragraph 8.141 of the Panel Report, on the European Communities' claim that the United States failed to comply with the recommendations and rulings of the DSB in the sunset reviews in Cases 2, 4, and 5.

382. Finally, we consider the Panel's findings with respect to the third subcategory of sunset determinations, which includes Case 19. We recall that, in Case 19, both the USDOC and the USITC had made their respective final likelihood-of-dumping and likelihood-of-injury determinations by the time the Panel was established. However, the USDOC issued a continuation order on 12 October 2007, *after* the Panel was established on 25 September 2007.

383. We recall that, in *Chile – Price Band System*, the Appellate Body found that a panel could examine amendments to a measure that post-dated its establishment, provided they did not change the essence of the measure at issue.<sup>508</sup> In the present case, we observe that, even if the continuation order post-dated the establishment of the Panel, it was issued only a few days after this date and does not change the essence of the determinations under this sunset review. We consider that the continuation order is relevant in judging compliance by the United States with the recommendations and rulings of the DSB. We also observe that, at the time the Panel was established, both determinations required by Article 11.3 of the *Anti-Dumping Agreement* in a sunset review had been made and, therefore,

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<sup>508</sup>Appellate Body Report, *Chile – Price Band System*, para. 139.

considering that both determinations were affirmative, the sunset review would result in a continuation order by operation of law<sup>509</sup> in the United States' anti-dumping system.<sup>510</sup>

384. We are of the view that the Panel should have considered that this sunset review resulted in a continuation order in its evaluation of whether it affected compliance by the United States with the recommendations and rulings of the DSB in this particular sunset review. Thus, we disagree with the Panel that the fact that the proceedings had not been formally concluded in Case 19 prevented it from considering the effects of the sunset review on the implementation of the DSB's recommendations and rulings by the United States.<sup>511</sup>

385. We therefore *reverse* the Panel's findings, in paragraph 8.140 the Panel Report, that any failure by the United States in the sunset review in Case 19 had not yet materialized as of the date of establishment of the Panel and thus had no effect on the United States' implementation of the DSB's recommendations and rulings and that, as a consequence, the European Communities has not demonstrated that the United States failed to comply with the recommendations and rulings of the DSB.

## 2. Completing the Analysis

386. This brings us to the question of whether we can complete the analysis, as requested by the European Communities, and find that, by relying in the sunset review proceedings in Case 19 on margins of dumping calculated in prior proceedings using zeroing, the United States failed to comply with the recommendations and rulings of the DSB and with its obligations pursuant to Articles 2.1, 2.4, 2.4.2, and 11.3 of the *Anti-Dumping Agreement*.

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<sup>509</sup>In response to questioning at the oral hearing, the United States confirmed that, if both the USDOC and the USITC have made affirmative likelihood-of-dumping and likelihood-of-injury determinations, the USDOC has no discretion not to issue a continuation order, as this is a "ministerial function".

<sup>510</sup>Section 351.218(f)(4) of Title 19 of the *United States Code of Federal Regulations* provides that:  
... the [USDOC] normally will issue its determination to continue an order or suspended investigation, or to revoke an order or terminate a suspended investigation, as applicable, not later than seven days after the date of publication in the Federal Register of the [USITC's] determination concluding the sunset review.

In its press release of 7 September 2007 relating to the likelihood-of-injury determination in Case 19, the USITC stated that, "[a]s a result of the [USITC's] affirmative determination, the existing orders on imports of pasta from Italy and Turkey *will* remain in place". (emphasis added) (See European Communities' appellant's submission, footnote 163 to para. 117)

<sup>511</sup>Panel Report, paras. 8.139 and 8.140.

387. A similar question arises with respect to Cases 24, 28, 29, 30, and 31, which the Panel found not to fall within its terms of reference. We have reversed this finding by the Panel, and the European Communities is therefore requesting us to complete the analysis and find that, by relying also in the sunset review proceedings in Cases 24, 28, 29, 30, and 31 on margins of dumping calculated in prior proceeding using zeroing, the United States failed to comply with the recommendations and rulings of the DSB and with its obligations pursuant to Articles 2.1, 2.4, 2.4.2, and 11.3 of the *Anti-Dumping Agreement*.<sup>512</sup>

388. In previous disputes, the Appellate Body has completed the analysis with a view to facilitating the prompt settlement of the dispute.<sup>513</sup> However, the Appellate Body has held that it can do so only if the factual findings of the panel and the undisputed facts in the panel record provide it with a sufficient basis for the completion of its own analysis.<sup>514</sup>

389. We start by considering whether we can complete the analysis in Case 19. The Panel found, with respect to the USDOC's likelihood-of-dumping determination in Case 19, that "[t]he Issues and Decision Memorandum submitted to the Panel by the United States ... indicates that the USDOC found that dumping was likely to continue or recur if the order[] were revoked based on its finding that dumping had continued at above *de minimis* levels since the issuance of the order".<sup>515</sup> Therefore, it concluded that "[i]t seems clear ... from the Issues and Decision Memorand[um] in [Case 19] that the finding[] that dumping had continued at above *de minimis* levels since the issuance of the relevant [anti-dumping duty] order refer[s] to [a] dumping margin[] that had been calculated in administrative reviews, using zeroing."<sup>516</sup>

390. We recall that, in *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body explained that, "should investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation of these margins must conform to the disciplines of

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<sup>512</sup>European Communities' appellant's submission, para. 120.

<sup>513</sup>See, for example, Appellate Body Report, *Australia – Salmon*, paras. 117 and 118; Appellate Body Report, *US – Wheat Gluten*, paras. 80-92; and Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, paras. 43-52.

<sup>514</sup>See Appellate Body Report, *Australia – Salmon*, paras. 209, 241, and 255; Appellate Body Report, *Korea – Dairy*, paras. 91 and 102; Appellate Body Report, *Canada – Autos*, paras. 133 and 144; Appellate Body Report, *Korea – Various Measures on Beef*, para. 128; Appellate Body Report, *EC – Asbestos*, paras. 82 and 83; and Appellate Body Report, *Canada – Periodicals*, p. 24, DSR 1997:I, 449, at 469.

<sup>515</sup>Panel Report, para. 8.138 (referring to USDOC Issues and Decision Memorandum from Notice of Final Results of Expedited Sunset Reviews of the Antidumping Duty Orders: Certain Pasta from Italy and Turkey (5 February 2007), at p. 5 (Panel Exhibit US-25)).

<sup>516</sup>Panel Report, para. 8.138.

Article 2.4."<sup>517</sup> The Appellate Body added that, "[i]f these margins were legally flawed because they were calculated in a manner inconsistent with Article 2.4, this could give rise to an inconsistency not only with Article 2.4, but also with Article 11.3 of the *Anti-Dumping Agreement*."<sup>518</sup> In such circumstances, the "likelihood determination could not constitute a proper foundation for the continuation of anti-dumping duties under Article 11.3."<sup>519</sup> The Appellate Body made similar findings in *US – Anti-Dumping Measures on Oil Country Tubular Goods*, *US – Zeroing (Japan)*, and *US – Continued Zeroing*.<sup>520</sup>

391. We consider that the findings by the Panel in Case 19 constitute a sufficient factual basis to allow us to complete the analysis and *find* that the sunset review in Case 19 is inconsistent with Article 11.3 of the *Anti-Dumping Agreement* and results in failure by the United States to comply with the recommendations and rulings of the DSB, which had established that the use of zeroing by the United States in the original investigation and administrative reviews relating to the same Case was inconsistent with the *Anti-Dumping Agreement*.

392. We consider next whether we can complete the analysis in respect of the subsequent sunset reviews in Cases 24, 28, 29, 30, and 31. These sunset reviews have all resulted in continuation orders and the relevant anti-dumping duty orders have not been fully revoked following the adoption of the DSB's recommendations and rulings in the original proceedings. The sunset reviews in these Cases provided the legal basis for the continued imposition of anti-dumping duties after the expiry of the reasonable period of time and still provide the legal basis for their continued imposition as of that date.

393. The Panel made no express factual findings on Cases 24, 28, 29, 30, and 31<sup>521</sup>, as it had excluded these sunset reviews from its terms of reference. The European Communities submitted to the Panel the USDOC's Issues and Decision Memoranda of the sunset reviews in Cases 28, 29, 30, and 31. We observe that the Issues and Decision Memoranda in these Cases indicate that the USDOC found that dumping was likely to continue or recur if the orders were revoked, based on margins of

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<sup>517</sup>Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127.

<sup>518</sup>Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127.

<sup>519</sup>Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 130.

<sup>520</sup>Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 181; Appellate Body Report, *US – Zeroing (Japan)*, para. 185; Appellate Body Report, *US – Continued Zeroing*, paras. 183-185.

<sup>521</sup>We note that the panel and the Appellate Body in *US – Continued Zeroing* had already found that the sunset reviews in Cases 18, 22, 28, 29, 30, and 31 were inconsistent with Article 11.3 of the *Anti-Dumping Agreement*. (See Appellate Body Report, *US – Continued Zeroing*, para. 383)

dumping calculated in original investigations and previous administrative reviews using zeroing.<sup>522</sup> The European Communities, however, did not submit to the Panel the USDOC's Issues and Decision Memorandum relating to Case 24.<sup>523</sup> In the absence of express factual findings by the Panel and undisputed evidence in the Panel record regarding Case 24, we are unable to complete the analysis in respect of this Case.

394. In contrast, the Issues and Decision Memoranda in Cases 28, 29, 30, and 31, which are in the Panel record, indicate that, in making its likelihood-of-dumping determinations in these Cases, the USDOC relied on dumping margins that had been calculated in original investigations and previous administrative reviews with the use of zeroing. We consider that this constitutes a sufficient factual basis to allow us to complete the analysis and *find* that the sunset reviews in Cases 28, 29, 30, and 31 are inconsistent with Article 11.3 of the *Anti-Dumping Agreement* and result in failure by the United States to comply with the recommendations and rulings of the DSB, which had established that the use of zeroing by the United States in the original investigation and in administrative reviews relating to the same Cases was inconsistent with the *Anti-Dumping Agreement*.

395. In this respect, as we have already considered above<sup>524</sup> for Case 19, in previous cases, the Appellate Body has found that, if an investigating authority relies upon a margin of dumping calculated using a WTO-inconsistent methodology to support its likelihood-of-dumping determination, the use of such a methodology would render a sunset review determination inconsistent with Article 11.3 of the *Anti-Dumping Agreement*. We consider that the failure to revise the likelihood-of-dumping determination so as to eliminate reliance on margins of dumping calculated using zeroing, effective as from the expiry of the reasonable period of time, undermines compliance by the United States with the recommendations and rulings of the DSB. We observe that, while continuation orders in these cases were issued before the expiry of the reasonable period of time, such

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<sup>522</sup>For Case 28, see USDOC Issues and Decision Memorandum for the Expedited Sunset Review of the Antidumping Duty Order on Stainless Steel Sheet and Strip in Coils from Germany; Final Results, at p. 4 (published in *United States Federal Register*, Vol. 69 (22 November 2004) 67896 (Panel Exhibit EC-58)). For Case 29, see USDOC Issues and Decision Memorandum for the Expedited Sunset Reviews of the Antidumping Duty Orders on Antifriction Bearings and Parts Thereof from France, Germany, Italy, and the United Kingdom; Final Results, at p. 9 (published in *United States Federal Register*, Vol. 70 (5 October 2005) 58183 (Panel Exhibit EC-37)). For Case 30, see USDOC Issues and Decision Memorandum for the Expedited Sunset Reviews of the Antidumping Duty Orders on Antifriction Bearings and Parts Thereof from France, Germany, Italy, and the United Kingdom; Final Results, at p. 9 (published in *United States Federal Register*, Vol. 70 (5 October 2005) 58183 (Panel Exhibit EC-37)). For Case 31, see USDOC Issues and Decision Memorandum for the Expedited Sunset Reviews of the Antidumping Duty Orders on Antifriction Bearings and Parts Thereof from France, Germany, Italy, and the United Kingdom; Final Results, at p. 10 (published in *United States Federal Register*, Vol. 70 (5 October 2005) 58183 (Panel Exhibit EC-37)).

<sup>523</sup>In its reply to Panel Question 6, the European Communities indicated that to the best of its knowledge there was no Issues and Decision Memorandum relating to the sunset review in Case 24.

<sup>524</sup>*Supra*, para. 390.

continuation orders resulted in the extension of the anti-dumping duty orders for another five years, thus beyond the expiry of the reasonable period of time. We further note that, based on the anti-dumping duty orders that were continued by means of these sunset reviews, the United States conducted administrative reviews after the expiry of the reasonable period of time that assessed duty rates and established cash deposit rates based on zeroing.

396. Based on the Panel's findings and on undisputed evidence in the Panel record, we have reached the conclusion that, in the likelihood-of-dumping determinations in the sunset reviews in Cases 19, 28, 29, 30, and 31, the USDOC relied on margins of dumping calculated using zeroing in previous administrative reviews and original investigations. We, therefore, conclude that, because the likelihood-of-dumping determinations in these sunset reviews relied on margins of dumping calculated inconsistently with the *Anti-Dumping Agreement*, they are inconsistent with Article 11.3 of that Agreement and undermine compliance by the United States.

397. Having found that the sunset reviews in Cases 19, 28, 29, 30, and 31 are inconsistent with Article 11.3 of the *Anti-Dumping Agreement*, we do not consider it necessary to rule on whether the same sunset review determinations are also inconsistent with Articles 2.1, 2.4, and 2.4.2 of the *Anti-Dumping Agreement*. Furthermore, the European Communities has not explained why additional findings under these provisions would be necessary to resolve the dispute.<sup>525</sup>

398. We turn finally to the claim by the European Communities that the Panel acted inconsistently with Article 11 of the DSU because it did not address the claim by the European Communities that the United States failed to comply with the DSB's recommendations in the original proceedings by keeping in place certain aspects of the original measures—that is, margins of dumping based on zeroing—and by relying on those margins for the determination of likelihood of recurrence of dumping in subsequent sunset review proceedings concerning the same anti-dumping measures.<sup>526</sup>

399. We note that, in respect of the five sunset reviews it considered to fall within its terms of reference, the Panel initially determined, based on the Issues and Decision Memoranda in the sunset reviews in Cases 2, 3, 4, 5, and 19, that the USDOC's likelihood-of-dumping determinations were based on margins of dumping calculated in administrative reviews using zeroing.<sup>527</sup> However, the Panel later concluded that, considering that none of the sunset reviews at issue had been concluded by the time the Panel was established, it could not find that the United States had violated the provisions of the *Anti-Dumping Agreement* because it had relied on margins of dumping calculated with zeroing.

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<sup>525</sup> Appellate Body Report, *Australia – Salmon*, para. 223.

<sup>526</sup> European Communities' appellant's submission, para. 102.

<sup>527</sup> Panel Report, para. 8.138.

400. In our view, therefore, the Panel addressed the claim by the European Communities that the United States failed to comply with the DSB's recommendations and rulings by relying on certain aspects of the measures at issue in the original proceedings (the margins of dumping based on zeroing) in these sunset reviews. The Panel, however, found that the European Communities has not demonstrated that the United States failed to comply with the DSB's recommendations and rulings, because none of the sunset reviews had been concluded by the time the Panel was established. We recall that we have reversed this finding by the Panel in respect of Case 19.

401. We further note that, in *Chile – Price Band System (Article 21.5 – Argentina)*, the Appellate Body found that a Member cannot base its claims under Article 11 of the DSU "on the same grounds" as its claims under substantive provisions in the covered agreements. In particular, the Appellate Body ruled that "a claim that a panel failed to comply with its duties under Article 11 of the DSU must stand by itself and should not be made merely as a subsidiary argument or claim in support of a claim that a panel failed to apply correctly a provision of the covered agreements."<sup>528</sup> In that case, the Appellate Body also referred to its decision in *US – Steel Safeguards*, where it found that:

[a] challenge under Article 11 of the DSU must not be vague or ambiguous. On the contrary, such a challenge must be clearly articulated and substantiated with specific arguments. An Article 11 claim is not to be made lightly, or merely as a subsidiary argument or claim in support of a claim of a panel's failure to construe or apply correctly a particular provision of a covered agreement. A claim under Article 11 of the DSU must stand by itself and be substantiated, as such, and not as subsidiary to another alleged violation.<sup>529</sup> (footnote omitted)

402. In the present case, we are not persuaded that the claims and arguments by the European Communities under Article 11 of the DSU differ from its claims that the Panel failed to apply correctly other provisions of the DSU and the *Anti-Dumping Agreement*. Therefore, we *find* that the Panel did not act inconsistently with Article 11 of the DSU.

#### **X. The Non-Existence of Measures between 9 April and 23 April/31 August 2007**

403. We move to the issue of whether the Panel erred in declining to make findings with respect to the contentions of the European Communities on the non-existence of measures "taken to comply" between 9 April 2007 and 23 April/31 August 2007.

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<sup>528</sup> Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 238.

<sup>529</sup> Appellate Body Report, *US – Steel Safeguards*, para. 498.



404. On 27 December 2006, the USDOC announced that it would abandon zeroing in original investigations in which the weighted average-to-weighted average comparison of normal value and export prices is used. The modification became effective on 22 February 2007 and concerned all pending and future original investigations as of that date.<sup>530</sup>

405. On 1 March 2007, the USDOC initiated proceedings pursuant to Section 129 of the URAA covering 12 of the 15 original anti-dumping investigations at issue in the original proceedings. The remaining three anti-dumping duty orders had been previously revoked. In the Section 129 determinations, the USDOC recalculated, without zeroing, the relevant margins of dumping by applying the modification published in the *United States Federal Register* in December 2006. Eleven Section 129 determinations were issued by the USDOC on 9 April 2007 and became effective on 23 April 2007. The results in the last Section 129 determination were issued on 20 August 2007 and became effective on 31 August 2007.<sup>531</sup> Thus, the 12 determinations under Section 129 came into effect after the reasonable period of time ended on 9 April 2007.

406. The European Communities requested the Panel to make the finding that, by failing to put into effect 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 recommendations and rulings of the DSB pursuant to Article 19.1 of the DSU.

407. The Panel considered it was not clear that Article 21.3 of the DSU, including subparagraph (b) thereof, provides a legal basis for the finding requested by the European Communities. In any event, the Panel considered that, even if it were assumed that Article 21.3(b) provided such a basis, it was neither necessary, nor appropriate, as a matter of judicial economy, for it to make the finding requested by the European Communities. The Panel noted that Article 21.5 of the DSU does not specify with respect to what date a compliance panel should assess the "existence or consistency ... of measures taken to comply".<sup>532</sup> In this respect, the Panel endorsed the positions of the compliance panels in *US – Upland Cotton (Article 21.5 – Brazil)* and *EC – Bed Linen (Article 21.5 – India)*, which determined that the relevant date is that of the establishment of the

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<sup>530</sup>USDOC, Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, *United States Federal Register*, Vol. 71, No. 248 (27 December 2006) 77722 (Panel Exhibit EC-1); USDOC, Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin during an Antidumping Investigation; Preliminary Results of the Section 129 Determinations (26 February 2007) (Panel Exhibit EC-4). See also European Communities' first written submission to the Panel, para. 16; and United States' first written submission to the Panel, para. 17.

<sup>531</sup>See Panel Report, para. 3.1.

<sup>532</sup>Panel Report, para. 8.226.

compliance panel.<sup>533</sup> The Panel was of the opinion 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, because the factual situation that forms the basis of the European Communities' claim is the non-existence of measures "taken to comply", and that factual situation had ceased to exist at the time of the establishment of this Panel. On the basis of these considerations, the Panel declined to make the finding requested by the European Communities.<sup>534</sup>

408. On appeal, the European Communities claims that the Panel erred in so doing, violating its duties under Article 11 of the DSU. The European Communities requests the Appellate Body to find that the Panel erred in this respect, and to complete the analysis and find that the United States violated Articles 19.1, 21.3, and 21.3(b) of the DSU in not putting into effect measures "taken to comply" between 9 April and 23 April/31 August 2007. The European Communities argues that, in failing to rule on this omission, the Panel failed to examine a matter that was part of its mandate and "abused" the concept of judicial economy<sup>535</sup>, as the Panel provided only a partial resolution to the matter at issue. The European Communities adds that Article 21.3 of the DSU implies that WTO Members have the obligation to bring their WTO-inconsistent measures into conformity with their obligations immediately after the adoption of the recommendations and rulings of the DSB, or, should a reasonable period be agreed between the parties to the dispute, at the end of such a period at the latest.

409. According to the United States, the Panel correctly rejected the European Communities' request for a finding that the United States failed to comply with the recommendations and rulings of the DSB by not taking any measures between the end of the reasonable period of time and the date on which the Section 129 determinations entered into force. In any event, the United States argues that the Panel was correct to find that the United States did not breach Article 21.3 of the DSU, because Article 21.3 does not impose an obligation on the Member concerned; rather, Article 21.3 provides the implementing Member with the right to a reasonable period of time should immediate compliance be impracticable. The United States notes that there was no "disagreement" between the parties that the United States did not implement the Section 129 determinations before 23 April 2007 or

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<sup>533</sup>Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 9.64-9.71; Panel Report, *EC – Bed Linen (Article 21.5 – India)*, para. 6.28. The Panel also referred to Panel Report, *US – Shrimp (Article 21.5 – Malaysia)*, paras. 5.12 and 5.13. The requests for findings examined (and rejected) by the panels in *EC – Bed Linen (Article 21.5 – India)* and *US – Upland Cotton (Article 21.5 – Brazil)* were made under Article 21.5 of the DSU.

<sup>534</sup>Panel Report, paras. 8.225-8.227.

<sup>535</sup>European Communities' appellant's submission, para. 218.

31 August 2007, respectively.<sup>536</sup> In any event, there being no "disagreement" within the meaning of Article 21.5 as to the existence of the Section 129 determinations at issue as of the date of Panel establishment, there is no basis for the Appellate Body to disturb the Panel's stance on this issue.

410. At the outset of our analysis, we underscore that, under Article 21.1 of the DSU, "[p]rompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members." Therefore, when it is impracticable for the responding WTO Member to comply immediately with the recommendations and rulings of the DSB and a reasonable period of time for implementation has been established pursuant to Article 21.3 of the DSU, the responding WTO Member is expected to comply with the recommendations and rulings of the DSB within this reasonable period of time, that is to say, at the latest, as of the end of the reasonable period of time.

411. In its assessment under Article 21.5 of the DSU, the Panel took into account events that occurred between the end of the reasonable period of time and the establishment of the Panel (25 September 2007), namely, the entry into force of 11 Section 129 determinations (issued by the USDOC on 9 April 2007) on 23 April 2007, the issuance of another Section 129 determination on 20 August 2007, and its entry into force on 31 August 2007. The appeal of the European Communities raises the question of whether the Panel was permitted to do so and to refrain from making a finding that there was a failure to comply in the periods between 9 April 2007 (when the reasonable period of time ended) and 23 April/31 August 2007 (when the Section 129 determinations entered into effect). In our view, these actions by the Panel have to be considered in the light of the objective of the WTO dispute settlement system, which is to secure a positive and effective solution to a dispute.<sup>537</sup> In this case, the Panel acted in a manner consistent with the objective of securing a positive and effective solution to the dispute, and did not exceed the bounds of its discretion when, in its analysis of whether the United States had complied with the recommendations and rulings of the DSB, it took into account implementation actions taken subsequent to the expiry of the reasonable period of time but before the Article 21.5 Panel was established.

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<sup>536</sup>United States' appellee's submission, para. 119.

<sup>537</sup>Article 3.7 of the DSU. See also Article 3.4 of the DSU, which provides that "[r]ecommendations or rulings of the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements."

In *Australia – Salmon*, the Appellate Body recalled, in the context of an analysis on judicial economy, that a panel should perform its assessment of the matter in a way so as "to ensure effective resolution of disputes to the benefits of all Members." (Appellate Body Report, *Australia – Salmon*, para. 223 (quoting Article 21.1 of the DSU))

412. When an Article 21.5 panel makes a finding that a WTO Member has not complied with the recommendations and rulings of the DSB in the original proceedings, the implication of that finding is that the WTO Member remains subject to obligations flowing from the recommendations and rulings issued by the DSB in the original proceedings. However, if the compliance panel finds that compliance has been achieved at the time of its establishment, but not at the end of the reasonable period of time, the responding WTO Member will not need to take additional remedial action.

413. In the light of these considerations, we *find* that the Panel did not act inconsistently with Article 11 of the DSU in declining, in paragraphs 8.227 and 9.1(b)(vii) of the Panel Report, to make findings on the European Communities' claim that, by not taking measures to comply between 9 April and 23 April/31 August 2007, the United States violated Article 21.3 of the DSU.

414. Having said that, we emphasize that, in principle, a measure found to be inconsistent is to be brought into conformity immediately, and that a reasonable period to do so can be agreed to or awarded only in circumstances where immediate compliance is impractical. In particular, Article 21.3 of the DSU provides that the Member concerned shall have a reasonable period of time "*in which*" to comply with recommendations and rulings of the DSB. The reference to a reasonable period *in which* to comply suggests that a Member should bring its measure into conformity *within* the reasonable period of time, so that compliance is in effect by the end of that period.

## **XI. The Alleged Arithmetical Error in the Section 129 Determination in Case 11**

415. We now turn to the European Communities' appeal of the Panel's finding that the European Communities was precluded from raising claims against an arithmetical error relating to *Stainless Steel Sheet and Strip in Coils from Italy* (Case 11) allegedly committed by the USDOC in the recalculation of the margin of dumping in its Section 129 determination.

### **A. The Panel's Findings**

416. Before the Panel, the European Communities argued that the USDOC committed, and then failed to remove, an obvious arithmetical error in its Section 129 determination in Case 11. The European Communities submitted that, in the original investigation, the USDOC incorrectly calculated the average unit value of 84 individual sales by TKAST<sup>538</sup> to the United States, to which

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<sup>538</sup>ThyssenKrupp Acciai Speciali Terni S.p.A. and ThyssenKrupp AST USA—a manufacturer/exporter of stainless steel sheet and strip in coils from Italy.

the USDOC applied a "facts available" rate.<sup>539</sup> This error artificially inflated the unit value and, therefore, the amount of dumping found. The European Communities argued that, despite realizing 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 instructions from the United States Trade Representative was outside the scope of the Section 129 proceeding.<sup>540</sup>

417. The Panel considered that "the EC claim with respect to the alleged calculation error constitute[d] 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*."<sup>541</sup> For this reason, the Panel concluded that the European Communities was precluded from raising this claim in these Article 21.5 proceedings.<sup>542</sup>

418. The Panel reasoned 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."<sup>543</sup> The Panel also found 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."<sup>544</sup> The Panel concluded that the European Communities' claims in respect of the alleged arithmetical error in the Section 129 determination relating to Case 11 were not properly before it, and therefore made no findings on the substance of the European Communities' claims in this respect.<sup>545</sup>

#### B. *Claims and Arguments on Appeal*

419. The European Communities submits that the Panel erred in the legal interpretation of Article 21.5 of the DSU when finding that the European Communities' claims in respect of the Section 129 determination in Case 11 were not properly before it.<sup>546</sup>

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<sup>539</sup>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.

<sup>540</sup>Panel Report, para. 8.229.

<sup>541</sup>Panel Report, para. 8.239. (original emphasis)

<sup>542</sup>Panel Report, para. 8.239.

<sup>543</sup>Panel Report, para. 8.242.

<sup>544</sup>Panel Report, para. 8.243. (footnote omitted)

<sup>545</sup>Panel Report, para. 8.244.

<sup>546</sup>European Communities' appellant's submission, para. 235.

420. The European Communities contends that "the arithmetical error was an *integral part* of the 'measure taken to comply' by the United States and, thus, fell under the scope of this compliance proceeding."<sup>547</sup> Alternatively, the European Communities claims that "the arithmetical error fell under the scope of this compliance proceeding because of its particularly close relationship to the re-determination of dumping carried out in the Section 129 Determination concerned."<sup>548</sup> The European Communities also claims that the Panel erred in finding that the European Communities was precluded from raising its claims against the arithmetical error in these compliance proceedings.<sup>549</sup> According to the European Communities, "in compliance proceedings a Member is not prevented from raising new claims against unchanged aspects of the original measure which remained in the measure taken to comply"<sup>550</sup>, and allowing such new claims "does not provide the complaining Member with a second chance to make its case; nor does it call into question the principles of fundamental fairness and due process."<sup>551</sup> The European Communities requests the Appellate Body to reverse this finding and to complete the analysis and find that, by failing to remove the arithmetical error, the United States violated Articles 2, 5.8, 6.8, 9.3, 11.1, and 11.2 of the *Anti-Dumping Agreement*, Article VI:2 of the GATT 1994, and Articles 19.1 and 21.3 of the DSU, and failed to comply with the DSB's recommendations and rulings in the original proceedings.<sup>552</sup>

421. The United States responds that it never acknowledged that an arithmetical error was made in the original investigation in Case 11. The United States also argues that, during the Section 129 proceeding, the USDOC neither realized nor agreed that an error had been made.<sup>553</sup> The United States claims that "[t]he compliance Panel correctly rejected the EC's claim that an alleged clerical error in one of the original investigations at issue in the original proceeding should have been corrected when the United States recalculated the margin of dumping without zeroing."<sup>554</sup> According to the United States, the alleged arithmetical error "is 'separable' from the measure taken to comply", because, in recalculating the margin of dumping without zeroing, the USDOC "changed only the language that caused the computer program to disregard non-dumped comparisons" and "then re-ran the program and calculated the revised margin of dumping", but "made no other changes to the computer program".<sup>555</sup> The United States argues that the Panel properly found that the new claim was not

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<sup>547</sup>European Communities' appellant's submission, para. 248. (original emphasis)

<sup>548</sup>European Communities' appellant's submission, para. 259. (footnote omitted)

<sup>549</sup>European Communities' appellant's submission, para. 270.

<sup>550</sup>European Communities' appellant's submission, para. 270.

<sup>551</sup>European Communities' appellant's submission, para. 272.

<sup>552</sup>European Communities' appellant's submission, paras. 291 and 296.

<sup>553</sup>United States' appellee's submission, para. 125.

<sup>554</sup>United States' appellee's submission, para. 15.

<sup>555</sup>United States' appellee's submission, para. 130 (referring to Panel Report, para. 5.148).

within the scope of these compliance proceedings.<sup>556</sup> The United States contends that "[t]he alleged error ... is an aspect of the original measure that is unchanged", even if the arithmetical error became an integral part of the "measure taken to comply" as the European Communities contends.<sup>557</sup> According to the United States, the European Communities' argument would allow complaining Members a "second chance" to pursue claims they could have pursued in the original proceedings, but did not, and thus presents "fundamental due process concerns".<sup>558</sup>

### C. *Analysis*

422. We begin our analysis by examining, first, whether the Panel erred in finding that the European Communities could not properly raise claims against the arithmetical error allegedly committed by the USDOC in the Section 129 proceeding in Case 11. We shall then consider the claim on appeal by the European Communities that the Panel erred in finding that its claims relate to a part of the Section 129 determination that remained unchanged from the original measure and that can be separated from the rest of the Section 129 determination.

423. The Panel relied on the panel report in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)* to find that the European Communities was precluded from raising in these Article 21.5 proceedings claims against an unchanged aspect of the original measure (the alleged arithmetical error), which the European Communities could have made, but did not make, in the original proceedings. The panel in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)* found that allowing a complaining Member to make "a new claim on an aspect of the original measure that was never challenged and remained unchanged"<sup>559</sup> would jeopardize the principles of fundamental fairness and due process, and that it would be unfair to expose a responding Member to the possibility of a finding of violation on an aspect of the original measure that it "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."<sup>560</sup>

424. We disagree with the notion that a Member may be entitled to assume in Article 21.5 proceedings that an aspect of a measure that was not challenged in the original proceedings is consistent with that Member's obligations under the covered agreements. In *US – Oil Country*

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<sup>556</sup>United States' appellee's submission, paras. 132 and 133.

<sup>557</sup>United States' appellee's submission, para. 133.

<sup>558</sup>United States' appellee's submission, para. 134.

<sup>559</sup>Panel Report, *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, para. 7.76.

<sup>560</sup>Panel Report, *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, para. 7.75. (footnote omitted)

*Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, the Appellate Body held that, "[o]n the basis of the original panel's conclusions [regarding the likelihood-of-dumping determination], the USDOC could not assume that its findings regarding the alleged decline in the volume of imports were WTO-consistent"<sup>561</sup>, as these concerned a different aspect of the original measure. If certain claims against aspects of a measure were not decided on the merits in the original proceedings, they are not covered by the recommendations and rulings of the DSB and, therefore, a Member should not be entitled to assume that those aspects of the measure are consistent with the covered agreements.

425. We recall that, in *EC – Bed Linen (Article 21.5 – India)*, the Appellate Body found that a complaining Member that has failed to make a *prima facie* case in the original proceedings regarding an element of the measure that remained unchanged after implementation may not re-litigate the same claim with respect to the unchanged element of the measure in the Article 21.5 proceedings where this unchanged element is separable from the changed part of the implementation measure.<sup>562</sup> In *US – Shrimp (Article 21.5 – Malaysia)*, the Appellate Body found that a complaining Member may not reassert the same claim against an unchanged aspect of the measure that has been found to be WTO-consistent in the original proceedings.<sup>563</sup>

426. Referring to these two cases in *US – Upland Cotton (Article 21.5 – Brazil)*, the Appellate Body observed that, "[b]ecause adopted panel and Appellate Body reports must be accepted by the parties to a dispute, allowing a party in an Article 21.5 proceeding to re-argue a claim that has been decided in adopted reports would indeed provide an unfair 'second chance' to that party."<sup>564</sup> However, in *US – Upland Cotton (Article 21.5 – Brazil)*, the Appellate Body distinguished the claims in *EC – Bed Linen (Article 21.5 – India)* and *US – Shrimp (Article 21.5 – Malaysia)* from those at issue in that dispute, and found that allowing a complaining Member to make a case that it did not establish in the original proceedings would not provide it with an unfair "second chance", nor would it compromise the finality of the DSB's recommendations and rulings.<sup>565</sup>

427. While claims in Article 21.5 proceedings cannot be used to re-open issues that were decided on substance in the original proceedings, the unconditional acceptance of the recommendations and rulings of the DSB by the parties to a dispute does not preclude raising new claims against measures taken to comply that incorporate unchanged aspects of original measures that could have been made, but were not made, in the original proceedings. We do not see how allowing such claims in

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<sup>561</sup>Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 150.

<sup>562</sup>See Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 86 and 93.

<sup>563</sup>See Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 96.

<sup>564</sup>Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 210. (footnote omitted)

<sup>565</sup>See Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 210.



Article 21.5 proceedings would "jeopardize the principles of fundamental fairness and due process"<sup>566</sup>, or how it would unfairly provide a "second chance"<sup>567</sup> to the complaining Member, provided these new claims relate to a measure "taken to comply" and do not re-argue claims that were decided in the original proceedings.

428. We observe that, in the present case, the European Communities did not raise a claim regarding the alleged arithmetical error in the original proceedings. As such, this issue was not decided in the original recommendations and rulings of the DSB, which concerned only the zeroing methodology. Therefore, allowing the European Communities to raise claims against such an alleged error in these Article 21.5 proceedings would not raise due process concerns, because it would not in itself provide another chance to the European Communities to make a case it failed to make in the original proceedings, such that the finality of the DSB's recommendations and rulings would be compromised.

429. We therefore disagree with the Panel, to the extent it relied on the principles of fundamental fairness and due process as applied by the panel in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, to support its finding that the European Communities was precluded from raising claims against the arithmetical error in these Article 21.5 proceedings.<sup>568</sup>

430. In finding 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", the Panel also relied on the statement by the Appellate Body in *US – Upland Cotton (Article 21.5 – Brazil)* that "[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."<sup>569</sup>

431. We note that the Appellate Body offered this statement after having made its main finding that a Member should be allowed to raise in Article 21.5 proceedings claims that were raised but not resolved on the merits in the original proceedings. The Appellate Body said that such claims could *ordinarily* not be raised in Article 21.5 proceedings; it did not say that such claims can never be raised, as the Panel suggests. Moreover, in the same paragraph, the Appellate Body referred to its

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<sup>566</sup>Panel Report, *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, para. 7.75.

<sup>567</sup>See also Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 150.

<sup>568</sup>Panel Report, para. 8.239.

<sup>569</sup>Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 211.

earlier decision in *Canada – Aircraft (Article 21.5 – Brazil)*, where it had found 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", and that "the claims, arguments and factual circumstances which are pertinent to the 'measure taken to comply' will not, necessarily, be the same as those which were pertinent in the original dispute".<sup>570</sup> We consider that the findings by the Appellate Body in *US – Upland Cotton (Article 21.5 – Brazil)* should be interpreted consistently with the findings in *Canada – Aircraft (Article 21.5 – Brazil)*.

432. Thus, if we read the Appellate Body's statement in *US – Upland Cotton (Article 21.5 – Brazil)* together with its statement in *Canada – Aircraft (Article 21.5 – Brazil)*, it excludes, in principle, ("ordinarily") from Article 21.5 proceedings new claims that could have been pursued in the original proceedings, but not new claims against a measure taken to comply—that is, in principle, a new and different measure. This is so even where such a measure taken to comply incorporates components of the original measure that are unchanged, but are not separable from other aspects of the measure taken to comply.

433. We recall that the Panel found 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".<sup>571</sup> We disagree with this finding by the Panel, insofar as it precludes new claims against inseparable aspects of a measure taken to comply, which are unchanged from the original measure. We, therefore, *find* that the Panel erred in finding, in paragraph 8.244 of the Panel Report, that the European Communities could not properly raise claims with respect to the alleged error in the calculation of TKAST's dumping margin in these Article 21.5 proceedings because it could have raised them in the original proceedings but failed to do so.

434. We consider that, in the present dispute, the critical question before the Panel was whether the alleged arithmetical error was an integral part of the measure taken to comply. If it was, as the European Communities alleges, then the Panel should have addressed the claims against the alleged

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<sup>570</sup>Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 41; Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 89 (referring to Appellate Body Report, *US – FSC (Article 21.5 – EC)*, allowing the new GATT Article III claim although the original proceedings involved only claims under the *Agreement on Subsidies and Countervailing Measures*).

In *US – Upland Cotton (Article 21.5 – Brazil)*, the Appellate Body further explained that the finding in *Canada – Aircraft (Article 21.5 – Brazil)* "refers to the situation in which the responding Member is seeking to circumvent its compliance obligations by replacing the WTO-inconsistent measure with a new measure that is also WTO-inconsistent, *albeit with a provision not at issue in the original proceedings*." (Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 211 (emphasis added))

<sup>571</sup>Panel Report, para. 8.242.

arithmetical error as new claims against the measure taken to comply; if it was not, as the United States alleges, then the Panel was correct in declining to rule on these claims.

435. The Panel relied, in its finding that excluded the claims against the alleged arithmetical error, on the fact that the relevant aspect of the compliance measure is "unchanged" and is "separable" from other parts of that Section 129 determination. Having reached the conclusion that the alleged arithmetical error concerns an unchanged aspect of the measure, the Panel, however, did not further address the parties' arguments as to whether the alleged error is an integral part of the measure taken to comply or whether it is separable from the rest of the measure taken to comply, that is, the Section 129 determination.<sup>572</sup> The Panel simply stated that the alleged error "is distinct from any of the claims made by the European Communities in the original dispute"<sup>573</sup>, which relate to zeroing, and that the recalculation of the dumping margin without zeroing did not affect the alleged error.

436. We consider that a determination of whether the alleged error is part of the measure taken to comply can only be done based on undisputed facts and factual findings concerning the existence and nature of such an alleged error. The European Communities argues that "the error consisted of inverting a fraction in the calculation of the average unit value of 84 TKAST US sales: instead of dividing total value by total volume, the USDOC divided total volume by total value" and that "[t]his error artificially inflated the unit value and, therefore, the amount of dumping found."<sup>574</sup> The European Communities further contends that the United States "acknowledges that such an error in the dumping margin calculation had been made by the USDOC in the original investigation"<sup>575</sup> and that "[i]n the Section 129 Determination concerned, the USDOC realised that there was an arithmetical error".<sup>576</sup> In particular, the European Communities relies on the fact that the USDOC extended the duration of the Section 129 proceedings to consider the allegations made by the parties concerning the alleged arithmetical error as evidence that the USDOC accepted that an error was made.<sup>577</sup>

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<sup>572</sup>The Panel stated:

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.

(Panel Report, footnote 864 to para. 8.243 (original emphasis))

<sup>573</sup>Panel Report, para. 8.243.

<sup>574</sup>European Communities' appellant's submission, para. 237.

<sup>575</sup>European Communities' appellant's submission, para. 237.

<sup>576</sup>European Communities' appellant's submission, para. 238.

<sup>577</sup>European Communities' appellant's submission, para. 238.

437. The United States, however, denies that it ever acknowledged that an arithmetical error was made in the original investigation and argues that, during the Section 129 proceeding, the USDOC neither realized nor agreed that an error had been made.<sup>578</sup> The European Communities also submitted to the Panel calculations made by TKA<sup>ST</sup>, which showed that, by eliminating zeroing and by correcting the alleged error, the margin of dumping would have been negative. At the oral hearing, the United States did not comment on the calculations by TKA<sup>ST</sup>. The United States, however, denies that it ever acknowledged that if it had corrected the alleged error the dumping margin would have been negative. The Panel made no factual finding as to whether an arithmetical error was made and the exact nature of such an error.

438. Having reviewed the Panel record, we are of the view that there are insufficient undisputed facts and evidence in the record that would allow us to reach any conclusion as to the precise nature and consequences of such an alleged error, in terms of whether it is separable from the compliance measure or is an integral part thereof. Even assuming *arguendo* that the USDOC extended the duration of the Section 129 proceeding for the sole purpose of considering the allegations concerning the alleged arithmetical error, this does not amount to an admission by the USDOC that an error was committed, nor does it shed light on the nature and content of the alleged error made in the calculation of the margin of dumping. Nor do we consider that the arguments of the European Communities and the calculations made by TKA<sup>ST</sup> of the dumping margin without the alleged arithmetical error are in themselves sufficient to show whether the nature and the effects of the alleged arithmetical error are such that the alleged error is separable from or incorporated into the re-determination.

439. Given the lack of factual findings by the Panel and of undisputed evidence in the Panel record, we do not have a sufficient factual basis to complete the analysis of the European Communities' claim on this issue. For these reasons are unable to rule on whether the United States failed to comply with the recommendations and rulings of the DSB by failing to correct such an alleged error.

## **XII. The "All Others" Rates Calculated in the Section 129 Determinations in Cases 2, 4, and 5**

440. We turn to the European Communities' claims that the Panel erred in finding that the United States did not act inconsistently with Article 9.4 of the *Anti-Dumping Agreement* in the establishment of the "all others" rates in the Section 129 determinations in *Stainless Steel Bar from France* (Case 2), *Stainless Steel Bar from Italy* (Case 4), and *Stainless Steel Bar from the United Kingdom* (Case 5), and in failing to examine the European Communities' claims under Article 6.8 and Annex II of the

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<sup>578</sup>United States' appellee's submission, para. 125.

*Anti-Dumping Agreement*. The European Communities requests the Appellate Body to reverse these findings, and to find instead that the United States acted inconsistently with Articles 9.4 and 6.8 and Annex II of the *Anti-Dumping Agreement* by using margins of dumping based on facts available in the calculation of the "all others" rates in the Section 129 determinations in Cases 2, 4, and 5.

441. We recall that, in order to implement the recommendations and rulings of the DSB, the United States issued Section 129 determinations in which it recalculated, without using zeroing, the margins of dumping for the exporters investigated individually.<sup>579</sup> In Cases 2, 4, and 5, the recalculation of margins of dumping without zeroing resulted in either zero or *de minimis* margins of dumping for all the cooperating exporters. The margins of dumping for the non-cooperating exporters, entirely based on "facts available", pursuant to Article 6.8 and Annex II of the *Anti-Dumping Agreement*, remained unchanged. As a result, all company-specific margins of dumping in Cases 2, 4, and 5 were either zero or *de minimis*, or based on facts available. The USDOC then calculated the margins of dumping applicable to the exporters not individually investigated (the "all others" rates) based on a simple average of the zero, *de minimis*, and "facts available" margins of dumping. This led to an increase in the "all others" rate from 3.9 per cent to 35.92 per cent in Case 2; from 3.81 per cent to 6.6 per cent in Case 4; and from 4.48 per cent to 83.95 per cent in Case 5.<sup>580</sup>

442. Before the Panel, the European Communities argued that the United States acted inconsistently with Articles 9.4 and 6.8 and Annex II of the *Anti-Dumping Agreement* in the Section 129 determinations in Cases 2, 4, and 5, because these provisions expressly prohibit the use of zero, *de minimis*, and "facts available" margins of dumping in the calculation of the "all others" rate.<sup>581</sup>

443. The Panel found that the United States did not act inconsistently with Article 9.4 of the *Anti-Dumping Agreement*, because Article 9.4 merely "establish[es] a methodology for the calculation of a 'ceiling' which the 'all others' rate may not exceed", but does not "specify a method for or imposes disciplines on the calculation of the 'all others' rate itself."<sup>582</sup> According to the Panel, in cases where all the margins of dumping for the investigated exporters are zero, *de minimis*, or based on facts available, "there are simply no margins of dumping from which the investigating authority ... may calculate the maximum allowable 'all others' rate" and therefore, in those circumstances, "Article 9.4 simply imposes no prohibition, as no *ceiling* can be calculated."<sup>583</sup>

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<sup>579</sup>See *supra*, para. 5.

<sup>580</sup>Panel Report, para. 8.273.

<sup>581</sup>Panel Report, paras. 8.273 and 8.275.

<sup>582</sup>Panel Report, para. 8.281.

<sup>583</sup>Panel Report, para. 8.283. (original emphasis)

444. The Panel also found that the European Communities' claims under Article 6.8 and Annex II of the *Anti-Dumping Agreement* were dependent on its claims of violation under Article 9.4 of that Agreement, and that Articles 6.8 and Annex II do not "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."<sup>584</sup> On this basis, the Panel made no findings with respect to the European Communities' claims under Article 6.8 and Annex II of the *Anti-Dumping Agreement*.

445. On appeal, the European Communities argues that the Panel erred in its interpretation of Article 9.4 of the *Anti-Dumping Agreement*. According to the European Communities, Article 9.4 expressly prohibits the inclusion of margins of dumping based on facts available in the calculation of the "all others" rate. The European Communities also argues that the Panel erred in exercising judicial economy in relation to its claims under Article 6.8 and Annex II of the *Anti-Dumping Agreement*, because these provisions provide an "independent basis"<sup>585</sup> for the prohibition of the inclusion of "facts available" margins in the calculation of the "all others" rate.

446. The United States responds that the Panel correctly held that the prohibition of the use of zero, *de minimis*, and "facts available" margins of dumping contained in Article 9.4 applies only to the ceiling of the "all others" rate, and that Article 9.4 provides no methodological guidance on the calculation of that rate. According to the United States, where all margins of dumping for the investigated exporters are zero, *de minimis*, or based on facts available, a ceiling cannot be determined pursuant to Article 9.4 and, therefore, the prohibition contained therein does not apply.<sup>586</sup>

447. Article 6.10 of the *Anti-Dumping Agreement* requires investigating authorities to determine an individual margin of dumping for each "known" exporter or producer of the product under investigation. However, in cases where the number of exporters is so large as to make such a determination impracticable, Article 6.10 permits investigating authorities to limit their examination to a statistically valid sample of exporters, or to exporters representing the largest possible volume of exports that can be reasonably investigated.

448. When investigating authorities have limited their examination to a selected number of exporters pursuant to Article 6.10, the margin of dumping applicable to exporters that were not selected for individual examination (the "all others" rate) is subject to the requirements of Article 9.4 of the *Anti-Dumping Agreement*, which provides, in relevant part:

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<sup>584</sup>Panel Report, para. 8.284.

<sup>585</sup>European Communities' appellant's submission, para. 340.

<sup>586</sup>United States' appellee's submission, paras. 148 and 152.

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. The authorities shall apply individual duties or normal values to imports from any exporter or producer not included in the examination who has provided the necessary information during the course of the investigation, as provided for in subparagraph 10.2 of Article 6. (emphasis added)

449. Hence, Article 9.4 provides for two distinct, but closely related, obligations. First, Article 9.4 establishes that, in cases where investigating authorities have limited their examination to a sample of selected exporters or producers, any anti-dumping duty applied to exporters that were not individually investigated "shall not exceed" the weighted average margin of dumping established for exporters that have been individually investigated. Secondly, Article 9.4 directs investigating authorities to disregard, "for the purposes of this paragraph", any zero and *de minimis* margins of dumping, and margins of dumping established on the basis of facts available pursuant to Article 6.8.

450. The Appellate Body addressed the obligations provided under Article 9.4 in *US – Hot-Rolled Steel*, where it explained that:

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.

... 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.<sup>587</sup> (original emphasis)

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<sup>587</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 116.

451. Thus, the Panel's interpretation that Article 9.4 "establish[es] a methodology for the calculation of a 'ceiling' which the 'all others' rate may not exceed" but does not "specify a method for or impose disciplines on the calculation of the 'all others' rate itself"<sup>588</sup> seems *a priori* not to depart from the Appellate Body's interpretation of that provision. The Appellate Body expressly recognized that Article 9.4 does not prescribe any particular methodology that must be used in the calculation of the "all others" rate. The Appellate Body also emphasized that Article 9.4(i) constrains the discretion of investigating authorities in two important ways: first, by imposing a ceiling that the "all others" rate "shall not exceed". This ceiling ordinarily will correspond to the weighted average margin of dumping for the exporters that were investigated. Secondly, the subsequent paragraph of Article 9.4 requires investigating authorities to disregard, for the purposes of that paragraph, any zero, *de minimis*, and "facts available" margins. We observe, in this respect, that the Appellate Body in *US – Hot-Rolled Steel* upheld the panel's finding that the "all others" rate at issue in that appeal exceeded the ceiling provided for in Article 9.4(i). In addition, the Appellate Body upheld the panel's finding that "the United States' *application* of the method set forth in section 735(c)(5)(A) of the Tariff Act of 1930, as amended, to determine the 'all others' rate in this case was inconsistent with United States' obligations under the *Anti-Dumping Agreement* because it was based on a method that included, in the calculation of the 'all others' rate, margins established, in part, using facts available."<sup>589</sup>

452. The circumstances of this appeal raise the question of what obligations, if any, Article 9.4 provides in situations where all margins of dumping for the investigated exporters fall into the three categories that Article 9.4 expressly requires investigating authorities to disregard for purposes of that paragraph. In *US – Hot-Rolled Steel*, the Appellate Body recognized the existence of a lacuna in this respect in Article 9.4.<sup>590</sup> The Appellate Body recognized that Article 9.4 does not expressly address the issue of how the ceiling for the "all others" rate should be calculated in circumstances where all margins of dumping for the investigated exporters are to be excluded from the calculation because they are either zero, *de minimis*, or based on facts available. The Appellate Body also explained that "Article 9.4 seeks to prevent the exporters, who were *not* asked to cooperate in the investigation, from

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<sup>588</sup>Panel Report, para. 8.281.

<sup>589</sup>Appellate Body Report, *US – Hot-Rolled Steel*, para. 129. (original emphasis)

<sup>590</sup>In *US – Hot-Rolled Steel*, the Appellate Body stated:

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. This appeal does not raise the issue of how that *lacuna* might be overcome on the basis of the present text of the *Anti-Dumping Agreement*. Accordingly, it is not necessary for us to address that question.

(Appellate Body Report, *US – Hot-Rolled Steel*, para. 126) (original emphasis; footnote omitted))



being prejudiced by gaps or shortcomings in the information supplied by the investigated exporters."<sup>591</sup>

453. In this regard, we do not agree with the Panel's statement that, in situations where all margins of dumping are either zero, *de minimis*, or based on facts available, Article 9.4 "simply imposes no prohibition, as no *ceiling* can be calculated."<sup>592</sup> In our view, the fact that all margins of dumping for the investigated exporters fall within one of the categories that Article 9.4 directs investigating authorities to disregard, for purposes of that paragraph, does not imply that the investigating authorities' discretion to apply duties on non-investigated exporters is unbounded. The lacuna that the Appellate Body recognized to exist in Article 9.4 is one of a specific *method*. Thus, the absence of guidance in Article 9.4 on what particular methodology to follow does not imply an absence of any obligation with respect to the "all others" rate applicable to non-investigated exporters where all margins of dumping for the investigated exporters are either zero, *de minimis*, or based on facts available. In any event, the participants have not suggested specific alternative methodologies to calculate the maximum allowable "all others" rate in situations where all margins of dumping calculated for the investigated exporters fall into the three categories to be disregarded, and we do not need to resolve this issue to dispose of this appeal.

454. Turning to the appeal before us, we note that, on 7 February 2008, the USDOC revoked the anti-dumping duty orders in Cases 2, 4, and 5, following negative likelihood-of-injury determinations made by the USITC in the context of sunset reviews. These revocation orders took effect as of 7 March 2007. As a result, any cash deposits imposed on imports of non-investigated exporters between 7 March 2007 and 7 February 2008, including those resulting from the recalculated "all others" rate, have been refunded. Consequently, no anti-dumping duties were imposed on imports of non-investigated exporters as a result of the Section 129 determinations in Cases 2, 4, and 5.

455. Accordingly, we do not consider it necessary to make findings in relation to the European Communities' claim that the United States acted inconsistently with Article 9.4 of the *Anti-Dumping Agreement* in the establishment of the "all others" rate in the Section 129 determinations in Cases 2, 4, and 5.

456. Finally, we turn to the European Communities' claim that the Panel erred in exercising judicial economy in relation to its claims under Article 6.8 and Annex II of the *Anti-Dumping Agreement*. The European Communities basically argues that those provisions establish an

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<sup>591</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 123. (original emphasis; footnote omitted)

<sup>592</sup> Panel Report, para. 8.283. (original emphasis)

"independent basis" for a prohibition of the use of "facts available" margins in the calculation of the "all others" rate, even in cases where the calculation of the "all others" rate is consistent with Article 9.4.

457. Article 6.8 and Annex II of the *Anti-Dumping Agreement* establish, in relevant parts, that:

6.8 In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph.

#### ANNEX II

#### BEST INFORMATION AVAILABLE IN TERMS OF PARAGRAPH 8 OF ARTICLE 6

...

7. ... It is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate.

458. In our view, the European Communities' allegation of error is predicated on the non-investigated exporters being covered by the disciplines of Article 6.8 and Annex II as "cooperating" exporters. According to the European Communities, Article 6.8 and Annex II limit the application of "facts available" to "non-cooperating" exporters, whereas non-investigated exporters are, by definition, "known" exporters that have "decided to 'cooperate'", but from which further information was not requested.<sup>593</sup>

459. We note, however, that by its express terms Article 6.8 permits the application of "facts available" to an "interested party" who "refuses access to, or otherwise does not provide, necessary information within a reasonable period, or significantly impedes the investigation". This, in our view, confirms that Article 6.8 applies exclusively to those "interested parties" from which information *was* required, rather than to those parties from which information was not requested. Thus, the disciplines in relation to the application of "facts available" under Article 6.8 and Annex II do not apply to non-investigated exporters that eventually will be subject to the "all others" rate. As noted above, the investigating authorities' discretion to impose duties on non-investigated exporters is subject to the

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<sup>593</sup>European Communities' appellant's submission, para. 348.

disciplines provided in Article 9.4, including the exclusion of any "facts available" margins of dumping in the calculation of the maximum permissible duty applied to those exporters.

460. For this reason, we *find* that the Panel did not err in not making findings, in paragraphs 8.284, and 9.1(c)(iii) of the Panel Report, in respect of the European Communities' claims under Article 6.8 and Annex II of the *Anti-Dumping Agreement* in the Section 129 determinations in *Stainless Steel Bar from France* (Case 2), *Stainless Steel Bar from Italy* (Case 4), and *Stainless Steel Bar from the United Kingdom* (Case 5).

### **XIII. The European Communities' Request for a Suggestion**

461. We now consider the European Communities' arguments relating to its request for a suggestion under the second sentence of Article 19.1 of the DSU.

462. The European Communities had asked the Panel to make suggestions as to how the United States should bring its measures into conformity with its obligations under the covered agreement. The Panel declined the request by the European Communities, noting that it had provided in the Report its "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".<sup>594</sup>

463. On appeal, the European Communities requests the Appellate Body to issue a suggestion to the United States, pursuant to Article 19.1 of the DSU, on how to implement the DSB's recommendations and rulings. The European Communities requests the Appellate Body to suggest to the United States, including the United States' administrative authorities and independent judicial authorities, "that they forthwith take all necessary steps of a general or particular character to ensure the conformity of all the measures at issue and all the measures taken to comply with the *Anti-Dumping Agreement*, the *GATT 1994*, the *DSU* and the rulings and recommendations of the DSB in the original proceeding, with full effect not later than the end of the reasonable period of time, such that any and all actions, including administrative reviews, assessment instructions and final liquidations after that date are not based on zeroing, and are revised as necessary to achieve that result".<sup>595</sup>

464. The United States responds that the Appellate Body should reject entirely the European Communities' request for a suggestion in this dispute, because it would "merely restate the findings or

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<sup>594</sup>Panel Report, para. 9.3.

<sup>595</sup>European Communities' appellant's submission, para. 351.

rulings that the EC is seeking in this appeal", and would therefore "provide no 'useful guidance and assistance' in implementing such rulings".<sup>596</sup> The United States also considers that the European Communities' request for a suggestion would extend the Panel's findings to "an indeterminate set of future measures"<sup>597</sup>, none of which would fall within the Panel's terms of reference.

465. We observe that the text of Article 19.1 of the DSU provides, in relevant part:

In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations. (footnotes deleted; emphasis added)

466. The second sentence of Article 19.1 of the DSU confers a discretionary right, authorizing panels and the Appellate Body to suggest ways in which the recommendations and rulings could be implemented. The Appellate Body observed in *EC – Bananas III (Article 21.5 – Ecuador II)*, that "[s]uggestions made by panels or the Appellate Body may provide useful guidance and assistance to Members and facilitate implementation of DSB recommendations and rulings, particularly in complex cases."<sup>598</sup> In the present case, the European Communities appears to request that the Appellate Body suggest that the United States cease using zeroing in any action that is taken after the expiry of the reasonable period of time.

467. We have expressed the view that subsequent administrative review determinations in which zeroing is used after the end of the reasonable period of time establish a failure to comply with the recommendations and rulings of the DSB and that, if no such review is requested, a determination after the end of the reasonable period of time by which anti-dumping liability is assessed on the basis of cash deposit rates calculated with zeroing also establishes such a failure.<sup>599</sup> With respect to measures that derive *mechanically* from the assessment of duties, we have indicated that they would establish a failure to comply with the recommendations and rulings of the DSB to the extent that they reflect zeroing and that they are applied after the end of the reasonable period of time even if such a measure is consequent to an administrative review issued before the end of that period. We have also found that subsequent sunset reviews, in which zeroing was used and that provide the legal basis for the continued imposition of anti-dumping duties after the end of the reasonable period of time, establish a failure to comply with the recommendations and rulings of the DSB.

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<sup>596</sup>United States' appellee's submission, para. 161 (quoting Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 325).

<sup>597</sup>United States' appellee's submission, para. 161.

<sup>598</sup>Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 325.

<sup>599</sup>We share the Panel's view that the United States fails to comply with the recommendations and rulings of the DSB if it continues to apply cash deposit rates established on the basis of zeroing after the end of the reasonable period of time in respect of the Cases at issue here.

468. In the light of these findings, we do not consider that the suggestion the European Communities is requesting us to make would provide useful guidance or facilitate the implementation of the recommendations and rulings of the DSB. Therefore, we *decline* the European Communities' request for a suggestion under Article 19.1 of the DSU.

#### **XIV. Findings and Conclusions**

469. For the reasons set out in this Report, the Appellate Body:

- (a) finds that the Panel did not err in refraining, in paragraphs 8.17 and 9.1(a) of the Panel Report, from making a finding on whether it was improperly composed;
- (b) in respect of the Panel's terms of reference:
  - (i) upholds the Panel's finding, in paragraph 8.80 of the Panel Report, that the subsequent reviews identified in the European Communities' panel request did not fall within the Panel's terms of reference under Article 21.5 of the DSU as "amendments" to the original measures at issue;
  - (ii) reverses the Panel's finding, in paragraph 8.119 of the Panel Report, that none of the subsequent reviews challenged by the European Communities that were decided before the adoption of the recommendations and rulings of the DSB fell within the Panel's terms of reference, and finds, instead, that the sunset reviews in *Granular Polytetrafluoroethylene Resin from Italy* (Case 24), *Stainless Steel Sheet and Strip in Coils from Germany* (Case 28), *Ball Bearings and Parts Thereof from France* (Case 29), *Ball Bearings and Parts Thereof from Italy* (Case 30), and *Ball Bearings and Parts Thereof from the United Kingdom* (Case 31), had a sufficiently close nexus with the declared measures "taken to comply", and with the recommendations and rulings of the DSB, so as to fall within the Panel's terms of reference under Article 21.5 of the DSU;
  - (iii) upholds the Panel's findings, in paragraph 8.126(i) and (v) of the Panel Report, that the 2004-2005 administrative reviews in Cases 1 and 6 fell within the Panel's terms of reference under Article 21.5 of the DSU; and

- (iv) finds that the Panel did not act inconsistently with Article 11 of the DSU in addressing the European Communities' alternative "close nexus" claim without first addressing the European Communities' "omissions" claim; and does not consider it necessary to make additional findings in relation to the European Communities' claim that the Panel erred in declining to rule on its claim that the subsequent reviews fell within the Panel's terms of reference as "omissions" or "deficiencies" in the United States' implementation of the recommendations and rulings of the DSB;
- (c) with respect to the United States' compliance obligations in relation to the Cases at issue in the original proceedings:
  - (i) considers that a subsequent administrative review determination issued after the end of the reasonable period of time in which zeroing is used, or, if no such review is requested, a determination issued after the end of the reasonable period of time by which anti-dumping liability is assessed on the basis of cash deposit rates calculated with zeroing, would establish a failure to comply with the recommendations and rulings of the DSB;
  - (ii) finds, with respect to measures that are consequent to assessment reviews that, in the ordinary course of the imposition of anti-dumping duties, derive *mechanically* from the assessment of duties would establish a failure by the United States to comply with the recommendations and rulings of the DSB to the extent that they are based on zeroing and that they are applied after the end of the reasonable period of time; and, accordingly, reverses the Panel's interpretation, in paragraph 8.199 of the Panel Report, that the United States' obligation to implement the recommendations and rulings of the DSB does not extend to the actual collection and liquidation of duties, and to the issuance of assessment or liquidation instructions, when these actions result from administrative review determinations made before the end of the reasonable period of time; and
  - (iii) declares the Panel's finding, in paragraphs 8.200 and 9.1(b)(iii) of the Panel Report, that the European Communities has not established that the United States failed to comply with the recommendations and rulings of the DSB by liquidating, after the end of the reasonable period of time, duties that were assessed with zeroing pursuant to administrative review determinations

issued before the end of the reasonable period of time, moot and of no legal effect, as it was based on an erroneous reasoning;

(d) with respect to *Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands* (Case 1):

(i) upholds the Panel's findings, in paragraphs 8.208 and 9.1(b)(i) of the Panel Report, 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 determination in the 2004-2005 administrative review and in issuing the consequent assessment instructions; and that, as a result of the final results of this administrative review, the United States has failed to comply with the recommendations and rulings of the DSB to bring the original investigation in Case 1 into conformity; and

(ii) reverses the Panel's finding, in paragraphs 8.209 and 9.1(b)(iv) of the Panel Report, that the assessment instructions issued on 16 April 2007 and the liquidation instructions issued on 23 April 2007 do not establish that the United States failed to comply with the recommendations and rulings of the DSB to bring the original investigation in Case 1 into conformity with its obligations under the covered agreements by virtue of those instructions; and finds, instead, that these instructions, derived mechanically from the assessment of final duty liability in the ordinary course of the imposition of anti-dumping duties, are measures that were adopted after the end of the reasonable period of time, and thus establish a failure by the United States to comply with the recommendations and rulings of the DSB;

(e) with respect to *Stainless Steel Wire Rod from Sweden* (Case 6):

upholds the Panel's findings, in paragraphs 8.213 and 9.1(b)(i) of the Panel Report, that the United States acted inconsistently with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 in issuing the results of the 2004-2005 administrative review determination on 9 May 2007, as well as the consequential assessment and liquidation instructions; and also upholds the Panel's finding, in paragraphs 8.213 and 9.1(b)(i) of the Panel Report, that the United States failed to comply with the recommendations and rulings of the DSB to bring the original investigation in Case 6 into conformity;

- (f) with respect to *Ball Bearings and Parts Thereof from the United Kingdom* (Case 31):
- finds that the Panel erred in refraining, in paragraph 8.217 of the Panel Report, to make a specific finding with respect to the assessment after the end of the reasonable period of time of duty liability for imports from NSK Bearings Europe Ltd. in Case 31; and finds further that duties assessed after the end of the reasonable period of time on the basis of cash deposits reflecting zeroing establish a failure by the United States to comply with the recommendations and rulings of the DSB;
- (g) with specific respect to Cases 18 through 24 and 27 through 30, is not in a position to complete the analysis in relation to these Cases and declines to rule on whether the Panel did not comply with its duties under Article 11 of the DSU;
- (h) with respect to the subsequent sunset reviews:
- (i) finds that the Panel did not err in concluding, in paragraph 8.140 of the Panel Report, that the European Communities has not demonstrated that the United States failed to comply with the recommendations and rulings of the DSB in respect of the sunset review in *Stainless Steel Bar from Germany* (Case 3);
- (ii) declines to make a finding on whether the Panel erred in not ruling, in paragraph 8.141 of the Panel Report, on the European Communities' claim that the United States failed to comply with the recommendations and rulings of the DSB in the sunset reviews in *Stainless Steel Bar from France* (Case 2), *Stainless Steel Bar from Italy* (Case 4), and *Stainless Steel Bar from the United Kingdom* (Case 5);
- (iii) reverses the Panel's findings, in paragraph 8.140 the Panel Report, that any failure to comply by the United States in the sunset review in *Certain Pasta from Italy* (Case 19) had not yet materialized as of the date of establishment of the Panel and thus had no effect on the United States' implementation of the recommendations and rulings of the DSB and that, as a consequence, the European Communities has not demonstrated that the United States failed to comply with the recommendations and rulings of the DSB;



- (iv) finds that the sunset review in *Certain Pasta from Italy* (Case 19) is inconsistent with Article 11.3 of the *Anti-Dumping Agreement* and results in failure by the United States to comply with the recommendations and rulings of the DSB;
  - (v) is unable to complete the analysis in respect of the sunset review in *Granular Polytetrafluoroethylene Resin from Italy* (Case 24) in the absence of express factual findings by the Panel and undisputed facts in the Panel record;
  - (vi) finds that the sunset reviews in *Stainless Steel Sheet and Strip in Coils from Germany* (Case 28), *Ball Bearings and Parts Thereof from France* (Case 29), *Ball Bearings and Parts Thereof from Italy* (Case 30), and *Ball Bearings and Parts Thereof from the United Kingdom* (Case 31) are inconsistent with Article 11.3 of the *Anti-Dumping Agreement* and result in failure by the United States to comply with the recommendations and rulings of the DSB; and
  - (vii) finds that the Panel did not act inconsistently with Article 11 of the DSU in addressing the claims by the European Communities that the United States failed to comply with the recommendations and rulings of the DSB in subsequent sunset review proceedings;
- (i) finds that the Panel did not act inconsistently with Article 11 of the DSU in declining, in paragraphs 8.227 and 9.1(b)(vii) of the Panel Report, to make findings on the European Communities' claim that, by not taking measures to comply between 9 April and 23 April/31 August 2007, the United States violated Article 21.3 of the DSU;
  - (j) in relation to the alleged arithmetical error in the Section 129 determination in *Stainless Steel Sheet and Strip in Coils from Italy* (Case 11):
    - (i) finds that the Panel erred in finding, in paragraph 8.244 of the Panel Report, that the European Communities could not properly raise claims with respect to the alleged error in the calculation of TKAST's dumping margin in these Article 21.5 proceedings, because it could have raised them in the original proceedings, but failed to do so;

- (ii) however, is unable to complete the analysis on whether the European Communities could raise such claims, nor therefore to rule on whether the United States failed to comply with the recommendations and rulings of the DSB by failing to correct such an alleged error;
- (k) with respect to the establishment of the "all others" rates in the Section 129 determinations in *Stainless Steel Bar from France* (Case 2), *Stainless Steel Bar from Italy* (Case 4), and *Stainless Steel Bar from the United Kingdom* (Case 5):
  - (i) does not consider it necessary to make findings in relation to the European Communities' claim that the United States acted inconsistently with Article 9.4 of the *Anti-Dumping Agreement* in the establishment of the "all others" rate; and
  - (ii) finds that the Panel did not err in not making findings, in paragraphs 8.284 and 9.1(c)(iii) of the Panel Report, in respect of the European Communities' claims under Article 6.8 and Annex II of the *Anti-Dumping Agreement*; and
- (l) declines the request by the European Communities to make a suggestion on how the United States could implement the recommendations and rulings of the DSB in this case.

470. To the extent that the United States has failed to comply with recommendations and rulings of the DSB in the original proceedings, they remain operative. The Appellate Body recommends that the DSB request the United States to implement fully the recommendations and rulings of the DSB.

Signed in the original in Geneva this 26th day of April 2009 by:

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Shotaro Oshima  
Presiding Member

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Lilia R. Bautista  
Member

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Jennifer Hillman  
Member



ANNEX I

**WORLD TRADE  
ORGANIZATION**

**WT/DS294/28**  
17 February 2009

(09-0804)

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

Notification of an Appeal by the European Communities  
under Article 16.4 and Article 17 of the Understanding on Rules  
and Procedures Governing the Settlement of Disputes (DSU),  
and under Rule 20(1) of the Working Procedures for Appellate Review

The following notification, dated 13 February 2009, from the Delegation of the European Commission, is being circulated to Members.

Pursuant to Article 16.4 and Article 17 of the *DSU* the European Communities hereby notifies to the Dispute Settlement Body its decision to appeal to the Appellate Body certain issues of law covered in the Panel report and certain legal interpretations developed by the Panel in the dispute *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"), Recourse to Article 21.5 of the DSU by the European Communities* (WT/DS294/RW). Pursuant to Rule 20(1) of the *Working Procedures for Appellate Review*, the European Communities simultaneously files this Notice of Appeal with the Appellate Body Secretariat.

For the reasons set out in its submissions to the Panel, and for the reasons to be further elaborated in its submissions to the Appellate Body, the European Communities appeals, and requests the Appellate Body to modify or reverse the legal findings and conclusions of the Panel and with respect to all matters to complete the analysis (whether or not this is specifically re-iterated in the following paragraphs), with respect to the following errors of law and legal interpretations contained in the Panel Report:

- (a) The Panel erred in failing to rule on the substance of the EC claim that the **Panel was composed** in a manner inconsistent with Articles 8.3 and 21.5 of the *DSU*, on the grounds that it did not have the "authority" to rule on a matter with respect to which, according to the Panel, the "ultimate power" rests with the Director General of the WTO.<sup>1</sup> The Panel thus failed to comply with basic requirements of due process and failed to ensure the full and proper exercise of its judicial function. The Panel also acted inconsistently with the following provisions of the *DSU*: Article 1.1 (failure to apply the *DSU* to a dispute concerning the *DSU*); Article 3.2, first sentence (failure to clarify the provisions of the *DSU* in accordance with customary rules of interpretation of public international law); Articles 3.2 and 19.2

<sup>1</sup>Panel Report, paras. 8.13–8.17 and 9.1(a).

(failure to ensure that the European Communities' *DSU* rights were not diminished); Articles 3.3 and 23.1 (failure to allow for the settlement of the dispute by recourse to the *DSU*); Article 7.2 (failure to properly address the relevant provisions of the *DSU* cited by the European Communities); Article 11 (failure to make such other findings as would assist the DSB); and Article 12.7 (failure to set out the basic rationale behind its findings). The European Communities requests the Appellate Body to modify or reverse the Panel's findings and complete the analysis by finding that the Panel was composed inconsistently with Articles 8.3 and 21.5 of the *DSU*. One panellist remained in office at the stage of the compliance panel and was not lawfully removed by the United States or by the Director General of the WTO. The European Communities also requests the Appellate Body to reverse the Panel's finding that, if it would have agreed with the European Communities, it would have been *compelled* to rule that it had no jurisdiction to rule on any of the EC claims.<sup>2</sup>

(b) The Panel made errors relating to the legal interpretation of Articles 19.1, 21.3 and 21.5 of the *DSU*,<sup>3</sup> and failed to comply with its functions as required by Articles 7 and 11 of the *DSU* when excluding certain subsequent reviews listed in the Annex to the EC Compliance Panel Request from its terms of reference.<sup>4</sup> In particular, the European Communities claims that:

- the Panel erred in rejecting the EC claim that the subsequent reviews listed in the Annex to the EC Compliance Panel Request fell under its terms of reference because they were "amendments" to the measures at issue in the original dispute;<sup>5</sup>
- the Panel erred in failing to examine or properly examine whether the US *omissions* and *deficiencies* in the US implementation of the DSB recommendations and rulings fell under its terms of reference;<sup>6</sup> and
- the Panel erred in excluding certain subsequent reviews from its terms of reference on the basis that they did not have a *close nexus* with the measures at issue in the original dispute and the DSB recommendations and rulings in view of their *timing*.<sup>7</sup>

The European Communities requests the Appellate Body to modify or reverse the Panel's findings, and to complete the analysis by finding that, in relation to these matters, the United States failed to comply with the relevant provisions of the covered agreements cited in the pleadings before the Panel and with the rulings and recommendations of the DSB in the original proceedings.

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<sup>2</sup>Panel Report, para. 8.13.

<sup>3</sup>All EC claims and arguments referring to Articles 19.1, 21.3 or 21.5 of the *DSU* are to be considered in the context of Article 3.7 of the *DSU*.

<sup>4</sup>Panel Report, paras. 8.119 and footnote 676, para. 8.120, para. 8.126 (by omission and by implication, only referring to certain subsequent reviews) and para. 9.1(b) (by omission and by implication, only referring to certain subsequent reviews).

<sup>5</sup>Panel Report, paras. 8.61–8.84 and para. 9.1(b) (by omission and by implication).

<sup>6</sup>Panel Report, paras. 8.85–8.86, para. 8.127 (by omission and by implication) and para. 9.1(b) (by omission and by implication).

<sup>7</sup>Panel Report, paras. 8.111–8.116, 8.119–8.124, 8.126 (by omission and by implication) and 9.1(b) (by omission and by implication).

- (c) The Panel erred in finding that the European Communities had not demonstrated that the United States failed to comply with the DSB recommendations and rulings in the subsequent **sunset reviews** at issue.<sup>8</sup> This conclusion was based on erroneous findings on issues of law and related legal interpretations of Articles 19.1, 21.3 and 21.5 of the *DSU*. Furthermore, the Panel disregarded its mandate and failed to comply with its functions as required by Article 11 of the *DSU* when failing to address the EC claim that the United States failed to comply with the DSB recommendations in the original dispute, since certain aspects of the measures at issue in the original dispute (*i.e.*, the dumping margins based on zeroing) remained in place (*i.e.*, the United States relied on those margins for the determination of likelihood of recurrence of dumping in subsequent sunset review proceedings concerning the same anti-dumping "measure").<sup>9</sup> The European Communities requests the Appellate Body to complete the analysis and find that the United States acted inconsistently with Articles 2.1, 2.4, 2.4.2 and 11.3 of the *Anti-Dumping Agreement* and Articles 19.1 and 21.3 of the *DSU*, and failed to comply with the DSB rulings and recommendations in the original proceedings.
- (d) The Panel erred in rejecting the EC claims that certain **US actions or omissions based on zeroing after the expiry of the reasonable period of time** were inconsistent with the US obligation and public commitment to immediately comply with the rulings and recommendations of the DSB, and with various provisions of Article VI of the *GATT 1994*, the *Anti-Dumping Agreement* and the *DSU*.<sup>10</sup> In particular, the European Communities requests the Appellate Body:
- with respect to all cases, to modify or reverse the Panel's finding that assessment instructions and final liquidations after the end of the reasonable period of time and within the scope of the compliance panel, based on zeroing, are not inconsistent with Article VI:2 of the *GATT 1994* and Article 9.3 of the *Anti-Dumping Agreement* (with respect to administrative reviews), Articles 2.1, 2.4, 2.4.2 and 11.3 of the *Anti-Dumping Agreement* (with respect to sunset reviews) and Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement* (with respect to original investigations) and do not constitute a failure to comply with the rulings and recommendations of the DSB in the original case.<sup>11</sup> The European Communities requests the Appellate Body to complete the analysis, finding that assessment instructions or final liquidations after the end of the reasonable period of time and within the scope of the compliance panel, based on zeroing, are inconsistent with the above provisions and with Articles 19.1 and 21.3 of the *DSU*, and constitute a failure to comply with the rulings and recommendations of the DSB in the original proceedings;
  - with respect to Case 1 (*Hot Rolled Carbon Steel from the Netherlands*), to uphold the Panel's finding that the 2004-2005 administrative review and assessment instructions (by action or omission) were inconsistent with Article VI:2 of the *GATT 1994* and Article 9.3 of the *Anti-Dumping Agreement* and a failure to comply with the DSB rulings and recommendations,<sup>12</sup> albeit on the basis of the different and more developed reasoning to be set out in the appeal; and to find that the Panel erred in failing to specifically address

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<sup>8</sup>Panel Report, paras. 8.135–8.141 and 9.1(b)(vi).

<sup>9</sup>Panel Report, para. 8.222.

<sup>10</sup>Panel Report, paras. 8.164–8.222 and 9.1(b)(i)-(v).

<sup>11</sup>Panel Report, paras. 8.191–8.193, particularly (but not only) para. 8.191, first sentence, referring to paras. 8.170–8.185, particularly (but not only) para. 8.174, first sentence (including footnote 769); re-iterated at paras. 8.199–8.200 (including footnote 803); and Panel Report, para. 9.1(b)(iii) and (iv) and 9.1 (by omission and by implication).

<sup>12</sup>Panel Report, paras. 8.208 and 9.1(b)(i).

the same issue with respect to the final liquidations (by action or omission)<sup>13</sup> and erred in its other findings on this issue,<sup>14</sup> and to complete the analysis by making the same findings as for the administrative review and assessment instructions;

- also with respect to Case 1 (*Hot Rolled Carbon Steel from the Netherlands*), to modify or reverse the Panel's findings and conclusions<sup>15</sup> concerning the assessment instructions on 16 April 2007 and the liquidation instructions on 23 April 2007, instructing liquidation for the period 1 November 2005 to 31 October 2006, on the basis of the cash deposit rate originally in force at the time of importation, and based on zeroing. The European Communities requests the Appellate Body to complete the analysis and find that these actions by the United States after the end of the reasonable period of time were inconsistent with Article VI:2 of the *GATT 1994*, Article 9.3 of the *Anti-Dumping Agreement* and Articles 19.1 and 21.3 of the *DSU*, and constitute a failure to comply with the rulings and recommendations of the DSB in the original case;
- with respect to Case 6 (*Stainless Steel Wire Rod from Sweden*), to uphold the Panel's finding that the 2004-2005 administrative review and assessment instructions (by action or omission) were inconsistent with Article VI:2 of the *GATT 1994* and Article 9.3 of the *Anti-Dumping Agreement*,<sup>16</sup> albeit on the basis of the different and more developed reasoning to be set out in the appeal; and to find that the Panel erred in failing to specifically address the same issue with respect to the final liquidations (by action or omission)<sup>17</sup> and erred in its other findings on this issue,<sup>18</sup> and to complete the analysis by making the same findings as for the administrative review and assessment instructions;
- with respect to 12 Cases,<sup>19</sup> to modify or reverse the erroneous findings in paragraph 8.202 of the Panel Report; to uphold the correct findings in the final two sentences of paragraph 8.218 of the Panel Report; to find that the Panel has acted inconsistently with Article 11 of the *DSU*; and to the extent necessary, to complete the analysis, also with respect to the appropriate conclusions and recommendations, by finding that, by continuing to maintain in place duty or cash deposit rates with respect to these 12 Cases, the United States acted inconsistently with Article VI:2 of the *GATT 1994*, Article 9.3 of the *Anti-Dumping Agreement* (or in the case of sunset reviews with Articles 2.1, 2.4, 2.4.2 and 11.3 of the *Anti-Dumping Agreement*) and Articles 19.1 and 21.3 of the *DSU*, and that this constitutes a failure to comply with the rulings and recommendations of the DSB in the original case; and
- to modify or reverse the Panel's findings rejecting the EC claim according to which, once an anti-dumping order is revoked pursuant to the Section 129 Determination (because absent zeroing no dumping was found) the United States was not entitled to continue adopting administrative reviews and other actions (including collection of duties) based on zeroing in relation to that revoked order after the end of the reasonable period of time; and to complete the analysis accordingly by finding that the United States violated Articles 19.1 and 21.3 of the *DSU* and the DSB rulings and recommendations in the original proceedings.<sup>20</sup>

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<sup>13</sup>Panel Report, paras. 8.208 and 9.1(b)(i) (by omission and by implication).

<sup>14</sup>Panel Report, para. 9.1(b)(iii) and (iv).

<sup>15</sup>Panel Report, paras. 8.205, 8.209 and 9.1(b)(iii) and (iv).

<sup>16</sup>Panel Report, paras. 8.213 and 9.1(b)(i).

<sup>17</sup>Panel Report, paras. 8.213 and 9.1(b)(i) (by omission and by implication).

<sup>18</sup>Panel Report, para. 9.1(b)(iii).

<sup>19</sup>Cases 18-24, 27-30 and 31.

<sup>20</sup>Panel Report, paras. 8.219–8.222, particularly (but not only) para. 8.222, final sentence.



- (e) The Panel erred with respect to the correct legal interpretations of Articles 19.1, 21.3 and 21.5 of the *DSU*, disregarded its mandate, exercised false judicial economy, and failed to comply with its functions as required by Article 11 of the *DSU* when failing to make any findings with respect to the EC claims regarding the **non-existence of measures taken to comply between 9 April and 23 April/31 August 2007**.<sup>21</sup> The European Communities requests the Appellate Body to complete the analysis by finding that the United States acted inconsistently with Articles 19.1 and 21.3 of the *DSU* and failed to comply with the DSB rulings and recommendations in the original proceedings.
- (f) The Panel made errors relating to the legal interpretation of Article 21.5 of the *DSU* when finding that the EC claims (particularly regarding the **arithmetical error**) in respect of the Section 129 Determination concerning *Stainless Steel Sheet and Strip in Coils from Italy* (listed as Case 11 in the Annex to the EC Panel Request) were not properly before the Panel.<sup>22</sup> The European Communities requests the Appellate Body to complete the analysis by finding that the EC claims could properly be made in these compliance proceedings and that the United States acted inconsistently with Articles 2, 5.8, 6.8, 9.3, 11.1 and 11.2 of the *Anti-Dumping Agreement*, Article VI:2 of the *GATT 1994*, Articles 19.1 and 21.3 of the *DSU* and failed to comply with the DSB rulings and recommendations in the original proceedings.
- (g) The Panel erred in finding that 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 concerning *Stainless Steel Bar from France, Italy and the United Kingdom* (listed as Cases 2, 4 and 5 in the Annex to the EC Compliance Panel Request);<sup>23</sup> moreover, the Panel erred in failing to examine the EC claim based on Article 6.8 and Annex II of the *Anti-Dumping Agreement*.<sup>24</sup> The European Communities requests the Appellate Body to complete the analysis by finding that the United States acted inconsistently with Article 9.4 of the *Anti-Dumping Agreement*, Article 6.8 and Annex II of the *Anti-Dumping Agreement*, Articles 19.1 and 21.3 of the *DSU* and failed to comply with the DSB rulings and recommendations in the original proceedings.
- (h) The Panel erred in rejecting the EC request for a **suggestion** pursuant to Article 19.1 of the *DSU*,<sup>25</sup> and the European Communities requests the Appellate Body to make appropriate suggestions in this case.

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<sup>21</sup>Panel Report, paras. 8.226–8.227 and 9.1(b)(vii).

<sup>22</sup>Panel Report, paras. 8.237–8.244 and 9.1(c)(i).

<sup>23</sup>Panel Report, paras. 8.278–8.284 and 9.1(c)(iii).

<sup>24</sup>Panel Report, paras. 8.284 and 9.1 (by omission and by implication).

<sup>25</sup>Panel Report, para. 9.3.

ANNEX II

**WORLD TRADE  
ORGANIZATION**

**WT/DS294/29**  
26 February 2009

(09-1001)

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

Notification of an Other Appeal by the United States  
under Article 16.4 and Article 17 of the Understanding on Rules  
and Procedures Governing the Settlement of Disputes (DSU),  
and under Rule 23(1) of the Working Procedures for Appellate Review

The following notification, dated 25 February 2009, from the Delegation of the United States, is being circulated to Members.

Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 23(1) of the Working Procedures for Appellate Review, the United States hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the report of the panel in *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"): Recourse to Article 21.5 of the DSU by the European Communities* (WT/DS294/RW) and certain legal interpretations developed by the Panel in this dispute.

1. The United States seeks review by the Appellate Body of the Panel's conclusion that the United States failed to comply with the recommendations and rulings of the Dispute Settlement Body ("DSB") in the original dispute and has acted inconsistently with Article 9.3 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") and Article VI:2 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") by publishing determinations, after the end of the reasonable period of time, of the amount of antidumping duty to be assessed based on zeroing in the 2004-2005 administrative reviews in *Hot-Rolled Steel from the Netherlands* and *Stainless Steel Wire Rod from Sweden* and issuing assessment instructions pursuant to the results of those administrative reviews. This conclusion is in error and based on erroneous findings on issues of law and related legal interpretations of DSU Articles 21 and 22.

2. Specifically, the United States requests the Appellate Body to reverse:

- (a) the Panel's finding in paragraph 8.126 of its report<sup>1</sup> that these two administrative reviews of entries that were made in 2004 and 2005 fell within its terms of reference;

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<sup>1</sup>The paragraphs on which the Panel's finding in paragraph 8.126 is based include, for example, paragraphs 8.87-8.125 of the Panel's report.

- (b) (i) the Panel's finding in paragraph 8.208 of its report<sup>2</sup> that, in issuing the final results of the 2004-2005 administrative review in *Hot-Rolled Steel from the Netherlands* and assessment instructions pursuant to those results, the United States acted inconsistently with Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994, because this review did not fall within the Panel's terms of reference; and
- (ii) the Panel's further finding in paragraph 8.208 of its report that, in issuing the final results of the 2004-2005 administrative review in *Hot-Rolled Steel from the Netherlands* and assessment instructions pursuant to those results, the United States failed to comply with the DSB's recommendations and rulings to bring the original investigation in *Hot-Rolled Steel from the Netherlands* into conformity with the covered agreements, because those assessment reviews were of entries that were made prior to the end of the reasonable period of time, and indeed prior to the DSB's recommendations and rulings in the original dispute;
- (c) (i) the Panel's finding in paragraph 8.213 of its report<sup>3</sup> that, in issuing the final results of the 2004-2005 administrative review in *Stainless Steel Wire Rod from Sweden* and assessment instructions pursuant to those results, the United States acted inconsistently with Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994, because this review did not fall within the Panel's terms of reference; and
- (ii) the Panel's further finding in paragraph 8.213 of its report that, in issuing the final results of the 2004-2005 administrative review in *Stainless Steel Wire Rod from Sweden* and assessment instructions pursuant to those results, the United States failed to comply with the DSB's recommendations and rulings to bring the original investigation in *Stainless Steel Wire Rod from Sweden* into conformity with the covered agreements, because those assessment reviews were of entries that were made prior to the end of the reasonable period of time, and indeed prior to the DSB's recommendations and rulings in the original dispute; and
- (d) the Panel's conclusions in paragraph 9.1(b)(i) of its report, which are based on the erroneous findings referenced above.

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<sup>2</sup>The paragraphs on which the Panel's findings in paragraph 8.208 are based include, for example, paragraphs 8.87-8.125 and 8.203-8.208 of the Panel's report.

<sup>3</sup>The paragraphs on which the Panel's findings in paragraph 8.213 are based include, for example, paragraphs 8.87-8.125 and 8.210-8.213 of the Panel's report.

ANNEX III

**ORGANISATION MONDIALE  
DU COMMERCE**

**ORGANIZACIÓN MUNDIAL  
DEL COMERCIO**

**WORLD TRADE ORGANIZATION**

**APPELLATE BODY**

*United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*

Recourse to Article 21.5 of the DSU by the European Communities

AB-2009-1

Procedural Ruling

1. On 16 February 2009, the Appellate Body Division hearing this appeal received a request from the European Communities to allow observation by the public of the oral hearing in the above appellate proceedings. On 19 February 2009, the United States also requested the Division to authorize public observation of the oral hearing. The participants argued that nothing in the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU") or the *Working Procedures for Appellate Review* (the "*Working Procedures*") precludes the Appellate Body from authorizing public observation of the oral hearing.<sup>1</sup>

2. On 20 February 2009, we invited the third participants to comment in writing on the requests of the participants. In particular, we asked the third participants to provide their views on the permissibility of opening the hearing under the DSU and the *Working Procedures*, and, if they so wished, on the specific logistical arrangements proposed in the requests. We received comments on 2 March 2009 from India, Japan, Korea, Mexico, Norway, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, and Thailand. Japan, Norway, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu expressed their support for the requests of the participants. India, Mexico, and Thailand expressed the view that the provisions of the DSU do not allow public hearings at the appellate stage. According to these third participants, the oral hearing forms part of the proceedings of the Appellate Body and, therefore, is subject to the requirement of Article 17.10 of the DSU that "[t]he proceedings of the Appellate Body shall be confidential." Korea shared these concerns but did not object to the opening of the oral hearing to the public in these proceedings; at the same time, Korea requested the Appellate Body to treat its written and oral statements as confidential. Mexico and Thailand expressly requested the Appellate Body to treat their written statements and oral submissions as confidential should it decide to allow public observation of the oral hearing.

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<sup>1</sup>Similar requests were made in the appeals in *United States – Continued Suspension of Obligations in the EC – Hormones Dispute* and *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*; *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador* and *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States*; and *United States – Continued Existence and Application of Zeroing Methodology*.

3. We are making the following ruling on the requests of the participants, having carefully considered the comments of the third participants. Article 17.10 must be read in context, particularly in relation to Article 18.2 of the DSU. The second sentence of Article 18.2 expressly provides that "[n]othing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public". Thus, under Article 18.2, the parties may decide to forego confidentiality protection in respect of their statements of position. The third sentence of Article 18.2 states that "Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential." This provision would be redundant if Article 17.10 were interpreted to require absolute confidentiality in respect of all elements of appellate proceedings. There would be no need to require, pursuant to Article 18.2, that a Member designate certain information as confidential. The last sentence of Article 18.2 ensures that even such designation by a Member does not put an end to the right of another Member to make disclosure to the public. Upon request, a Member must provide a non-confidential summary of the information contained in its written submissions that it designated as confidential, which can then be disclosed to the public. Thus, Article 18.2 provides contextual support for the view that the confidentiality rule in Article 17.10 is not absolute. Otherwise, no disclosure of written submissions or other statements would be permitted during any stage of the proceedings.

4. In practice, the confidentiality requirement in Article 17.10 has its limits. Notices of Appeal and Appellate Body reports are disclosed to the public. Appellate Body reports contain summaries of the participants' and third participants' written and oral submissions and frequently quote directly from them. Public disclosure of Appellate Body reports is an inherent and necessary feature of our rules-based system of adjudication. Consequently, under the DSU, confidentiality is relative and time-bound.

5. In our view, the confidentiality requirement in Article 17.10 is more properly understood as operating in a relational manner.<sup>2</sup> There are different sets of relationships that are implicated in appellate proceedings. Among them are the following relationships. First, a relationship between the participants and the Appellate Body. Secondly, a relationship between the third participants and the Appellate Body. The requirement that the proceedings of the Appellate Body are confidential affords protection to these separate relationships and is intended to safeguard the interests of the participants and third participants and the adjudicative function of the Appellate Body, so as to foster the system of dispute settlement under conditions of fairness, impartiality, independence and integrity. In this case, the participants have requested authorization to forego confidentiality protection for their communications with the Appellate Body at the oral hearing. The requests of the participants do not extend to any communications, nor touch upon the relationship, between the third participants and the Appellate Body. The right to confidentiality of third participants vis-à-vis the Appellate Body is not implicated by these requests. The question is thus whether the participants' requests to forego confidentiality protection satisfy the requirements of fairness and integrity that are the essential attributes of the appellate process and define the relationship between the Appellate Body and the participants. If the requests meet these standards, then the Appellate Body would incline towards authorizing them.

6. We note that the DSU does not specifically provide for an oral hearing at the appellate stage. The oral hearing was instituted by the Appellate Body in its *Working Procedures*, which were drawn up pursuant to Article 17.9 of the DSU. The conduct and organization of the oral hearing falls within the authority of the Appellate Body (*compétence de la compétence*) pursuant to Rule 27 of the *Working Procedures*. Thus, the Appellate Body has the power to exercise control over the conduct of the oral hearing, including authorizing the lifting of confidentiality at the request of the participants as long as this does not adversely affect the rights and interests of the third participants or the integrity of

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<sup>2</sup>This relational view of rights and obligations of confidentiality is consistent with the approach followed in domestic jurisdictions with respect to similar issues, such as privilege.

the appellate process. As we observed earlier, Article 17.10 also applies to the relationship between third participants and the Appellate Body. Nevertheless, in our view, the third participants cannot invoke Article 17.10, as it applies to their relationship with the Appellate Body, so as to bar the lifting of confidentiality protection in the relationship between the participants and the Appellate Body. Likewise, authorizing the participants' requests to forego confidentiality does not affect the rights of third participants to preserve the confidentiality of their communications with the Appellate Body.

7. The powers of the Appellate Body are themselves circumscribed in that certain aspects of confidentiality are incapable of derogation—even by the Appellate Body—where derogation may undermine the exercise and integrity of the Appellate Body's adjudicative function. This includes the situation contemplated in the second sentence of Article 17.10, which provides that "[t]he reports of the Appellate Body shall be drafted without the presence of the parties to the dispute and in the light of the information provided and the statements made." Confidentiality of the deliberations is necessary to protect the integrity, impartiality, and independence of the appellate process. In our view, such concerns do not arise in a situation where, following requests from the participants, the Appellate Body authorizes the lifting of the confidentiality of the participants' statements at the oral hearing.

8. The Appellate Body has fostered the active participation of third parties in the appellate process in drawing up the *Working Procedures* and in appeal practice. Article 17.4 provides that third participants "may make written submissions to, and be given an opportunity to be heard by, the Appellate Body." In its *Working Procedures*, the Appellate Body has given full effect to this right by providing for participation of third participants during the entirety of the oral hearing, while third parties meet with panels only in a separate session at the first substantive meeting. The rights of third participants are distinct from those of the main participants to a dispute. They have a systemic interest in the interpretation of the provisions of the covered agreements that may be at issue in an appeal. Although their views on the questions of legal interpretation that come before the Appellate Body are always valuable and thoroughly considered, these issues of legal interpretation are not inherently confidential. However, it is not for the third participants to determine how the protection of confidentiality in the relationship between the participants and the Appellate Body is best dealt with. We do not consider that the third participants have identified a specific interest in their relationship with the Appellate Body that would be adversely affected if we were to authorize the participants' requests.

9. The requests for public observation of the oral hearing in this dispute have been made by the European Communities and the United States. As we explained earlier, the Appellate Body has the power to authorize the requests by the participants to lift confidentiality, provided that this does not affect the confidentiality of the relationship between third participants and the Appellate Body, or impair the integrity of the appellate process. The participants have suggested that the Appellate Body allow observation by the public of the oral hearing in this dispute by means of simultaneous closed-circuit television broadcasting with the transmission being switched off when those third participants who do not wish to make their statements public take the floor. We do not see the public observation of the oral hearing, using the means described above, as having an adverse impact on the integrity of the adjudicative functions performed by the Appellate Body.

10. For these reasons, the Division authorizes the public observation of the oral hearing in these proceedings on the terms set out below. Accordingly, pursuant to Rule 16(1) of the *Working Procedures*, we adopt the following additional procedures for the purposes of this appeal:

- (a) The oral hearing will be open to public observation by means of simultaneous closed-circuit television. The closed-circuit television signal will be shown in a separate room to which duly registered delegates of WTO Members and members of the general public will have access.
- (b) Oral statements and responses to questions by third participants wishing to maintain the confidentiality of their submissions will not be subject to public observation.
- (c) Any third participant that has not already done so may request that its oral statements and responses to questions remain confidential and not be subject to public observation. Such requests must be received by the Appellate Body Secretariat no later than 5:00 p.m. Geneva time on Wednesday, 18 March 2009.
- (d) An appropriate number of seats will be reserved for delegates of WTO Members in the room where the closed-circuit broadcast will be shown.
- (e) Notice of the oral hearing will be provided to the general public through the WTO website. WTO delegates and members of the general public wishing to observe the oral hearing will be required to register in advance with the WTO Secretariat.
- (f) Should practical considerations not allow simultaneous broadcast of the oral hearing, deferred showing of the video recording will be used in the alternative.

4 March 2009

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