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

ANSWERS OF THE UNITED STATES TO THE QUESTIONS FROM THE PANEL TO THE PARTIES

May 8, 2008

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Australia – Salmon (Article 21.5)	Panel Report, *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada*, WT/DS18/RW, adopted 20 March 2000
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US REQUEST FOR PRELIMINARY RULING

A. IDENTIFICATION OF MEASURES UNDER ARTICLE 6.2 DSU

Q1. US: Is it the US position that, in order to "identify" the "subsequent reviews" as measures at issue in this proceeding consistent with Article 6.2 of the DSU, the EC's Article 21.5 panel request should have, when referring to these (subsequent) reviews, used the precise terms "measure", "measure in question", or "measures at issue"? If so, where does the US find support, in the DSU, or in WTO case-law, for such a requirement?

1. Article 6.2 requires a Member, in its panel request, to "identify the specific measures at issue . . . ." The requirements in Article 6.2 allow the responding party to "know the case it has to answer"[1] and allows other Members to know what is the "matter" at issue in order to help them determine whether to participate as third parties.

2. The Appellate Body has clarified that whether a complaining party fulfills its obligations under Article 6.2 "must be determined on the merits of each case, having considered the panel request as a whole, and in the light of attendant circumstances."[2] The Appellate Body has further noted that "compliance with the requirements of Article 6.2 must be demonstrated on the face of the request for the establishment of a panel."[3] The panel request must be read "as a whole," and it is "on the basis of the language used"[4] in a *particular* panel request that the Appellate Body has examined compliance with Article 6.2.

3. The United States does not take the position that, in general, a panel request must use the term "measure" to identify the measures at issue. However, the EC's panel request must be examined "on the basis of the language used." In its Article 21.5 panel request, the EC used the word "measure" to describe the determinations that it had challenged as applied in the original proceeding. In that same panel request, the EC did *not* use the term "measure" to describe what we have come to term the "subsequent reviews." The EC repeated its deliberate choice of words in the Annexes to its Article 21.5 panel request. Examining the panel request "on the basis of the language used," and reading the panel request "as a whole," one must give meaning to the EC's deliberate use of "measures" to describe the determinations in the original proceeding, and its deliberate use of a *different* term to describe the "subsequent reviews." This is particularly so when the EC chose to use the operative term from the text of Article 6.2 itself since the EC is to be understood as invoking Article 6.2 to the extent it uses the language therein, and thus to be understood as choosing <u>not</u> to have the legal effect under Article 6.2 when using different language.

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[1] *Thailand – H-Beams (AB),* para. 88.

[2] *US – German Steel (AB)*, para. 127 (citing *Korea – Dairy Safeguards (AB),* para. 127 and *Thailand – H-Beams (AB),* para. 95).

[3] *US – German Steel (AB)*, para. 127.

[4] *US – OCTG from Argentina (AB)*, para. 164.

4. The logical conclusion from such an examination is that, at the time of panel establishment, the EC did not consider the subsequent reviews as measures for purposes of this proceeding.[5] Thus, it was only when faced with its first written submission that the EC attempted to effectively rewrite its panel request as including the subsequent reviews as "measures" for purposes of this proceeding. The EC's "reinterpretation" of its panel request is confirmed by the extraordinary inclusion in its first submission of an entire section justifying its attempt to treat the subsequent reviews as measures for purposes of this proceeding.[6] Such a section would have been unnecessary had the panel request been clear.

5. As noted in our oral statement, the United States understood from the EC's panel request that it was not challenging the subsequent reviews themselves. Instead, the United States understood that the EC was presenting the subsequent reviews as evidence of the alleged undermining of the U.S. measures taken to comply (that is, the EC was attempting to demonstrate that these subsequent reviews resulted in the "non-existence" of measures taken to comply in the language of Article 21.5) in respect of the 15 investigations and 16 administrative reviews that were the subject of the DSB recommendations and rulings in the original proceeding.[7]

6. Thus, the language of the EC's panel request makes clear that the only "measures" at issue, with respect to which the EC was seeking a determination of "compliance" within the meaning of DSU Article 21.5, were the determinations challenged "as applied" in the original proceeding. The United States is not asking the Panel to find that Article 6.2 would require the EC to use the term "measure" to describe the subsequent reviews. Rather, the United States is asking the Panel to find that, reading the EC's panel request as a whole and in context, the EC's deliberate use of the term "measure" to describe the determinations challenged as applied in the original proceeding, and its deliberate choice not to use that term to describe the "subsequent reviews," leads to the conclusion that the EC's Article 21.5 panel request did not identify the "subsequent reviews" as measures for purposes of *this* proceeding.

Q7. EC, US: Should the Panel make findings with respect to measures that were revoked before the establishment of the Panel (25 September 2007), where there are no unliquidated duties outstanding nor judicial proceedings delaying the final liquidation of duties? If so, what provisions of the DSU or of the covered

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[5] The United States notes in this regard that, leaving aside the question of whether the subsequent reviews are set out as measures for purposes of this proceeding in the EC's panel request, there is a separate, very fact intensive question of whether, depending on the date on which they were issued, particular reviews are within the terms of reference of this Panel. In this regard, the United States notes that the Panel has requested the EC to provide a chart to facilitate this inquiry. The fact that the Panel needed to make this request highlights the confusion generated by the EC's attempt to expand the scope of the proceeding.

[6] EC First Written Submission, paras. 47-64.

[7] U.S. Closing Statement, para. 11.

agreements do you consider to be relevant to this question? Is the fact that these are Article 21.5 proceedings of relevance?

7. The fact that these are Article 21.5 proceedings is of direct relevance to this question. Where the DSB has recommended that a Member's measure be brought into conformity with that Member's WTO obligations, and the Member has withdrawn that measure prior to the establishment of a compliance panel, then the first question is whether there is disagreement as to the existence of that measure taken to comply. Only if there were such disagreement would there be a basis for the compliance panel to examine the revocation.

8. Where there is such disagreement, then the compliance panel would find that a measure taken to comply exists. In this case, there is no such disagreement, and the Panel should not make findings.

Q10. US: Please address the argument of the EC, Norway and Japan that, in the present dispute, the links, in terms of their nature and the effects, between the "subsequent reviews" and the measures at issue in the original dispute are similar to the links that existed between the corresponding measures in US - Softwood Lumber IV (21.5)? More precisely, would the US agree that the "subsequent reviews" and the measures at issue in the original dispute are closely connected, in terms of their nature and effects?

9. A compliance panel's terms of reference are set by the panel request and Article 21.5. The first question is whether the subsequent reviews are identified in the EC's panel request as "specific measures" within the meaning of DSU Article 6.2. Only if they are would the Panel need to consider the question of whether they are measures "taken to comply". Here, the subsequent reviews were not identified as measures for purposes of Article 6.2 in the EC's panel request.

10. The reviews are not "closely connected in terms of their nature and effects" as that concept has been understood in the dispute settlement context. The two reports upon which the Appellate Body relied in its reasoning in *US – Softwood Lumber CVD Final (Article 21.5)(AB)* are *Australia – Salmon (Article 21.5)* and *Australia – Leather (Article 21.5)*.

11. In *Australia – Leather (Article 21.5)*, the DSB found that a grant contract by Australia to a particular company was inconsistent with Australia's obligations pursuant to the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement").[8] Australia notified the DSB that the subsidy that had been found to be inconsistent had been withdrawn.[9] The next day, Australia

[8] *Australia – Leather (Article 21.5)*, para. 1.1.
[9] *Australia – Leather (Article 21.5)*, para. 1.4.

announced a new grant contract, made to the company's parent.[10] In concluding that the new grant contract was within the compliance proceeding's terms of reference, the compliance panel noted that the contract was "inextricably linked to the steps taken by Australia in response to the DSB's ruling in this dispute, in view of both its timing and its nature."[11]

12. Thus, Australia chose to undertake action coincident with its implementation of the DSB recommendations and rulings. Grant contracts are not *required* by the SCM Agreement. But assessment reviews *are* required under the Antidumping Agreement, when requested. In *Australia – Leather (Article 21.5)*, Australia chose to provide a grant the day after it withdrew the WTO-inconsistent measure, thus affecting the existence of the withdrawal of the prohibited subsidy.

13. The facts are similar in *Australia – Salmon (Article 21.5).* There, Australia claimed compliance with the recommendations and rulings of the DSB in July 1999, but in October 1999 Tasmania chose to impose a new import ban on salmonids. There, the panel noted its concern about a situation in which "an implementing Member could simply avoid any scrutiny of certain measures by a compliance panel" by claiming one measure was a measure taken to comply and that another was not,[12] even though the latter, voluntary action had the effect of undoing the compliance.

14. That is not the situation generally presented with administrative reviews, which, as noted above, occur on a schedule that is established without regard to dispute settlement proceedings and pursuant to rights and obligations established in the Antidumping Agreement. The initiation of the 54 administrative reviews in question occurred independently of the EC's initiation of dispute settlement proceedings. Thus, they were not actions *taken* by the United States to "avoid any scrutiny" of the measures found to be inconsistent with the DSB recommendations and rulings.

15. Furthermore, it is important to recall that the DSB recommendations and rulings concerned the treatment of particular imports during particular times. The treatment of those imports is not affected by the subsequent reviews. Those reviews look at different import transactions. What the EC is really seeking is a finding against an *order*. There is no basis in the Antidumping Agreement or the DSU for such an approach.

16. In addition, the subsequent reviews and the measures at issue in the original dispute are not closely connected in terms of their nature and effects. The EC's "as applied" claims in the original dispute involved determinations in both investigations and administrative reviews. In this regard, the nature and effect of investigations and administrative reviews differ. Moreover,

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[10] *Australia – Leather (Article 2.15)*, para. 5.1.
[11] *Australia – Leather (Article 21.5)*, para. 6.5.
[12] *Australia – Salmon (Article 21.5)*, para. 7.10.

the nature and effect may vary between subsequent administrative reviews of the same antidumping duty order.

17. With respect to investigations, Article 1 of the Antidumping Agreement provides that an antidumping measure can only be applied pursuant to an investigation initiated and conducted in accordance with the Antidumping Agreement. Pursuant to Article 5.1, the purpose of the investigation is "to determine the existence, degree and effect of any alleged dumping . . . ." Thus, the nature of an investigation is to determine, among other things, whether the imposition of an antidumping duty is appropriate because margins of dumping above *de minimis* levels exist.[13] In making this determination, Commerce will analyze import transactions occurring prior to the date of the initiation of the investigation.

18. By contrast, the nature of an administrative review is to determine the final amount of the antidumping duties consistent with Article 9.3. To determine the final amount of the antidumping duties, Commerce will look at a different set of import transactions than it examined in the investigation. These transactions will have occurred over a different period of time, and may involve different exporters or producers. Because assessment reviews examine different transactions, different issues may arise than those addressed in the investigation, or even in previous reviews. Interested parties may make different arguments, and Commerce may make different determinations, based on the particular facts that exist in that period of review. Accordingly, the effect of an assessment review will likewise vary depending on the particular facts established in the review.

19. As discussed more fully in answer to question 13 below, the Appellate Body's finding in *US – Softwood Lumber CVD Final (Article 21.5) (AB)*, was not based entirely on the fact that through an investigation Commerce establishes the cash deposit rate and through an assessment review Commerce determines the final amount of the antidumping duties. Rather, the Appellate Body considered: (1) the timing of the Section 129 determination and the determination in the first assessment review at issue in that dispute; (2) the link with respect to the specific issue involved in both the Section 129 determination and the first assessment review; and (3) the acknowledgment of the United States that the determination in the first assessment review was made "in view of" the recommendations and rulings of the DSB.[14]

Q11. US: What is the US response to para. 45 of the EC's Rebuttal, in which the EC argues that the US admits this close relationship between the subsequent reviews and the measures at issue in the original dispute and relies, in this respect, on the US' assertion that the subsequent review proceedings relieved it of any obligation to act in order to comply with the DSB's recommendations and rulings?

[13] Antidumping Agreement, Article 5.8.

[14] *US – Softwood Lumber CVD Final (Article 21.5) (AB)*, para. 84.

20. The United States has not argued that the subsequent reviews "relieved it of any obligation to comply." Rather, the United States has complied with the recommendations and rulings of the DSB by removing the measures found to be inconsistent.

21. The United States has concerns with adopting the EC's loose references to "close connection,"[15] detached from context. As discussed in the response to Question 10 above, panels and the Appellate Body have, on occasion, engaged in a careful, fact-specific analysis of the situation particular to a dispute to examine whether it may be appropriate to examine measures in an Article 21.5 proceeding other than a measure declared by the responding Member to be a measure taken to comply. However, the EC detaches the phrase from its context in order to lead to the unprecedented, sweeping conclusion that a compliance proceeding can involve three times the measures challenged in the original proceeding. The EC's approach would also lead to what would effectively be a *per se* rule that all administrative reviews in a given antidumping proceeding are closely connected to one another and to the original investigation. The latter proposition directly contradicts the Appellate Body's views in *US – Softwood Lumber CVD Final (Article 21.5)* where the Appellate Body was careful to note that there was no finding that an administrative review was *per se* a measure taken to comply.[16]

Q12. EC, US: The EC and some third parties argue that following the US arguments would lead to a situation in which the WTO dispute settlement system cannot resolve disputes regarding the calculation of duties in AD proceedings, in particular because it would mean that each WTO dispute challenging administrative reviews of a Member applying a retrospective duty assessment system would almost always concern measures that are no longer in effect once the dispute reached the implementation stage.

a) US: What is the US response to this argument?

22. The United States disagrees with the premise of the argument. The fact that the WTO dispute settlement system does not provide for *retrospective relief* – e.g., that refunds of duties (whether antidumping duties or ordinary customs duties) paid on entries made prior to the end of the reasonable period of time – does not mean that disputes cannot be *resolved*. It simply means that the resolution will not involve a particular form of relief to private parties.

23. That the WTO dispute settlement system might not provide a particular *remedy* is not novel. Indeed, in *Australia – Leather (Article 21.5)*, the EC argued that relief is only prospective and took the position, articulated by the panel, that "the absence of a remedy for past and consummated violations is and has always been a well-known feature of the GATT/WTO

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[15] *See, e.g.,* EC Rebuttal Submission, para. 44.

[16] *US – Softwood Lumber CVD Final (Article 21.5) (AB)*, para. 93 (footnote omitted).

system, under which in some cases there is no remedy at all for a complaining party."[17] This is consistent with the position the EC took in *EC – Chicken Cuts*, as discussed in the U.S. first written submission.[18] Finally, the United States – the complaining Party in *Australia – Leather (Article 21.5)* – agreed that relief is only prospective.[19]

24. It should also be noted that this situation is not unique to retrospective systems: It is true of any system that conducts proceedings under Article 9.3.1 or 9.3.2. It is the nature of the proceeding itself, and not the particular antidumping system, that all entries subject to the proceeding will be *past* entries. If Members wish to have a different result, then they must agree to that result through negotiation.

b) Please discuss whether (and if so, how) the situation before this Panel differs from a hypothetical situation in which a Member imposes AD measures that, pursuant to domestic legislation, only last for one year unless extended following a sunset review. Would such a situation be similar to the one which the EC alleges would result from the US' arguments, and lead to the same concerns? Would it be more, or less, acceptable, in such a case, that such a measure somehow "evades" the scope of review in the WTO dispute settlement system?

25. With respect to the issue of retrospective relief, the hypothetical situation described in the question would be similar to the situation in the instant dispute: nothing in the Antidumping Agreement or the DSU authorizes retrospective relief (and this is the case in connection with both investigations and reviews). To the extent that these situations give rise to concerns among Members, it would be necessary to negotiate a change in the rules that have been agreed upon in the WTO Agreement for the WTO dispute settlement system.

Q13. EC, US:

a) Would you agree that US "administrative reviews" perform two functions: first, they provide an assessment rate to be applied to past entries, and second, they set a cash deposit rate for future entries of the subject product?

26. Yes.[20]

b) If so, would you consider, in light of the fact that original AD orders solely provide for a prospective cash deposit rate and do

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[17] *Australia – Leather (Article 21.5)*, para. 6.37.
[18] U.S. First Written Submission, para. 100.
[19] *Australia – Leather (Article 21.5)*, para. 6.29.
[20] U.S. First Written Submission, para. 10.

not establish a duty assessment rate to be applied to past entries, that both elements of a subsequent administrative review bear the same "close nexus" with the measure at issue in the original dispute where that measure was an original investigation?

27. No. In addressing this question, the Panel should be guided by the Appellate Body's admonition in *US – Softwood Lumber CVD Final (Article 21.5)* that "not . . . every assessment review will necessarily fall within the jurisdiction of an Article 21.5 panel."[21] Every administrative review of the same antidumping duty order will necessarily involve the same product from the same country. An administrative review may, or may not, involve the same companies that were examined in the investigation. However, if an overlap between product, exporting country, and exporter, was sufficient to establish a "close nexus," then every administrative review would fall within the jurisdiction of an Article 21.5 panel. This would run counter to the Appellate Body's admonition.

28. Investigations and administrative reviews serve different purposes, thus demonstrating a more limited nexus. That is, as discussed in the answer to question 10, the purpose of the investigation is to determine, among other things, if dumping exists in such a degree so as to justify the imposition of an antidumping duty. Under the U.S. system, the investigation will also establish the cash deposit rate applied as an estimate of antidumping duties. The United States recalls that the original Panel discussed in some detail the factual differences between investigations and reviews.[22]

29. By contrast, in administrative reviews, the United States analyzes a different set of import transactions than those analyzed in the investigation. The purpose of an administrative review is to determine the precise amount of dumping in order to establish the final amount of antidumping duties to be applied to those particular transactions. Indeed, the transactions involved in an administrative review may even involve different companies than those involved in the investigation.

30. Turning to the Appellate Body's finding in *US – Softwood Lumber CVD Final (Article 21.5),* the Appellate Body did not base its conclusion that the determinations from the Section 129 proceeding and the first assessment review were closely connected solely on the fact that the investigation established a prospective cash deposit rate, while the administrative review in question determined the final assessment rate on past entries. In making its finding, the Appellate Body considered the timing of the two determinations at issue. The Appellate Body noted that "[a]s a whole, Article 21 deals with events *subsequent* to the DSB's adoption of recommendations and rulings in a particular dispute."[23] In that dispute, the determinations in

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[21] *US – Softwood Lumber CVD Final (Article 21.5) (AB)*, para. 93 (footnote omitted).
[22] Panel Report, para. 7.156-7.157.
[23] *US – Softwood Lumber CVD Final (Article 21.5) (AB)*, para. 70 (italics in original).

both the Section 129 proceeding and the first administrative review occurred after the adoption of the DSB's recommendations and rulings. More importantly, the Section 129 determination and the determination in the first administrative review both closely corresponded to the expiration of the reasonable period of time.[24] Thus, the timing of these two determinations provided Commerce with the ability to take account of the DSB's recommendations and rulings in the first administrative review.[25] In fact, in that case, the United States expressly acknowledged that the determination in the first administrative review was made "in view of" the DSB's recommendations and rulings.[26]

31. Moreover, the specific aspect of the determination from the first administrative review that the Appellate Body found to be within the jurisdiction of the Article 21.5 panel was Commerce's "pass-through" analysis. That is, both the Section 129 determination and the first administrative review addressed whether subsidies paid to producers of an upstream product "passed through" to the producers of the downstream products.[27] The Appellate Body also found that the legal basis for the obligation to conduct a "pass-through" analysis in a countervailing duty proceeding does not vary depending on whether the issue arises in an investigation or an assessment review. That is, in either case, the obligation arises from Articles 10 and 32.1 of the SCM Agreement, and Article VI:3 of the GATT 1994.

32. This is not the case with respect to the legal basis for the prohibition of zeroing in antidumping determinations. That is, the original panel's finding that zeroing is prohibited in investigations and the Appellate Body's finding that zeroing is prohibited in assessment proceedings are based on different obligations. Concerning investigations, the original panel noted that the resolution of the issue involved the interpretation of the first sentence of Article 2.4.2, which provides that "the existence of margins of dumping during the investigation phase ... on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions . . . ."[28] The panel recalled that when a Member has engaged in multiple averaging in the application of Article 2.4.2, the Appellate Body had found that the Member must include all of the results of the separate calculations in the margin of dumping.[29] Based on these principles, the panel found that Commerce's zeroing methodology as applied in investigation was "as such" inconsistent with Article 2.4.2.[30] The United States did not appeal this finding.

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[24] *US – Softwood Lumber CVD Final (Article 21.5) (AB)*, para. 84.
[25] *US – Softwood Lumber CVD Final (Article 21.5) (AB)*, para. 84.
[26] *US – Softwood Lumber CVD Final (Article 21.5) (AB)*, para. 84.
[27] *See US – Softwood Lumber CVD Final (Article 21.5) (AB)*, para. 15.
[28] *US – Zeroing (EC) (Panel)*, para. 7.26.
[29] *US – Zeroing (EC) (Panel)*, para. 7.27.
[30] *US – Zeroing (EC) (Panel)*, para. 7.106.

33. By contrast, the Appellate Body found that Commerce's use of zeroing in administrative reviews was inconsistent with Article 9.3.[31]

34. Thus, because the legal basis for the prohibition of zeroing differs depending on whether the measure at issue is an investigation or assessment review, the situation in this dispute differs from that in *US – Softwood Lumber CVD Final (Article 21.5)*. This further demonstrates that the same nexus that the Appellate Body found to exist between the Section 129 determination and the determination in the first assessment review in *US – Softwood Lumber CVD Final (Article 21.5)* does not exist in this dispute.

Q14. EC, US: If the Panel were to conclude that sunset reviews are essentially of a different nature than original AD orders and administrative reviews, could the Panel nevertheless consider that such (subsequent) sunset reviews are "closely connected" to the measures at issue in the original dispute and to the DSB's recommendations and rulings?

35. No. The United States recalls that the EC made no claims against, and neither the original panel nor the Appellate Body made any findings regarding, determinations made in sunset reviews in this dispute. Therefore, the United States does not see how such sunset reviews could be regarded as "closely connected." At any rate, the sunset review determinations identified by the EC in its annex to the Article 21.5 panel request are not sufficiently "closely connected" to either the measures at issue in the original dispute or the DSB's recommendations and rulings to bring those determinations within the jurisdiction of this Panel.

36. As the United States has noted, the phrase "closely connected" is a descriptive phrase that has appeared in some panel and Appellate Body reports discussing whether individual measures, under specific circumstances, were or were not within the scope of a particular Article 21.5 proceeding. The phrase does not appear in the DSU but rather was developed in the course of dispute settlement. The sunset reviews are not "closely connected" to the measures at issue in the original dispute or to the DSB's recommendations and rulings.

37. First, the analysis in a sunset review is different from the analysis in either an investigation or an administrative review.

38. As discussed in answer to question 10 above, in an investigation a Member determines, among other things, whether dumping exists and at a sufficient level to justify the imposition of an antidumping duty.[32] The United States accomplishes this by analyzing import transactions that occurred prior to the initiation of the investigation. An administrative review analyzes import transactions from a different period of time in order to determine the final amount of antidumping

[31] *US – Zeroing (EC) (AB)*, para. 163(a)(i).
[32] *See* Antidumping Agreement, Articles 5.1 and 5.8.

duties to be assessed. While they may look at different periods of time, different transactions, and possibly different companies, and may use different approaches (to which different WTO obligations may apply), both investigations and administrative reviews involve the calculation of margins of dumping.

39. By contrast, the Appellate Body has recognized that Members are not required to calculate fresh margins of dumping in a sunset review.[33] Indeed, the United States does not calculate new margins of dumping in its sunset reviews. Consistent with Article 11.3, the purpose of a sunset review is to determine if the expiration of the antidumping duty would likely lead to the continuation or recurrence of dumping and injury. The analysis is essentially counterfactual and pertains to what is likely to happen in the future, rather than to determine what has happened in the past. Thus, a determination in a sunset review involves different factors, a different analysis, different obligations, and a different period of time – the future – than either an investigation or an administrative review.

40. Second, the timing of many of the sunset review determinations at issue in this dispute demonstrates that they cannot possibly be regarded as closely connected to the determinations originally challenged, or to the DSB's recommendations and rulings. As the United States discussed in its opening statement to the panel, of the 16 sunset review determinations identified by the EC as "subsequent reviews," 11 of them were made prior to the adoption of the DSB's recommendations and rulings.[34] Thus, unlike the situation in *US – Softwood Lumber CVD Final (Article 21.5) (AB)*, as discussed in response to question 13, the timing of these determinations demonstrates that they cannot be connected to DSB recommendations and rulings that did not even yet exist.

41. Finally, the sunset review determinations were not made "in view of" the DSB's recommendations and rulings. The United States did not *choose* to make sunset review determinations at all, let alone with a view to dispute settlement proceedings. Sunset reviews are required by Article 11.3 of the Antidumping Agreement. Certainly Commerce could not have taken into consideration the DSB's recommendations and rulings in the 11 sunset review determinations that predated those recommendations and rulings. Four of the five sunset reviews that post-date the DSB's recommendations and ruling resulted in the revocation of the antidumping duty.[35] In the one remaining sunset review determination, the interested parties did not raise, and Commerce made no mention of, the issue of non-dumped sales.[36] Accordingly,

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[33] *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 123.

[34] US Opening Statement, para. 16.

[35] Those are the antidumping duty orders on Stainless Steel Bar from France, Germany, Italy and the United Kingdom. As discussed in response to question 48, there is no possibility that these orders will be reintroduced as a result of domestic litigation.

[36] *See* Issues and Decision Memorandum from Notice of Final Results of Expedited Sunset Reviews of the Antidumping Duty Orders: Certain Pasta from Italy and Turkey (February 5, 2007). (Exhibit US-25)

these sunset review determinations do not possess the required nexus to fall within this Panel's jurisdiction.

Q15. EC, US: What is the relevance, if any, to the present proceedings of paragraph 82 of the Appellate Body Report in US - Softwood Lumber IV (21.5) which reads:

"We also observe that the United States emphasizes the separate nature of original countervailing duty investigations and duty assessment proceedings, and cites, inter alia, to its domestic law in this regard. Although such references may be useful, the Appellate Body has already observed that municipal law classifications are not determinative of issues raised in WTO dispute settlement proceedings. We also note the argument of the United States that the SCM Agreement recognizes that original countervailing duty investigations are proceedings distinct from duty assessment reviews. This does not, in our view, answer the question of whether the Panel was entitled, in these proceedings under Article 21.5 of the DSU, to examine the pass-through analysis conducted by the USDOC in the First Assessment Review." (footnotes omitted)

a) Should this statement of the Appellate Body influence the Panel's consideration of whether a "close nexus" exists between the subsequent reviews and the DSB's recommendations?

42. No. The quoted passage (particularly the words "does not . . . answer the question") simply makes the point that two distinct proceedings may – or may not – have a relationship. The passage does not lead to any particular conclusion about whether a close nexus exists on the basis of the facts in *this* dispute. As discussed more fully in response to question 13 above, the Appellate Body also considered the timing of the two determinations in question, as well as the acknowledgment of the United States that the determination in the first assessment review was made "in view of" the DSB's recommendations and rulings.[37]

43. Further, the arguments the United States has advanced in this dispute do not depend on municipal law classifications. The United States recalls that the Appellate Body did not state that all administrative reviews are necessarily measures taken to comply, but rather drew conclusions on the basis of the particular facts presented in that dispute. As discussed further below, the EC has failed to demonstrate that, as a factual matter, the subsequent reviews have the "close nexus" described in *Softwood Lumber*.[38]

[37] *US – Softwood Lumber CVD Final (Article 21.5) (AB)*, para. 84.
[38] *See also*, Panel Report, para. 7.157-7.158.

b) To what extent should this Panel take into account the US system of retrospective duty assessment in deciding the issue of the "close nexus" or connection of subsequent reviews with the DSB recommendations in the original dispute? What is the relevance, to the Panel's analysis of this question, of the recognition of retrospective duty assessment systems in Article 9.3 and footnotes 21 and 22 of the Anti-Dumping Agreement?

44. As discussed more fully below in answer to question 28, the Antidumping Agreement recognizes retrospective duty assessment, prospective duty assessment, and prospective normal value systems. The Appellate Body has recognized that the Antidumping Agreement should not be construed so as to place one system at an advantage over the other.[39] Thus, these systems should be treated equally, unless the Antidumping Agreement expressly provides otherwise.

Footnote 21 to Article 11.2 of the AD Agreement provides:

> A determination of final liability for payment of anti-dumping duties, as provided for in paragraph 3 of Article 9, does not by itself constitute a review within the meaning of this Article.

Article 11.2 itself provides that a Member shall review the continued need for the imposition of an antidumping duty, where such a review is warranted. The footnote confirms that the determination of the final amount of antidumping liability is a separate function from the review of whether the duty is still needed to address injurious dumping. The distinction undermines the EC's assertion that the varying segments of an antidumping proceeding are "closely connected" for purposes of evaluating the scope of an Article 21.5 proceeding.

45. Footnote 22 to Article 11.3 demonstrates that different proceedings concerning the same product from the same country have different functions and are not necessarily interrelated:

> When the amount of the anti-dumping duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding under subparagraph 3.1 of Article 9 that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.

Article 11.3 concerns determinations made in sunset reviews. The purpose of a sunset review is to determine whether the expiration of the antidumping duty would be likely lead to a recurrence or continuation of dumping and injury. Footnote 22 clarifies that the result of a single assessment proceeding where it is determined that the margin of dumping is zero or *de minimis* does not necessarily lead to a negative likelihood determination.

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[39] *See US – Zeroing (Japan)(AB)*, para. 163.

46. These various provisions demonstrate that different proceedings addressing the antidumping measure on the same product from the same company are not necessarily "closely connected" as that term has been used in prior proceedings. Simply conducting an assessment proceeding does not obligate a Member to review the continued necessity of an antidumping measure. Rather, these are separate determinations, based on separate sets of facts.

47. Thus, in the U.S. system, while administrative reviews of the same antidumping duty order may address the same product from the same country, Commerce examines different transactions from different time periods, sometimes involving different companies. The facts and issues raised change from review to review, and the obligations under the WTO Agreement may differ.

Q16. US: Please react to Japan's argument that a number of WTO panels and the Appellate Body have considered that measures adopted during the course of a dispute that are substantively the same as the measure identified in the panel request form part of the same dispute (paras. 65-73 of Japan's Third Party Submission). Japan makes this argument in reaction to what it says is the US argument that "closely connected measures adopted during a WTO dispute, but prior to adoption, must be split into separate WTO proceedings." (para. 65 of Japan's Third Party Submission).

48. Japan provides no citation for its characterization of the alleged U.S. position. Indeed, Japan has attributed to the United States a position it has not taken. The United States has not argued that "closely connected measures adopted during a WTO dispute, but prior to adoption, must be split into separate WTO proceedings." However, with respect to events occurring prior to adoption, the United States *has* argued that:

> Many of the distinct administrative review determinations identified by the EC in its 21.5 panel request cannot be considered measures taken to comply because they pre-date the adoption of the DSB's recommendations and rulings.[40]

49. Japan appears to be confusing two distinct questions. One is whether a measure that has changed after the date of a request for consultations can be part of the "matter" described in Article 7 of the DSU. A separate question is whether measures pre-dating the adoption of DSB recommendations and rulings can be *measures taken to comply* within the meaning of Article 21.5 of the DSU.

50. Japan's failure to grasp the critical distinction between terms of reference in original proceedings and the concept of a "measure taken to comply" may explain Japan's misplaced reliance on dispute settlement reports relating to the terms of reference of original panel proceedings. Because they involve original proceedings, and therefore necessarily do not involve

[40] U.S. First Written Submission, para. 46.

the question of what is a "measure taken to comply," those reports do not assist the Panel in its task of determining whether the 54 subsequent reviews are "measures taken to comply" under Article 21.5.

51. The only report Japan cited that involves the question of whether reviews can be measures taken to comply is *US – Softwood Lumber CVD Final (Article 21.5)*. There, the Appellate Body expressly stated that "not . . . every assessment review will necessarily fall within the jurisdiction of an Article 21.5 panel ."[41] Thus, it cannot be the case that subsequent administrative reviews are *always* measures taken to comply.

52. Japan's views as to the factors that must exist to constitute a "close nexus" are common to all administrative reviews. As a result, they would undo the Appellate Body's finding in *US – Softwood Lumber CVD Final (Article 21.5)* that administrative reviews are not *necessarily* measures taken to comply. Japan ignores the fact that the panel and Appellate Body in *Lumber* engaged in a detailed discussion of the facts particular to the two determinations in question.

53. While the EC and Japan have emphasized the "close nexus" aspect of the *Lumber* report, they have ignored other aspects of that report that are germane to the issues here:

> the scope of Article 21.5 proceedings logically must be narrower than the scope of original dispute settlement proceedings.[42]

The original proceedings involved 31 as applied findings. The EC and Japan are advocating findings that would expand the scope of these proceedings *threefold* over the original proceeding. That would make this Article 21.5 proceeding *broader*, rather than narrower, than the original proceeding and thus contradict the Appellate Body's conclusion in *US – Softwood Lumber CVD Final (Article 21.5)*.

Q18. US: Please discuss why subsequent administrative reviews are so different from original investigations that the Panel could not consider, for instance, that the second administrative review falls within the scope of this proceeding where the first administrative review was challenged in the original dispute. Why is this different, for instance, to a case in which subsidies - in annually differing amounts - are distributed to a group of producers, with some changes in the composition of group, over the course of two or three years, and under the same enabling legislation. Would the US argue that, in such a case, the subsidies granted in years two and three could not be taken into consideration by an Article 21.5 panel assessing the implementation of DSB recommendations with respect to the subsidies granted in year 1?

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[41] *US – Softwood Lumber CVD Final (Article 21.5)(AB)*, para. 93.

[42] *US – Softwood Lumber CVD Final (Article 21.5)(AB)*, para. 72 (emphasis added).

54. The only time an administrative review has been found to be within the scope of an Article 21.5 proceeding in respect of an investigation was in *US – Softwood Lumber CVD Final (Article 21.5).* However, in that dispute, the Appellate Body carefully examined the facts particular to the two determinations in question. Further, the Appellate Body expressly stated that the reasoning used in that dispute "should not be read to mean that every assessment review will necessarily fall within the jurisdiction of an Article 21.5 panel."[43]

55. The EC has argued that the reasoning in *US – Softwood Lumber CVD Final (Article 21.5)* is applicable here, and the United States has disagreed, for the reasons set out in our submission.[44] Assuming *arguendo* the reasoning in *US – Softwood Lumber CVD Final (Article 21.5)* were appropriate in that dispute, it is not applicable here. The EC has failed to establish the requisite nexus. The facts upon which the EC relies – the same products and countries are involved, and sometimes the same companies – are inherent in all administrative reviews and thus would contradict the Appellate Body's express statement that not every assessment review will necessarily fall within the jurisdiction of an Article 21.5 panel.

56. With respect to the question on subsidies, as the question recognizes, the reference point for analyzing whether the subsidies granted in years two and three could be taken into consideration by the Article 21.5 panel would be the recommendations and rulings of the DSB. In the absence of having actual recommendations and rulings, it is not possible to answer the question with greater specificity.

Q19. US: In its Oral Statement (paragraph 31), the EC posits a situation in which a subsidy granted by a WTO Member to a particular company is found to be prohibited, and one day before adoption of the report by the DSB, "that Member grants the same prohibited subsidy, equally inconsistent with the WTO rules, pursuant to a different scheme to the same company". The EC states that "even if the Member were to stop the payments pursuant to the first subsidy scheme found to be WTO inconsistent, it could be argued that compliance has not been achieved." Could the United States comment?

57. In the absence of knowing what DSB recommendations and rulings were adopted by the DSB, it is not possible to comment on what the proper *outcome* in the EC's hypothetical proceeding should be. Furthermore, as an initial matter the United States does not understand how a subsidy under a different scheme could be "the same prohibited subsidy." It is possible that the subsidy under the new and different scheme would also be prohibited, but that would not make it the same prohibited subsidy.

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[43] *US – Softwood Lumber CVD Final (Article 21.5)(AB),* para. 93.
[44] *See, e.g.,* U.S. Closing Statement, paras. 6-9.

58. However, the United States notes that the facts described in the EC hypothetical appear to be similar to those found in *Australia – Leather (Article 21.5).* The United States would like to comment on the analysis in that report, in case those comments may prove helpful to the Panel's analysis of the issues at hand.

59. As discussed in our response to Question 10, in *Australia – Leather (Article 21.5)*, the panel found that a grant contract by Australia to a particular company was inconsistent with Australia's obligations pursuant to the SCM Agreement.[45] Australia notified the DSB that the subsidy had been withdrawn.[46] The next day, Australia announced a new grant contract, made to the company's parent.[47] In concluding that the new grant contract was within the compliance proceeding's terms of reference, the compliance panel noted that the contract was "inextricably linked to the steps taken by Australia in response to the DSB's ruling in this dispute, in view of both its timing and its nature."[48]

60. In *Australia – Leather (Article 21.5),* Australia chose to undertake action coincident with its implementation of the DSB recommendations and rulings. Grant contracts are not *required* by the SCM Agreement. But assessment reviews *are* required under the Antidumping Agreement, when requested. Thus, in *Australia – Leather (Article 21.5)*, Australia chose to provide a grant the day after it withdrew the WTO-inconsistent measure. Here, the United States did not choose to conclude administrative reviews with any particular timeframe in mind. The United States simply completed administrative reviews on a schedule established pursuant to the Antidumping Agreement and independent of WTO dispute settlement proceedings. Therefore, to the extent the EC is suggesting that the analysis as set out in the *Australia – Leather (21.5)* report supports a particular result here, the United States disagrees.

Q20. EC, US: What are the systemic implications of the EC's argument on the scope of Article 21.5 proceedings, in particular the EC's argument referring to the panel report in US - Upland Cotton (21.5) and the Appellate Body report in US - Softwood Lumber IV (21.5)? (See, inter alia, EC's Oral Statement, paras. 24-34). The EC seems to be arguing that the Panel should consider that any review that was undertaken in relation to the measures challenged in the original dispute falls within the scope of this Article 21.5 proceeding.

a) Do you agree that, in principle, the interpretation of Article 21.5 should be the same regardless of the type of measures that are at issue or the Agreement concerned? Why or why not?

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[45] *Australia – Leather (Article 21.5)*, para. 1.1.
[46] *Australia – Leather (Article 21.5)*, para. 1.4.
[47] *Australia – Leather (Article 2.15)*, para. 5.1.
[48] *Australia – Leather (Article 21.5)*, para. 6.5.

61. In view of the question's focus on the systemic implications of arguments concerning the scope of an Article 21.5 proceeding, the United States considers it useful to recall the scope that WTO Members have negotiated for Article 21.5 proceedings. An Article 21.5 proceeding is available when there is a disagreement as to the existence or consistency with a covered agreement of a measure taken to comply. Consonant with the fact that it is a compliance proceeding, rather than an original dispute, the time limits for Article 21.5 proceedings are shorter than those for original proceedings, and a responding Member found not to have to brought its measure into compliance is not expected to have a further reasonable period of time to bring its measure into compliance. The Appellate Body has reasoned that Article 21.5 proceedings must "logically be narrower" than original proceedings.[49]

62. The United States considers that the *interpretation* of Article 21.5 should be the same, regardless of the type of measures at issue or the covered agreement concerned, given that Article 21.5 includes no text that distinguishes on these bases. However, the *application* of Article 21.5 will vary from situation to situation, depending on the measures involved and the recommendations and rulings of the DSB (which are agreement-specific) at issue. In this connection, the United States notes that it does not agree that *US – Upland Cotton (Article 21.5)* and *US – Softwood Lumber CVD Final (Article 21.5)(AB)* support the EC's position. Each of those reports involved a specific set of facts and circumstances, and does not support the proposition the EC is advancing here, namely, that administrative reviews inherently have a "close nexus" to preceding and subsequent reviews and investigations and therefore are measures taken to comply with respect to those reviews and investigations.

63. The United States notes that *US – Upland Cotton* has not been adopted and is currently on appeal.

b) If one were to transpose the logic of the EC's argument to (for instance), a case involving an SPS measure that was replaced during the course of the original dispute, but before adoption of the reports, and assuming that the new measure was adopted without regard to the findings of the panel or Appellate Body assessing the conformity of the original measure, would you consider that such a measure falls into the scope of a subsequent Article 21.5 dispute?

64. The EC has taken the position that such action should not result in findings even by the original panel, let alone a compliance panel. In *EC – Biotech*, the panel described the EC position as follows:

> The European Communities argues that the Panel should not address product-specific measures concerning applications which were withdrawn after the

[49] *US – Softwood Lumber CVD Final (Article 21.5)(AB),* para. 72.

> Panel was established. According to the European Communities, the issue has become moot and the relevant claims must be considered inadmissible. The European Communities bases its argument on . . . the DSU . . . . Article 3.3 of the DSU states that the basic aim of the dispute settlement system is "the prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member"(emphasis added). This shows that the purpose of dispute settlement is to address and redress situations that are in actual existence.[50]

If the responding Member claimed that the replacement SPS measure was a measure taken to comply with adopted DSB recommendations and rulings, and the complaining Member disagreed, then Article 21.5 proceedings would be available to address that disagreement.

Q22. EC, US: At what date must the existence and consistency of the US measures taken to comply be assessed? The end of the reasonable period of time? That of the establishment of the panel? A later date, taking into consideration "measures", "acts" or "omissions" that occurred, took effect, or ceased to exist after the date of the panel's establishment? Is there any distinction with respect to whether the Panel makes findings and/or recommendations? Does the fact that this is an Article 21.5 proceeding lead to a different conclusion than would be the case in an original dispute?

65. The terms of reference for a compliance dispute are to examine "the matter referred to the DSB" in the panel request within the parameters of Article 21.5, including the question of whether there is a disagreement and the question of what is a measure taken to comply. The "matter" consists of the measure and the claim.[51] Thus, in an Article 21.5 proceeding, the date of the panel request provides the earliest date for which a panel may examine the existence or consistency of a measure taken to comply.

66. Whether a panel may take events subsequent to panel establishment into account depends on the facts of a particular proceeding. For example, where there is a subsequent act that results in both parties agreeing on the existence or consistency of a measure taken to comply, there would no longer be a basis for the compliance panel to examine that question.

67. In terms of a recommendation, the fact that a proceeding is an Article 21.5 proceeding is relevant. A panel in a compliance proceeding is tasked with determining whether a measure taken to comply by the Member concerned that is within the panel's terms of reference exists or is inconsistent with a covered agreement. That is all the panel needs to do.

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[50] *EC – Biotech*, para. 7.1756.
[51] *Canada – Wheat Exports (AB),* para. 176.

Q24. EC, US: Assume that one administrative review is challenged in WTO dispute settlement, and is found to be inconsistent with the Anti-Dumping Agreement. Looking at implementation of the DSB's recommendations and rulings with respect to that measure, could the parties please address what the implementation obligations would be in the following circumstances:

a) as of the end of the RPT, that administrative review is no longer the basis for any cash deposits; the different results of a subsequent administrative review are the basis for cash deposits;

68. For purposes of addressing all three parts of this question, the United States notes that the concept of "liquidation" is not universal, and it is not found in the Antidumping Agreement. Nothing in the Antidumping Agreement or the DSU suggests that the status of entries as liquidated or unliquidated is germane to a Member's implementation obligations. While it is generally difficult to answer questions involving implementation in the absence of the actual recommendations and rulings adopted by the DSB, this question involves entries that occurred prior to the end of the RPT. As the United States has discussed in its previous submissions, relief pursuant to the WTO dispute settlement system is prospective in nature.[52] That is, in the context of antidumping duties, the recommendations and rulings of the DSB do not act as the basis for the reimbursement of duties. Even the EC's municipal law recognizes this principle.[53] Thus, there would be no implementation obligations in respect of these entries.

b) as of the end of the RPT, there are no unliquidated entries of imports on which cash deposits were made in the amounts set in the administrative review at issue;

69. As noted above, nothing in the Antidumping Agreement or the DSU suggests that the status of entries as liquidated or unliquidated is germane to a Member's implementation obligations. The question involves entries that occurred prior to the end of the RPT. Thus, there would be no implementation obligations in respect of these entries.

c) as of the end of the RPT, there are still outstanding unliquidated entries of imports on which cash deposits were made in the amounts set in the administrative review at issue.

70. As noted above, nothing in the Antidumping Agreement or the DSU suggests that the status of entries as liquidated or unliquidated is germane is germane to a Member's

[52] U.S. First Written Submission, para. 101; US, Rebuttal Submission, paras. 45-47; US, Opening Statement, para. 9; US, Closing Statement, para. 2.

[53] *See* U.S. First Written Submission, paras. 98-100; US, Closing Statement, para. 4.

implementation obligations. The question involves entries that occurred prior to the end of the RPT. Thus, there would be no implementation obligations in respect of these entries.

Q26. US: The Panel notes that, on the one hand, the US considers that the panel should not make any findings with respect to US' failure to implement between 9 April 2007 and either 23 April 2007 or 31 August 2007 and seems to rely, in this respect, on the reasoning of panels (and in particular the US - Cotton (21.5) panel, which the US cites in para. 106 of its First Written Submission) that have considered that the relevant date, to assess a Member's implementation, is that of the establishment of the Article 21.5 panel. But on the other hand, the US argues that the EC's claims concerning the Section 129 determinations in cases 2, 3, 4 and 5 should be rejected because they concern measures that are no longer in effect because the AD orders in these cases were revoked. The Panel notes, however, that the sunset review determination that revoked these orders was published in January 2008, with retroactive effect to 7 March 2007. Is there a contradiction in the fact that the US seems, in the first instance, to be asking the Panel to rule on the US' implementation of the DSB recommendations and rulings as of the date of establishment of the Panel, and in the second instance, asking the Panel to take into account measures that were taken after this Panel was established?

71. The United States wishes to clarify that the EC is making two requests, neither of which pertains to asking the Panel to rule on the U.S. implementation of the DSB recommendations and rulings as of a particular date.

72. The first is a request that the Panel find that the United States breached Article 21.3.[54] As the United States has explained, Article 21.3 does not impose an obligation, and therefore a Member cannot be found in breach of that Article.[55] As discussed in paragraph 106 of the U.S. first written submission, the United States finds that the reasoning of the panel in *US – Upland Cotton (Article 21.5)* is instructive in this regard. Thus, paragraph 106 of the U.S. first written submission was meant to address the straightforward question of whether a Member can be found to have breached Article 21.3. That question has nothing to do with the date forming the basis for evaluating compliance.

73. Second, the EC has requested the Panel to make a very particular finding: that no measure taken to comply existed *between* April 9, 2007 and April 23, 2007/August 31, 2007 – a set of dates before the date of the EC's request for establishment of this Panel.[56] The EC has explicitly stated that this "is different from a finding on the existence or consistency with a covered

[54] *See, e.g.*, EC First Written Submission, para. 100.

[55] Not all WTO provisions impose obligations on Members. For example, Article 1 of the SCM Agreement does not.

[56] *See, e.g.*, EC First Written Submission, para. 103.

agreement of measures taken to comply . . . . [T]he European Communities is not asking the Panel to rule on the existence of measures taken to comply 'at the end of the reasonable period of time', *i.e.,* on 9 April 2007."[57] Therefore, the EC itself states that its request is unrelated to the question of *when* the United States adopted measures taken to comply, but rather is a request for a particular finding with no demonstrated relevance to these proceedings and is not a finding within the scope of Article 21.5. In particular, it does not appear that there was any "disagreement" (within the meaning of DSU Article 21.5) between the parties on this issue as of September 14, 2007, the date of the EC panel request.

Q27. US: There are examples, in WTO dispute settlement, of panels and/or the Appellate Body having made findings with respect to measures that were no longer in effect. Does the US consider that the nature of Article 21.5 proceedings warrants a different outcome in the situation of measures no longer in effect in the present dispute? If so, why?

74. The parties do not disagree as to the existence of a measure taken to comply in respect of the antidumping duty determinations revoked after panel establishment; nor do the parties disagree that as a result of the revocation the United States is in compliance with its WTO obligations. The EC acknowledges that the determinations in question have been revoked.[58] There therefore does not appear to be a "disagreement" within the meaning of Article 21.5 with respect to these measures.

75. The EC argues, however, that findings are necessary to "secure a positive solution to this dispute."[59] Yet the EC does not explain how, given the facts presented, findings would in fact lead to a "positive solution" to the dispute. The EC has not disputed that this order cannot be revived. Even if the United States were to undertake a new antidumping investigation of the same product from the same country, that order would be based on a different time period. Moreover, in light of the U.S. abandonment of zeroing in investigations using the average-to-average comparison, it is clear that legally significant methodological differences would exist. Thus, while the EC has justified its request on the basis of securing a positive solution to this dispute, the EC has failed to explain how findings would lead to such a solution in respect of a measure that is, simply, dead.

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[57] EC First Written Submission, para. 103. In this regard, the EC's request differs from that of Canada in *Australia – Salmon (Article 21.5)*. In that dispute, Canada took the position that no measures to comply existed at the conclusion of the reasonable period of time (rather than *between* two particular dates). *See Australia – Salmon (Article 21.5),* para. 7.23. Here, however, the EC has taken pains to make it clear that it is not requesting a finding that no measures to comply existed at the conclusion of the reasonable period of time, but rather it is requesting a finding that no measure taken to comply existed *between* two dates. In this context, the EC request is perplexing.

[58] EC Rebuttal Submission, para. 132.

[59] EC Oral Statement, para. 83.

Q28. EC, US: Is it your view that a proper interpretation of a Member's obligation to implement in the context of a dispute involving AD measures must ensure that a "level playing field" exists between retrospective duty assessments systems, prospective duty assessment systems, and prospective normal value systems? If so, what is the extent of such a "level-playing field"? What importance must the Panel accord to the Anti-Dumping Agreement's recognition of these different types of duty assessment systems?

76. A proper interpretation of a Member's implementation obligations requires that retrospective duty assessment, prospective duty assessment, and prospective normal value systems be placed on a "level playing field," unless the Agreement expressly provides otherwise.

77. Article 9 of the Antidumping Agreement recognizes that a Member may adopt one of three types of system: retrospective duty assessment, prospective duty assessment, and prospective normal value systems. The Appellate Body has stated, "The Anti-Dumping Agreement is neutral as between different systems for levy and collection of anti-dumping duties."[60] The Appellate Body continued, stating that the Antidumping Agreement does not favor one system over the other, or place one system at a disadvantage.[61]

78. Article 9.3.1 specifically notes that *final liability* in a retrospective system occurs some time after importation. That is why it is a "retrospective" system. By contrast, Article 9.3.2 contains no such language in respect of prospective duty assessment system. That is because there is no distinction between potential and final liability in such systems. They are the same, and that liability attaches at the time of importation. A Member with a prospective ad valorem system or a prospective normal value system will never send out assessment instructions *after* importation. The gap between the entry of the good and the calculation of final liability simply does not arise under such systems.

79. Neither the Agreement, nor the DSU, authorizes different implementation obligations in respect of these types of systems. Yet if the issuance of assessment or liquidation instructions *after* the RPT forms the basis for implementation obligations, retrospective systems will be subject to very different and more extensive implementation obligations than prospective duty assessment and prospective ad valorem systems.

Q29. EC, US: What is the relevance, if any, of the principles underlying the transitional provisions of Article 18.3 of the Anti-Dumping Agreement to the question of the "temporal" aspect of a Member's obligation to "implement" under Article 21.5 DSU in the anti-dumping context? Are

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[60] *US – Zeroing (Japan)(AB)*, para. 163.
[61] *US – Zeroing (Japan)(AB)*, para. 163.

any other provisions of the Anti-Dumping Agreement or of the DSU relevant to this question?

80. Article 18.3 provides express provisions for the transition to the new rules under the Antidumping Agreement. Article 18.3 does not address the implementation obligations of Members pursuant to the dispute settlement mechanism, nor is it listed as a special or additional rule in Appendix 2 of the DSU. The rules with respect to the implementation of DSB recommendations and rulings are provided for in the DSU. Accordingly, Article 18.3 is not relevant to this dispute.

Q30. EC, US: Assume the DSB has issued a ruling that a Member operating a prospective duty assessment system "bring into conformity" an anti-dumping measure found WTO-inconsistent because the dumping margin was calculated inconsistently with Article 2.2 of the AD Agreement.

a) How should a request for a refund, made after the expiration of the RPT, but concerning imports on which duty in the original, WTO-inconsistent amount was paid before the expiration of the RPT, be handled? Must any refund amount necessarily be calculated on the basis of a new, WTO-consistent calculation of the normal value under Article 2.2 and thus a new dumping margin?

(The Panel notes that it is not, in this question, considering the practice of any particular Member, and is not asking for examples from any Member's experience. Rather, it is seeking a response in light of the obligations imposed by the WTO Agreements on all Members operating prospective duty assessment systems.)

81. As discussed more fully in answer to question 28, relief is prospective. Members are not required to provide refunds for duties collected with respect to entries made prior to the date of implementation of the DSB's recommendations and rulings. Therefore, under the circumstances described by the Panel in this question, a Member using a prospective system would not be obligated to provide a refund for the import occurring prior to the expiration of the RPT.

b) Does the Anti-Dumping Agreement treat administrative review proceedings (under a retrospective duty assessment system) and refund proceedings (under a prospective system) analogously? If it does, how does this impact the resolution of the question of the "temporal" aspect of a Member's obligation to "implement"?

82. Yes, the Antidumping Agreement treats assessment proceedings in a retrospective system and refund proceedings in a prospective system analogously. First, the chapeau of Article 9.3

applies to both provisions: regardless of the system used, the amount of the antidumping duty may not exceed the margin of dumping.

83. Second, pursuant to Article 9.3.1, final liability for antidumping duties must be determined normally within 12 months, and in no case longer than 18 months, after the date on which a request for a final assessment is requested. Similarly, pursuant to Article 9.3.2, when a refund is requested, that refund normally should be made within 12 months, and no later than 18 months, after the request is made. Thus, similar time periods apply to both systems. Similarly, footnote 20, which refers to judicial review proceedings, specifies that observance of the time-limits for both Article 9.3.1 and 9.3.2 may not be possible.

84. Third, both Article 9.3.1 and 9.3.2 recognize that the amount paid upon importation can become the final amount paid. In Article 9.3.1, the timeframe for the determination of *final* liability is triggered by *request* for final assessment. In the absence of such a request, no obligation to engage in the later determination of final liability arises. Similarly, in Article 9.3.2, the timeframe for a refund is triggered by a *request* for a refund.

85. Fourth, Article 9.3.3, which concerns reimbursement when export price is constructed, applies equally to Article 9.3.1 and 9.3.2.

86. Thus, nothing in Article 9 suggests that Members have different obligations in respect of implementation. Indeed, concluding otherwise would lead to a circumstance in which antidumping duty liability under the two systems would differ even though the normal values and export prices were the same.

Q31. EC, US: Assume that a product is imported into Member A after a tariff concession has been negotiated, but before that concession enters into force. Assume the import is not liquidated due to a dispute over classification of the product into a category covered by the concession, and liquidation is suspended during the course of litigation in the domestic courts. The litigation process ends after the entry into force of the new tariff concession, with a conclusion that the product is properly classified into the category covered by the concession.

a) Must Member A apply the newly in force tariff concession to that importation? Why or why not?

87. Assuming that the agreement setting out the new tariff concession does not otherwise provide, Article II of GATT 1994 sets out the obligations concerning the tariff treatment to be afforded imported products from other Members. According to Article II, Member A is not obligated to provide the newly in force tariff concession. Paragraphs (1) and (2) of Article II expressly provide that imported goods are subject to the tariff treatment provided in the Member's

schedule *"on their importation"*[62] into the territory of that Member. Thus, Article II expressly triggers the obligation to provide the tariff treatment set out in the Member's schedule to the importation of the good. It does not refer to liquidation, nor does it link the obligation to provide a particular tariff treatment to a good to the liquidation of an entry. Therefore, liquidation does not provide a basis for triggering the obligation to provide a tariff concession.

Q32. EC, US: If one were to treat the end of the reasonable period of time as analogous to the date of entry into force of a treaty, how would general principles of international law concerning temporal application of treaties under Article 28 of the Vienna Convention suggest that the issues in this case might be resolved? Is the analogy suggested a relevant one? Are there any other principles of public international law that you consider may be relevant to this question?

88. The United States does not consider the analogy particularly helpful. Article 28 concerns the application of an agreement to events occurring prior to the entry into force of that agreement. By contrast, the question here is not one of the consistency with an agreement of actions occurring prior to the entry into force of that agreement, but the question of the nature of the consequences that result where a current action of a Member is found to be in breach and that Member is given a reasonable period of time in which to come into compliance.

Q33. EC, US: Are there any past panel or Appellate Body decisions - not necessarily in anti-dumping disputes, for instance in the field of subsidies - that may provide useful insights as to how the Panel should decide whether the approach to implementation advocated by the EC in this dispute amounts to a retrospective remedy, or not?

89. The United States recalls that the parties to this proceeding all agree that WTO relief is prospective. The question, therefore, is whether relief in respect of entries occurring prior to the expiry of the reasonable period of time would constitute retrospective relief.

90. The panel's reasoning in *EC – Bananas III (Ecuador) (21.5)* supports the U.S. position in this dispute. There, the panel expressly considered the appropriate date for ensuring that relief was *prospective* only. In that dispute, Ecuador argued that the panel had to make certain adjustments in connection with a license regime existing in 1994-1996,[63] and thus predating the end of the reasonable period of time (January 1, 1999) because failure to do so would mean that the regime adopted after the conclusion of the reasonable period of time would have a "carry-over" effect from the prior regime.

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[62] Emphasis added.

[63] *EC – Bananas III (Article 21.5)(Ecuador),* para. 6.91.

91. The panel rejected Ecuador's request. The panel concluded that making adjustments in respect of the period 1994-1996 "would create a retroactive effect of remedies *ex tunc* . . . [I]n our view, what the EC is required to ensure is to terminate discriminatory patterns of licence allocation with *prospective effect* as of the *beginning of the year 1999*."[64] Liquidation instructions issued after the reasonable period of time do not have prospective effect; quite the contrary, they have effect with respect to entries that predated the conclusion of the reasonable period of time. Therefore, the panel's reasoning in that proceeding in the *Bananas* dispute supports the proposition that the terms of reference of a compliance proceeding only include prospective actions taken after the reasonable period of time.

Q34. US: Please comment on Japan's argument, in paragraph 41 of its Oral Statement, that by correcting the importer-specific assessment rate, the US would not be "retrospectively" undoing a legal situation definitively fixed at an earlier point in time because:

- ***the EC's claims focus on situations where liquidation has not occurred by the end of the RPT;***
- ***the EC is not asking for a retrospective reduction in the cash deposits collected; and***
- ***Japan considers that, prior to liquidation, the US has not collected any definitive AD duties so that there is no question of repaying duties already collected on an entry.***

92. As discussed above, liquidation is not a term that appears in the Antidumping Agreement. Article 9.3.1 does refer to final liability and the final assessment of duties. Article 9.3.2 only refers to the assessment of duties. If unliquidated entries connotes entries for which a final assessment has not been made, then the United States notes that nothing in Article 9.3 suggests that the existence of a mechanism for *final* assessment in retrospective duty assessment system imposes *increased* implementation obligations for Members with such systems as compared to Members with prospective duty assessment systems.

93. Assessing a Member's implementation with respect to any particular import by the date of *entry* of that import maintains equality among the systems and is not dependent upon municipal law labels such as "liquidation." Recognizing that it is the date of entry that determines a Member's implementation obligation with respect to any particular import maintains equality among the systems.

94. The EC's position, as reflected in its domestic legislation, is that relief based on WTO dispute resolution need not be granted for importations occurring prior to date of

[64] *EC – Bananas III (Article 21.5)(Ecuador),* para. 6.105 (emphasis added).

implementation.[65] The United States agrees. However, the U.S. position is based on the Antidumping Agreement's treatment of the systems, and not on any label under municipal law.

95. As the question notes, Japan refers (repeatedly) to the *collection* of *definitive* duties. That phrase does not appear in Article 9 (or elsewhere in the Agreement), and Japan has not explained on what basis this phrase is pertinent to the determination of implementation obligations in this dispute.

> ***Q35. US: Does the US concede that it has not implemented the DSB's recommendations and ruling with respect to case 31 (the administrative review determination in respect of NSK's imports)? The Panel recalls that the EC alleges that the cash deposit rate applicable to NSK's entries is still the one that was calculated in the administrative review challenged in the original dispute.***

96. Yes. The cash deposit rate for imports of merchandise manufactured or exported by NSK established by Commerce in its determination from the May 1, 2000 through April 30, 2001 administrative review of Ball Bearings from the United Kingdom[66] remains in effect. This was one of the determinations challenged by the EC in the original dispute.

> ***Q40. US: Please comment on Japan's argument in paragraph 20 of Japan's Oral Statement, that the United States has to ensure that any administrative review (and presumably sunset review) dealing with imports that had occurred by the end of the reasonable period of time has to comply with the DSB recommendations and rulings. Please consider, in particular, the following statement of Japan: "Likewise, having initially failed to comply with Article 9.3, the United States is not exonerated from its duty to bring the periodic reviews into conformity with Article 9.3 simply because, at the time of importation, its respected the provisions it cites".***

97. Japan appears to misunderstand the U.S. argument. The United States referred to certain provisions in the GATT and the Antidumping Agreement to demonstrate that the basis for evaluating compliance in respect of duties (including antidumping duties) depends on the date of entry of the merchandise, not the date the liquidation instructions were issued. The United States did not cite those provisions as evidence of compliance; indeed, the point is that, for purposes of complying with the recommendations and rulings in this dispute, those entries are irrelevant.

98. To conclude otherwise would disadvantage retrospective systems. Japan contends that the provisions the United States cited establish that importation of goods is an event that triggers

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[65] *See* Exhibit US-34.

[66] Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews, 67 Fed. Reg. 55780 (August 30, 2002) (Exhibit US-35)

"*potential* liability" to pay antidumping duties.[67] That is only true of retrospective systems. Indeed, that is the main distinction between retrospective and prospective systems, as reflected in the text of Article 9.3.1 and 9.3.2. Article 9.3.1 provides:

> When the amount of the anti-dumping duty is assessed on a retrospective basis, the determination of the *final* liability for payment of anti-dumping duties shall take place as soon as possible . . . after . . . a request for a final assessment . . . has been made. (Emphasis added.)

By contrast, Article 9.3.2 contains no reference to "final liability." Instead, it states:

> When the amount of the anti-dumping duty is assessed on a prospective basis, provision shall be made for a prompt refund . . . of any duty paid in access of the margin of dumping.

As the original Panel noted, in the U.S. retrospective system, duties are not *assessed* at the time of entry.[68] Thus, only in retrospective system does entry of a good trigger *potential* liability, because only in retrospective system can *final* liability be determined at a later date. Panels – including the original Panel here – have recognized that this feature is unique to retrospective systems.[69]

99. Japan's position would impose greater obligations on retrospective systems than prospective systems, with no textual justification for the disparate treatment. The Appellate Body has rejected such an approach, stating that the "Anti-Dumping Agreement is neutral as between different systems for levy and collection of anti-dumping duties."[70]

> ***Q41. US, EC: Please comment on the proposition that either (i) the determination in an original investigation or the determination in a review (administrative, sunset, changed circumstances, or new shipper), can be considered a "final action ... taken... to levy definitive anti-dumping duties" under Article 17.4 of the Anti-Dumping Agreement, or (ii) the final assessment or collection of an amount of duty can be such a final action, but not, with respect to the same import transactions, both a determination in (i) and a determination in (ii).***

100. The United States considers that "final action . . . taken . . . to levy definitive anti-dumping duties" occurs when a final affirmative determination is made at the conclusion of an investigation. Thus, a Member may not refer a matter to the DSB *prior* to the issuance of a final affirmative determination in an investigation. Thus, final assessment is not in and of itself final action taken to

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[67] Japan Oral Statement, para. 18.
[68] Panel Report, para. 2.4.
[69] *See, e.g.*, panel report para 2.4; *EC – Salmon*, para. 7.744.
[70] *US – Zeroing (Japan) (AB)*, para. 163

levy an antidumping duty, within the meaning of Article 17.4, but it can be part of the matter referred to the DSB, if the measure in question is so specified in the consultation request.

Q46. EC, US: Is the error alleged by the EC "separable" from the Section 129 determination such that the Panel may consider that it is not part of the "measure taken to comply"? If so, why? Please discuss in light of the relevant WTO jurisprudence, in particular EC - Bed Linen (21.5).

101. Yes, the alleged error in Stainless Steel Sheet and Strip in Coils from Italy is "separable."

102. In *EC – Bed Linen (Article 21.5)*, India had challenged an EC antidumping determination. The panel made adverse findings against certain aspects of the determination. The panel did not make adverse findings about the EC's analysis of "other factors" in accordance with Article 3.5 of the Antidumping Agreement. The EC sought to comply with the DSB recommendations and rulings by issuing a redetermination. The EC included in that redetermination its original "other factors" analysis. India then sought to challenge the "other factors" analysis when it brought an Article 21.5 proceeding against the EC.

103. The Appellate Body, upholding the panel's finding, rejected India's attempt to include the "other factors" analysis as part of the measure taken to comply. The Appellate Body found that the EC had not been obligated to modify the "other factors" analysis as a result of any of the DSB's recommendations and rulings.[71] The Appellate Body summarized the situation by noting that "India seeks to challenge an aspect of the original measure which has not changed, and which the European Communities did not have to change, in order to comply with the DSB recommendations and rulings to make that measure consistent with the European Communities' WTO obligations."[72]

104. *EC – Bed Linen* stands for the proposition that the mere fact that a particular analysis is incorporated into a redetermination does not render that analysis part of the measure taken to comply. "Separability" is analyzed in the context of the recommendations and rulings. Here, the United States was obliged to recalculate the margin of dumping without zeroing, and the United States did so. The alleged error related to the use of facts available with respect to certain transactions the exporter failed to report and had nothing to do with the recommendations and rulings in this dispute, which were limited to the use of zeroing.

Q47. EC, US: The Panel notes that the panel and Appellate Body reports cited by the EC in footnote 97 to its Rebuttal concerned original disputes, not Article 21.5 proceedings. Please discuss whether the fact the present dispute is an Article 21.5 dispute raises different considerations that may justify that the Panel not rule on measures that are no longer in effect?

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[71] *EC – Bed Linen (21.5) (AB)*, para. 86.
[72] *EC – Bed Linen (21.5) (AB)*, para. 87.

105. The EC cited, among other reports, *Indonesia – Autos*. In that dispute, the panel noted that "any revocation of a challenged measure could be relevant to the implementation stage of the dispute settlement process" and for that reason considered that it was "appropriate for us to make findings"[73] in respect of the revoked measure. Thus, the panel in that dispute made findings during an original proceeding because such findings could be relevant for purposes of a future compliance proceeding. Here, this proceeding is the compliance proceeding. Thus, the logic of making findings in an original proceeding because of potential relevance in an implementation proceeding does not offer a rationale for making findings in the implementation proceeding itself.

106. Similarly, the EC cited *Chile – Price Band,* also an original dispute. There, the panel stated that it would not be prevented from making findings in respect of an expired measure "if we were to consider that the making of such findings is necessary 'to secure a positive solution' to the dispute."[74] The EC has argued that it considers findings in respect of the revoked measure necessary to secure a positive solution to the dispute – but the EC has never explained why.[75]

Q48. US: Please confirm the factual accuracy of the EC's assertion, in paragraph 125 of its Rebuttal, that under US law, AD measures may be reintroduced in case the USITC sunset review determination revoking the underlying AD order is overturned on appeal.

107. On March 31, 2008, the U.S. Court of International Trade, at the domestic industry's request, dismissed the domestic court case challenging the USITC's sunset review determinations with respect to the antidumping duty orders on Stainless Steel Bar from France, Germany, Italy and the United Kingdom.[76] This dismissal permanently terminated all domestic litigation relating to the ITC sunset determination. Under U.S. law, the revocation of the antidumping duties on stainless steel bar from France, Germany, Italy, and the United Kingdom is therefore "final and conclusive," and may no longer be appealed. Because the underlying antidumping duty orders cannot be reintroduced, the EC's assertion is moot.

Q49. EC, US: What significance must be given, in the resolution of the matter before the panel, to the fact that the prohibition contained in Article 9.4 is expressed in terms of a ceiling for the anti-dumping margin that may be applied to imports from exporters or producers not individually examined?

108. Article 9.4 provides a "ceiling" to the amount of the antidumping duty that may be applied to companies that have not been individually investigated when a Member has limited its investigation pursuant to Article 6.10. That is, the amount of the antidumping duty applied to

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[73] *Indonesia – Autos*, para. 14.9.

[74] *Chile – Price Band*, para. 7.112.

[75] EC Oral Statement, para. 83.

[76] *See Carpenter Technology Corp., et al. v. United States*, Ct. No. 08-00082, Notice of Dismissal (Ct. Int'l Trade March 31, 2008) (Exhibit US-33).

non-investigated companies is based on the results of other companies. In order to determine this "ceiling," certain results from the investigated companies must be excluded; namely zero and *de minimis* margins and margins based on the application of Article 6.8. However, when the only margins from investigated companies are zero or *de minimis* or based on an application of Article 6.8, this simply means that a ceiling cannot be determined pursuant to Article 9.4 A Member may still apply an antidumping duty to the non-investigated companies, and under the general principles of Article 9.4, that amount may be based on the results of other companies.

Q50. EC, US: Please discuss, with respect to the EC's claims that the "all others" rates recalculated in certain Section 129 determinations are inconsistent, inter alia, with Article 9.4 of the Anti-Dumping Agreement, the principles that should guide a WTO panel in resolving the interpretation issue raised by the existence of a lacuna in one of the covered agreements. Please indicate, in particular, whether you consider that it would be appropriate for a WTO panel to assess the "reasonableness" of an allegedly WTO-inconsistent measure in resolving a dispute involving a provision of a WTO Agreement containing a lacuna. If so, what is the legal basis for this view, and what criteria or parameters should guide a panel in this assessment?

109. Where a lacuna exists in the covered agreements, the Members have not agreed to be bound by any specific obligation. The Panel should be guided by Article 3.2 of the DSU, which provides, "Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements." Accordingly, the Panel should not find an obligation where none exists. In addition, the Panel should be guided by Article 11 of the DSU, which provides that the Panel "should make an objective assessment of the matter before it . . . ."

110. Moreover, the Appellate Body has confirmed that the "principles of interpretation [referred to in DSU Article 3.2] neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended."[77]

111. The Panel should be guided by those provisions of the covered agreements that address the establishment of the "all others" rate in general. The Ad Note 1 to paragraphs 2 and 3 of Article VI of the GATT 1994, for example, provides that "a contracting party may require reasonable security (bond or cash deposit) for the payment of anti-dumping or countervailing duty pending final determination of the facts of any case of suspected dumping or subsidization." Moreover, Article 9.4 of the Antidumping Agreement provides that when a Member has limited its investigation in accordance with Article 6.10, the Member may establish an "all others" rate to apply to those exporters or producers who were not investigated. Thus, in a retrospective system such as that of the United States, the "all others" rate calculated in an investigation serves as the basis for

[77] *India – Patent Protection (US) (AB)*, para. 45.

calculating security for the payment of antidumping duties for those companies that have not been individually investigated.

112. Article 9.4 also establishes that the "all others" rate cannot be arbitrary. Rather, a Member may apply an antidumping duty to non-investigated companies based upon the results of the exporters and producers who have been investigated. Article 9.4 does not specifically provide for the situation where the only margins of dumping calculated in an investigation are either zero and *de minimis* or calculated in accordance with Article 6.8. Thus, in such a situation, the "ceiling" to be applied to the non-investigated companies cannot be determined by the specific methodology set forth in Article 9.4.

Q51. EC, US: With respect to the EC's claims regarding "injury" (cases 2, 3, 4 and 5), the Panel understands the parties to agree that the EC made a similar claim before the original panel and that the original panel refrained from making a finding in this respect. Is the situation in the present case distinguishable from that in US - OCTG Sunset Reviews (21.5), in which the Appellate Body indicated that a Member may, before an Article 21.5 panel, repeat a claim with respect to which the original panel exercised judicial economy?

113. The United States considers that the original panel did *not* refrain from making findings concerning the EC's claim. Rather, the panel made the very specific finding that "[d]eciding [claims concerning Articles 3.1, 3.2, 3.5, and 5.8] "would provide no additional guidance as to the steps to be undertaken by the United States in order to implement our recommendation regarding the violation upon which it is dependent."[78] The EC's suggestion that the original panel did not consider the merits of the injury claims is inconsistent with these findings. The statement by the panel indicated not that it declined altogether to examine the injury claims, but instead that it found that no change to the original injury determination was necessary to effect implementation. For, if the original panel believed that the United States was obligated to conduct a new injury analysis in the light of revised volumes attributable to non-zeroed margins of dumping, then it would have been necessary for the panel to decide those claims in order to provide additional guidance as to the steps the United States had to undertake. Then the United States would have been on notice that the original panel considered the reconsideration of aspects of the injury analysis to be the necessary result of the change in dumped imports.

114. Irrespective of how one characterizes the findings of the original panel with respect to the injury claims, the United States respectfully disagrees that in the dispute *US – OCTG from Argentina (21.5)*, the Appellate Body "indicated that a Member may, before an Article 21.5 panel, repeat a claim with respect to which the original panel exercised judicial economy." In that compliance dispute, the Appellate Body simply observed that the "participants have characterized the original panel's approach as an exercise of judicial economy. We do not express a view on

[78] Panel Report, para. 7.34.

whether this is a proper characterization of the approach taken by the original panel."[79] Thus, the Appellate Body did not opine as to whether the original panel had exercised judicial economy, let alone conclude that a Member may repeat a claim with respect to which the original panel exercised judicial economy.

115. In fact, the pertinent aspects of the OCTG dispute are easily distinguishable from the circumstances of the dispute at issue here. In *US – OCTG from Argentina*, the original panel concluded that the determination breached Article 11.3 because, as the Appellate Body put it, the determination lacked a "proper factual basis."[80] That factual basis had two aspects, and the original panel only identified the flaws in one of the two. Argentina requested the panel to make findings regarding the second factual basis. However, the original panel rejected that request, noting that it had addressed the *claim* and that further findings were therefore unnecessary.[81] The United States corrected the factual basis the original panel had found to be flawed but did not correct the factual basis for which the original panel had made no findings. The compliance panel considered that the second, unchanged factual basis was within the scope of the Article 21.5 proceedings. The Appellate Body agreed, noting that the original panel had addressed the claim, that it had found the determination to lack a proper factual basis, and that the measure taken to comply continued to lack a proper factual basis.[82]

116. The situation in the present dispute is different. Here, the original panel did not find a breach in respect of the *claims* at issue. Rather, as noted above, the original panel did *not* find that the United States was in breach of the cited provisions of Article 3 or Article 5 and further found that deciding such claims would not provide guidance in terms of implementation. As noted above, that can only be true if the original panel considered that the United States was under no obligation to conduct its injury analysis anew. The original panel's findings in respect of those claims thus led to no recommendations and rulings with which the United States would need to comply. The EC claims with respect to injury thus do not fall within the scope of DSU Article 21.5, and therefore cannot be litigated (or re-litigated) in a compliance proceeding. Indeed, the EC has provided no textual basis for its assertion that the United States was obligated as a matter of implementation to conduct its injury analysis anew where there were no recommendations and rulings concerning the injury claims.

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[79] *US – OCTG from Argentina (Article 21.5)(AB)*, para. 148.

[80] *US – OCTG from Argentina (Article 21.5)(AB),* para. 150.

[81] *US – OCTG from Argentina (Panel)*, para. 6.11. The panel stated: "As far as legal findings are concerned, we note that we have decided Argentina's claim regarding the USDOC's likelihood determinations in the OCTG sunset review. We have found that the USDOC's reliance on the existence of the original dumping margin was inconsistent with Article 11.3 of the Anti-Dumping Agreement. We therefore did not need to address whether the USDOC's reliance on declined import volumes was yet another action inconsistent with that article."

[82] *US – OCTG from Argentina (Article 21.5)(AB),* para. 150.