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

COMMENTS OF THE UNITED STATES ON THE REPLIES OF THE EC TO THE QUESTIONS FROM THE PANEL

May 15, 2008

B. PANEL'S TERMS OF REFERENCE (SCOPE OF THESE ARTICLE 21.5 PROCEEDINGS)

Q2. EC: How does the EC reconcile its argument that subsequent reviews were covered by the original dispute as "amendments" to the measures challenged in the original dispute with the fact that:

> ***a) with respect to some of the measures challenged in the original dispute, the EC's panel request in the original dispute referred to "amended" determinations, notably in the form of amendments to correct for ministerial errors (cases 1, 3, 4, 9, 19, 25, 26, 28).***

1. Despite the eight paragraphs written by the EC concerning Question 2, the EC does not actually reply to the question asked. The Panel asked how the EC justifies construing the term "amended," as used in the panel request, to include subsequent reviews, when the identical term in the original panel request referred exclusively to determinations as amended under U.S. law – which does not include subsequent reviews. Although the question clearly, and properly, refers to the panel *request,* not the panel report, the EC repeatedly refers to the panel report, as if the panel report can expand the scope of the measures challenged. The EC does not identify a single instance in which the term "amended," as used in the original panel request, refers to subsequent reviews.[1] These omissions demonstrate that the EC cannot reconcile its current argument regarding subsequent reviews with the manner in which it referred to "amended" determinations in its original panel request.

2. The United States notes that the EC does not merely attempt to rely on the panel report to support its argument that the terms of reference include "subsequent reviews," but the EC actually attempts to *diminish* the relevance of the original panel request. The EC criticizes the United States for attempting to "revert to the original Panel request."[2] However, this suggests that the EC believes that the measures described in the panel report and the panel request *differ.* However, under Article 7 of the DSU, the matter to be examined by a panel is the matter referred to in the panel request, and that matter cannot be modified by the panel report.

3. Therefore, the EC is asking the Panel to accept that there is a *difference* between the scope of the original panel request and the panel report, and that the panel report *expanded* the terms of reference of the original proceeding. The U.S. position, by contrast, construes the panel report, which refers to "any amendments," and the panel request, which uses the term "amended' in a specific manner, as coterminous. The U.S. position is consistent with Article 7 of the DSU; the EC's position is not.

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[1] Indeed, the EC provides no citation for its assertion that the panel report has already disposed of this issue, nor specific cross-references to its prior written submissions.

[2] EC Replies to the Panel's Questions, para. 3.

4. The United States would further note that the EC's discussion of the original panel request is relevant for the Panel's consideration of the terms of the reference set out in the EC's Article 21.5 panel request. The EC has confirmed that it does not consider a panel request to form the basis for a panel's terms of reference. Instead, according to the EC, a complaining party may modify the terms of reference if it can lead a panel, knowingly or otherwise, to reflect that modification in its report.[3] In the view of the United States, this is what the EC has attempted to do in *this* proceeding. The Article 21.5 panel request clearly identifies the measures at issue as being the 31 "as applied" measures identified in the original proceeding, rather than any "subsequent reviews." However, the EC attempts to use its subsequent submissions in this proceeding to modify the terms of reference of the dispute. Article 7 prohibits the EC from doing so.

5. Finally, the United States regrets the tone and word choice in the EC's answer, which suggests that the United States is not acting in good faith[4] but instead is acting in an "unlawful" manner.[5] The United States and the EC in the past have both understood that such rhetoric neither facilitates the settlement of a dispute nor assists a panel in the completion of its task. The United States looks forward to returning to a state of affairs in which that understanding prevails

> ***b) the EC's panel request in the original dispute specifically listed different determinations in a same AD "investigation" (AD measures on a specific product from a given EC Member State) as different "cases" (for instance, cases 21 and 22 are the administrative reviews that, following the EC's argument, "amend" the determination in the original investigation listed as case 11 (Stainless Steel Sheet and Strip in Coils from Italy), the same is true, for the administrative reviews listed as cases 25 and 26 with respect to case 10, for the administrative reviews listed as cases 19 and 20 with respect to case 15, and for the administrative review listed as case 18 with respect to case 9. If the administrative reviews listed in Annex II were "amendments" to the original investigations listed in Annex I, why did the EC consider it either necessary or appropriate to list them separately as "administrative reviews"? Why did the EC list subsequent administrative reviews in the same "investigation" as distinct "cases"?***

6. The EC's answer in respect of the relationship between investigations and reviews reinforces that these are distinct proceedings subject to distinct obligations. The EC states that it distinguished investigations and reviews because of the claims at issue.[6] However, multiple

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[3] EC Replies to the Panel's Questions, para. 3.
[4] EC Replies to the Panel's Questions, para. 4.
[5] EC Replies to the Panel's Questions, para. 1.
[6] EC Replies to the Panel's Questions, para. 1.

claims can be advanced in respect of *one* measure. Therefore, that response does not explain why the EC listed investigations and reviews separately, as well as multiple reviews relating to the same order.

7. The EC also states that it identified investigations and reviews separately in the Annexes "in order to allow for a separate examination of the measures . . . ."[7] This confirms that the *measures* in question were the individual determinations set out in the Annexes, rather than each antidumping "order."

8. Further, the EC answer never addresses the question of why it identified multiple reviews relating to the same order, each as a distinct case. The question clearly asked the EC to provide an explanation, referring expressly to "administrative reviews listed as cases 25 and 26 with respect to case 10 . . . administrative reviews listed as cases 19 and 20 with respect to case 15." The EC's inability to answer the question confirms that the EC distinguished these reviews because it considered them each to be a measure and that, in fact, it never challenged the underlying order as a "measure."

9. In fact, the EC's reference to Section 3.2 of its original panel request undermines its argument that the original panel request challenged the order, rather than each investigation and review individually.[8] Had the EC in fact been challenging the order, it would have been unnecessary to specify (1) DOC determinations; (2) ITC determinations; (3) original investigations; and (4) the outcome of administrative reviews "as detailed in the annexes."

10. The EC's original panel request supports the U.S. position: In that request, the EC treated each investigation and each review as a separate measure. In its panel request, the EC did not challenge orders, and there is no basis for the EC's assertions to the contrary.

> ***Q3. EC: Please explain how the EC reconciles its argument that subsequent reviews whose determination was not in existence at the time of the original dispute are covered as "amendments" to the measures at issue in the original dispute with the fact that the only findings in the original dispute concerning administrative reviews were "as applied" findings – and thus were, presumably, findings with respect to measures that existed at the time of the original dispute.***

11. The EC's answer asks the *Panel* to abandon the "as applied" and "as such" distinction.[9] The EC attributes that distinction to the United States.[10] However, the briefest review of the

[7] EC Replies to the Panel's Questions, para. 9.
[8] EC Replies to the Panel's Questions, para. 10.
[9] EC Replies to the Panel's Questions, para. 14.
[10] EC Replies to the Panel's Questions, para. 14.

EC's original panel request, and its answer to the previous question, exposes the fact that it is the EC that invoked the distinction between measures challenged "as such" and those challenged "as applied." Thus, paragraph 3.1 of the EC's original panel request is entitled "**As such claims**," and paragraph 3.2 is entitled "**As applied claims**." The United States pointed this out at the meeting of the Panel with the parties, yet the EC persists in attributing this distinction to the United States.

12. Not only did the EC invoke this distinction, but both the original panel and the Appellate Body adopted it, and the distinction therefore informs the recommendations and rulings with which the United States was tasked with complying. Thus, in paragraph 263(c) of its report, the Appellate Body "finds that it is unable to complete the analysis to determine whether the zeroing methodology, as it relates to administrative reviews, is inconsistent, *as such* . . . ."[11]

13. An Article 21.5 proceeding calls for an evaluation of a Member's compliance with the DSB's *actual* recommendations and rulings, and not recommendations and rulings that the complaining party wishes that the DSB had made. In this dispute, the DSB's recommendations and rulings clearly distinguish between the "as applied" findings and the "as such" findings. In this compliance proceeding, the EC is not free to ignore the distinction that the EC proposed and the DSB accepted, but which the EC now would prefer to reject.

14. Finally, the EC argues that the "whole series of findings of instances of application of [the] methodology"[12] authorizes the Panel to make findings in respect of reviews other than those for which the as applied findings were made in the original proceeding. However, the Appellate Body considered that the same evidence regarding instances of application did not suffice to allow it to complete the analysis and make the "as such" findings that the EC expressly sought in its panel request. The EC is simply asking the Panel to disregard the rulings in the original proceeding.

15. With respect to the EC's arguments about subsidy programs, the EC makes the unsupported assertion that a subsidy program and an antidumping duty order are similar for 21.5 purposes, but that is an assertion, not an argument. Specifically, the United States notes that *US – Upland Cotton (Article 21.5)* does not support the EC's position. That report 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. The United States further notes that *US – Upland Cotton (Article 21.5)* has not been adopted and is currently on appeal.

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[11] Emphasis added.

[12] EC Replies to the Panel's Questions, para. 15.

Q4. EC: Please explain why the Panel should consider determinations pre-dating the EC's panel request in the original proceeding as either "amendments" to the measures at issue in the original proceeding or "measures taken to comply". How should the Panel read the non-inclusion of such determinations in the EC's panel request in the original dispute in light of the fact that the EC challenged a set of precisely identified determinations in that request? Noting that, during the meeting, the EC referred in addressing this question to the request for consultations, could the EC please explain the relevance of the date of the request for consultations?

16. The EC makes clear that the success of its argument in response to this question depends on its ability to persuade the Panel that the phrase "any amendments" as used in the original panel report refers to "subsequent reviews."[13] The United States has already addressed the flaws in this argument and will not repeat itself here, except to note the following.[14] Examining the determinations of Stainless Steel Sheet and Strip in Coil from Italy, the United States notes that the EC's original panel request mentions two separate reviews for Stainless Steel Sheet and Strip in Coils from Italy – cases 21 and 22. Yet the EC now argues that there is a third review that was part of the original panel request, even though the third review was not listed. In fact, the EC argues that the third review is captured by the second review – case 22, according to footnote 9 of the EC's Answers. This answer raises more questions than its answers. Why case 22? Why not case 21? Why list both case 22 and case 21 if case 21 would have captured both case 22 and the third, unlisted review? This example highlights the implausibility of the EC's theory that its panel request did not identify specific, discrete reviews as measures, but instead identified as measures all reviews – both past and future – relating to a single order.

17. At the meeting of the Panel with the parties, the EC suggested that its failure to identify the pre-panel-request reviews was attributable to the fact that some of them were published very close in time to the original panel request. We fail to see why – given the transparency of U.S. antidumping proceedings – it would be difficult for a Member such as the EC to include in its consultation request a measure that was published at any time before the consultation request was submitted. Further, the United States notes that the EC had already revised its panel request once, and sees no reason why the EC could not have amended its panel request a second time. However, more importantly, the EC's response clarifies that the EC did not simply fail to include determinations issued near the time of the filing of the EC's (revised) original panel request, but also determinations issued three to eight months *prior* to the filing of the revised original panel request.[15] Thus, while it may not be "surprising that something published on 10 February 2004 . . . was not included in the Panel Request . . . dated 16 February 2004," that argument, to

[13] EC Replies to the Panel's Questions, para. 16.

[14] *See, e.g.*, U.S. Rebuttal Submission, paras. 18-24.

[15] *See* EC Replies to the Panel's Questions, n.9. The EC lists determinations published in June, July, and December of 2003.

the extent it has merit, is unavailing in respect of the determinations issued on June 16, 2003, July 24, 2003, December 12, 2003, and certainly for the determination dated February 21, *2001*. While three days may be insufficient time for the EC to peruse the Federal Register and modify its panel request accordingly, presumably *three years* is adequate.

18. The EC's reliance on *Brazil – Aircraft* and *US – Certain EC Products* is unavailing. While a measure that has changed since the request for consultations may nevertheless, in certain circumstances, be included within a panel request and thus within the terms of reference of a dispute, the considerations discussed in those two reports are by no means applicable here. An assessment review – in which the Department of Commerce examines different imports, over a different time period, and possibly with different companies – is in no plausible sense the same measure, unchanged in its essence from the original investigation or a prior assessment review. However, an entirely new determination is not an amendment or modification of a measure. It is an entirely new measure.

19. Finally, the EC posits that "administrative reviews pre-dating the original Panel Request are 'measures taken to comply' with the DSB's recommendations and rulings in the original measure . . . ."[16] This logic of this argument is elusive. According to the EC, the United States began taking measures to comply in 2001 – three years before dispute settlement proceedings involving zeroing in reviews had even been initiated. In the absence of clairvoyance, it is difficult to see how those measures could have been taken "to comply" within the meaning of Article 21.5 of the DSU.

> ***Q5. EC: Please identify, for each "subsequent review" referred to in the last column of the Annex to the EC's Article 21.5 panel request, the precise "implementation" issues that arise. To that effect, please provide, as applicable, the following information for each such review, by filling out the table attached as Annex A:***
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> ***a) The date of initiation of the review;***
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> ***b) The companies concerned by the review;***
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> ***c) Whether there were unliquidated duties (if so, please provide an approximate value of such unliquidated duties), for the entries covered by the review, as of:***
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> ***- The end of the reasonable period of time (9 April 2007);***
>
> ***- The date of the establishment of the Panel (25 September 2007);***
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> ***- The most recent information available.***
>
> ***d) Whether there were ongoing judicial proceedings with respect to duties associated with entries covered by the review, as of:***
>
> ***- The end of the reasonable period of time (9 April 2007);***

[16] EC Replies to the Panel's Questions, para. 21.

- ***The date of the establishment of the Panel (25 September 2007);***
- ***The most recent information available.***

20. In response to question 5, the EC makes various excuses as to why it cannot furnish the Panel with all of the information that has been requested. However, as the complaining party, it is the EC's burden to provide sufficient evidence to support its claims.[17] It is insufficient for the EC to rely on sweeping, generalized arguments concerning whether the United States has implemented the DSB's recommendations and rulings.

21. While the EC complains of the "very short time limits" it had to respond to this question,[18] in fact, the EC should have had this information at the ready from the outset of this proceeding. That the EC did not have this information tends to confirm the U.S. interpretation of the EC's panel request in this proceeding as pertaining *only* to the 31 determinations at issue in the original proceeding.

22. Turning to the specific information provided by the EC, the EC contends that litigation is ongoing concerning Commerce's determination in the 2002-03 administrative review of Certain Hot-Rolled Steel from the Netherlands.[19] This is not accurate. The U.S. Court of Appeals for the Federal Circuit issued its decision on September 21, 2007.[20] Pursuant to the rules of the U.S. Supreme Court, the aggrieved party had 90 days from the entry of judgment in which to seek further review from the Supreme Court by applying for a writ of certiorari.[21] Corus Staal did not do so. Accordingly, the Federal Circuit's decision is final and conclusive. There is no ongoing litigation concerning Commerce's determination of the amount to be assessed in this review.

23. The EC contends that the liquidation of $1.5 million of entries of hot-rolled steel from the Netherlands made during the 2002-03 period of review is not final because the protest period is still open. In making this claim, the EC misunderstands U.S. Customs law.

24. Pursuant to U.S. Customs law, liquidation is "the final computation or ascertainment of the duties . . . accruing on an entry."[22] Liquidation by CBP is "final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed . . . ."[23] However, the scope of a protest is limited to challenging decisions made by CBP.[24] In this regard, CBP plays only a ministerial role in the liquidation of antidumping duties as directed by

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[17] *Chile – Price Band System (Article 21.5) (AB)*, para. 134.
[18] EC Replies to the Panel's Questions, para. 22.
[19] EC Replies to the Panel's Questions, Annex A.
[20] *Corus Staal BV v. United States*, 502 F.3d 1370 (Fed. Cir. 2007) (Exhibit US-36).
[21] U.S. Supreme Court Rule 13 (Exhibit US-37).
[22] 19 C.F.R. § 159.1 (Exhibit US-38).
[23] 19 U.S.C. § 1514(a) (Exhibit US-39).
[24] 19 C.F.R. § 174.11 (Exhibit US-40).

Commerce.[25] Accordingly, determinations regarding the amount to be assessed as antidumping duties are not decisions by CBP and are not protestable.

25. Certain parties may be filing protests under U.S. law after liquidation has become final. Those protests can only challenge CBP actions, and not the antidumping duty assessment rate. In the case of the 2002-2003 administrative review of Hot-Rolled Steel from the Netherlands, the issue of whether it is appropriate under U.S. law to assess antidumping duties on these entries has already been decided by the U.S. courts.[26] This issue cannot be revisited in a customs protest.[27] Therefore, upon the completion of the litigation concerning that review, the antidumping duty assessment rate became final and conclusive.

26. The EC similarly notes that liquidation has been protested in connection with the 2005-06 administrative review of Stainless Steel Bar from the United Kingdom. However, as noted above, protests cannot be used to challenge Commerce decisions in administrative reviews. They can only be used to challenge *Customs* determinations. The amount of antidumping duties to be assessed is a determination made by Commerce, and the antidumping duty assessment rate is final and conclusive.

> ***Q6. EC: With respect to the sunset reviews identified in the last column of the EC's Article 21.5 panel request, please indicate, for each sunset review, whether the likelihood-of-dumping determination in the sunset review at issue relies on dumping margins calculated (with the use of zeroing) in the original investigation or on dumping margins calculated (with the use of zeroing) in an administrative review. If the latter, please indicate whether the margins relied upon are those calculated in the administrative review determination challenged in the original dispute, or a subsequent administrative review. Please provide, for each sunset review, and unless the EC has already done so, the relevant Federal Register Notice and Issues and Decision Memorandum.***

27. The EC's answer demonstrates a fundamental misunderstanding of the nature of Commerce's determinations in sunset reviews.[28] Under U.S. law, Commerce's determinations in sunset reviews serve two purposes. First, Commerce determines whether the revocation of the antidumping duty order would likely lead to the continuation or recurrence of dumping.[29] Second, Commerce reports to the ITC the margin of dumping that is likely to prevail if the order

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[25] *See Koyo Corp. v. United States*, 497 F.3d 1231, 1242 (Fed. Cir. 2007) (Exhibit US-41); *Mitsubishi Elec. Am. v. United States*, 44 F.3d 973, 977 (Fed. Cir. 1994) (Exhibit US-42).

[26] *Corus Staal BV v. United States*, 502 F.3d 1370, 1375 (Fed. Cir. 2007) (Exhibit US-36).

[27] *See* 19 C.F.R. § 174.11 (Exhibit US-40).

[28] This misunderstanding concerning the margin likely to prevail is also evident in Norway's answer to Question 6 to the Third Parties. Norway, Answers to the First Set of Questions from the Panel to the Third Parties, p. 6.

[29] 19 U.S.C. § 1675a(c)(1). (Exhibit US-43)

is revoked.[30] The ITC, in turn, determines whether the revocation of the antidumping duty order would likely lead to a continuation or recurrence of material injury.[31] Commerce does not, as the EC suggests,[32] calculate any new margins of dumping in a sunset review determination.

28. In its table in Annex B, the EC reports as the "US DOC Margin in Sunset Review" the margin of dumping that Commerce reported to the ITC as the margin likely to prevail. As the panel in *US – OCTG from Mexico* recognized, Commerce does not "rely on this margin in making its determination of likelihood of continuation or recurrence of dumping."[33] Indeed, this element of U.S. sunset reviews does not derive from any provision of the Antidumping Agreement.[34] The Appellate Body did not disturb these findings, and noted that Mexico had provided no evidence "that the USITC relied on or otherwise factored in the margin of dumping likely to prevail that was reported to it by the USDOC."[35]

29. Likewise, in its answer to question 6, the EC has now failed to present any evidence that Commerce or the ITC in any way relied upon "the margin likely to prevail" in making their respective likelihood determinations. Indeed, the EC has also failed to demonstrate whether Commerce relied on margins calculated in the 31 determinations from the investigations or administrative reviews originally challenged by the EC in this dispute in making its likelihood of dumping determination. Therefore, should the Panel find that the sunset reviews are within the terms of reference of this dispute – a conclusion with which the United States would disagree – the Panel should reject those claims because the EC has failed to establish that the United States acted inconsistently with its WTO obligations in making those sunset review determinations.

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

30. As the United States has noted, the terms of reference of an Article 21.5 panel are established as of the date of panel establishment. A measure that has been revoked prior to the existence of the Article 21.5 panel request cannot form part of the terms of reference of that proceeding for the simple reason that there can be no "disagreement" (within the meaning of DSU Article 21.5) about whether that measure complies with the responding Member's

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[30] 19 U.S.C. § 1675a(c)(3). (Exhibit US-43)
[31] 19 U.S.C. § 1675a(a). (Exhibit US-43)
[32] EC Replies to the Panel's Questions, Annex B, para. 3.
[33] *US – OCTG from Mexico*, para. 7.83.
[34] *US – OCTG from Mexico*, para. 7.83.
[35] *US – OCTG from Mexico (AB)*, para. 180.

obligations: the measure does not exist, and thus it cannot be inconsistent with those obligations. Thus, the EC errs in asserting that the fact that this is an Article 21.5 proceeding is not relevant.[36]

31. The United States notes that in a later response, the EC acknowledges that the Panel should evaluate the "existence and consistency of the US measures taken to comply . . . on the date of the establishment of the Panel."[37] This is consistent with the view that a measure not in existence at the time of panel establishment is not part of the terms of reference of the dispute.

32. In terms of textual justification, the EC argues that a revoked measure is nevertheless a measure for purposes of Article 6.2. Article 6.2 is not relevant to this question. Article 6.2 imposes an obligation on the complaining party. If a complaining party fails to identify a measure in its panel request, that measure is not part of the terms of reference. That does not mean that a complaining party may include a revoked measure in its Article 21.5 panel request and thereby render that measure subject to examination by an Article 21.5 panel, whose scope is limited to "disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings . . . ." Furthermore, nothing in the DSU authorizes panels and the Appellate Body to issue advisory opinions.[38]

33. The EC also attempts to justify its position by offering unsubstantiated hypotheticals about the "risk" that some unliquidated duties may exist.[39] In this regard, the United States recalls its argument that the status of an entry as liquidated or unliquidated is a function of U.S. municipal law. The United States also notes that the EC appears to recognize that basing WTO obligations on the status of entries as unliquidated is not always appropriate, yet fails to explain why it is relevant to implementation of obligations under the Antidumping Agreement.[40][41]

34. Further, as the party pleading a fact, the EC bears the burden of proving that fact. The EC has failed to do so. Specifically, the EC has failed to demonstrate that the United States collects antidumping duties, on imports after the end of the RPT, pursuant to the *measures from the original proceeding that have been revoked.* The EC argues that if the Panel fails to make findings in respect of revoked measures, there will be a "risk that . . . the United States would be allowed to collect duties based on zeroing . . . ."[42] As a factual matter, the EC fails to explain how the failure to make findings in respect of *revoked* measures would lead to that result.

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[36] EC Replies to the Panel's Questions, para. 31.

[37] EC Replies to the Panel's Questions, para. 67.

[38] The Appellate Body has recognized that some international tribunals authorize parties to request advisory opinions. *US – Offset Act (Byrd Amendment) (AB)*, n.135. However, no such provision exists in WTO dispute settlement.

[39] EC Replies to the Panel's Questions, para. 26.

[40] EC Replies to the Panel's Questions, para. 90.

[41] *See* U.S. Answers to the Panel's Questions, paras. 68-69.

[42] EC Replies to the Panel's Questions, para. 26.

35. The third parties' answers are similarly flawed. Korea addresses this question as if it is a matter of panel discretion.[43] However, the threshold question is whether measures revoked before the request for the establishment of the Panel are within the terms of reference. This is not a matter of discretion. Norway relies on a GATT 1947 panel report that predated the Dispute Settlement Understanding, which sets out the terms of reference of a dispute.[44] In addition, compliance proceedings did not exist under the GATT 1947, and thus panels did not consider the limitations on such proceedings. The analysis in the context of the GATT 1947 is therefore not relevant.

> ***Q8. EC: One of the arguments the EC makes in response to the US' request for preliminary rulings is that the subsequent review proceedings listed in the Annex of the Panel request fall within the scope of this proceeding as "omissions and deficiencies" by the United States in complying with the DSB's recommendations. Could the EC please clarify its argument in this respect? In particular, would the EC please clarify whether it considers, for instance, that the "subsequent reviews" constitute evidence of the alleged US "omissions and deficiencies"?***

36. Although the EC initially answers "yes" to this question, the EC fails to draw the proper conclusions from that answer. Instead, the rest of the answer continues to jumble its various theories of the dispute. After stating "yes," the EC continues with the statement that the United States was under an obligation to stop, after April 9, 2007, "taking positive acts for the final payment of duties . . . based on zeroing pursuant to the Administrative Reviews listed in the Annex . . . to the Panel Request."[45] However, that statement fundamentally confuses two separate points: arguing that those reviews constitute evidence of a failure to eliminate zeroing in respect of the 31 determinations originally challenged (which is what the EC, by answering this question "yes", is saying) is not the same thing as arguing that the results of the reviews in the Annex put the United States in breach of its WTO obligations. If the EC is alleging that the United States "omitted" to take measures to comply, then the subsequent reviews would simply provide evidence of an omission in respect of the 16 administrative reviews in the original proceeding and would not form the basis for findings in respect of the "subsequent reviews" themselves.

37. Further, the EC statement quoted in the preceding paragraph is incorrect. The United States was under an obligation, in respect of entries made after April 9, 2007, to bring the 15 investigations and 16 administrative reviews in the Annex to the EC's *original* panel request into compliance with U.S. WTO obligations. That is what the recommendations and rulings from the original proceeding provide, and that establishes the scope of U.S. implementation obligations.

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[43] Korea Answer to Third Party Question 1.
[44] Norway Answer to Third Party Question 1.
[45] EC Replies to the Panel's Questions, para. 35.

38. Some third parties similarly confuse the various theories. Japan responds that the subsequent reviews are measures taken to comply and not "simply evidence of continued omissions."[46] It remains unclear how they can be both. Further, Korea considers that the reviews are evidence of omissions, yet states that they "fall under the scope of the 21.5 dispute."[47] However, as noted above, if the reviews are simply evidence of omissions, and not measures taken to comply in and of themselves for purposes of this dispute, the question of their consistency with U.S. WTO obligations does not arise, and no findings may be made in respect of those reviews in this Article 21.5 proceeding.

> ***Q9. EC: How does the EC respond to the US argument that the situation in this dispute differs from the situation in US - Softwood Lumber IV (21.5) because, in that case, the Appellate Body found it significant that the United States had acknowledged that the methodology used by the USDOC in the First Assessment Review was adopted "in view of" the recommendations and rulings of the DSB and that, in Lumber IV, the Section 129 Determination and the first administrative review determination both closely corresponded to the expiration of the reasonable period of time (see US Rebuttal, paras. 30-31)?***

39. The EC responds to the question by misconstruing what the Appellate Body said in *Softwood Lumber*. It is not accurate to say that the Appellate Body based its finding that the determination in the first assessment review had a close nexus with the Section 129 Determination simply because the United States had time to take into account the DSB's recommendations and rulings.[48] The Appellate Body's analysis was more refined, noting, among other things that the United States acknowledged that its determination was actually made "in view of" those recommendations and rulings.[49]

40. The EC argues that it is not required to show that the determinations in the subsequent reviews were made "in view of" the DSB's recommendations and rulings, but rather that the United States "had *time* to take account of the DSB's recommendations and rulings," and thus "should have taken" certain actions in respect of the subsequent reviews "in view of" those recommendations and rulings.[50] As an initial matter, it is unclear how the United States could have had time to take into account the DSB's recommendations and rulings with respect to those determinations that were made prior to the adoption of those recommendations and rulings.

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[46] Japan Answers, para. 1. Norway answers the question in a similar fashion, but recognizes the distinction. Norway Answer to Third Party Question 2.

[47] Korea Answer to Third Party Question 2.

[48] EC Replies to the Panel's Questions, para. 36.

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

[50] EC Replies to the Panel's Questions, para. 38.

41. The EC argues that the United States "should have taken" certain actions in respect of the subsequent reviews "in view of" the DSB's recommendations and rulings.[51] However, that was not the basis of the Appellate Body's analysis in *Softwood Lumber*. There, the Appellate Body considered, *inter alia*, the *fact* that the United States itself acknowledged that it had issued the determination in the subsequent administrative review "in view of" the DSB recommendations and rulings relating to the investigation; on that basis, the Appellate Body considered that the pass-through analysis in the subsequent administrative review fell within the scope of the Article 21.5 proceeding. The Appellate Body's approach in that dispute did not involve examining what "should have been done" but (allegedly) was not.

42. Likewise, in this dispute, the issue is whether the determinations made in the 54 subsequent determinations can fall within this Panel's jurisdiction. Given the Appellate Body's admonition that "not . . . every assessment review will necessarily fall within the jurisdiction of an Article 21.5 panel,"[52] it is not sufficient to argue that the subsequent reviews involve the same products from the same countries as the determinations originally challenged. That would be true of every subsequent administrative review. Thus, whether these additional determinations were made "in view of" the DSB's recommendations and rulings becomes an important factor.

43. Moreover, the EC's answer once again assumes that there is no difference in the implementation obligation that a Member has with respect to an "as applied" finding and an "as such" finding.[53] As the United States has previously stated, an "as applied" challenge concerns the "application of a general rule to a specific set of facts."[54] The United States' implementation obligation, therefore, do not extend to future applications of antidumping duty law to different transactions made during different time periods.

> ***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.***
>
> > ***(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***

[51] EC Replies to the Panel's Questions, para. 38.
[52] *US – Softwood Lumber CVD Final (Article 21.5) (AB)*, para. 93 (footnote omitted).
[53] *See* EC Replies to the Panel's Questions, paras. 38-41.
[54] See U.S. Rebuttal Submission, para. 35 (quoting *US – OCTG from Argentina (AB)*, para 6, n.22).

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?

44. The EC's answer to this question repeats its theory, not advanced in the original proceeding, that in an antidumping proceeding there is only one measure, and that administrative reviews are therefore not separate measures.[55] The United States has already extensively rebutted this theory and has also noted that the EC itself has recognized that the dispute settlement system does not always provide relief.[56]

45. Some of the third party responses confuse a Member's ability to challenge a determination with a Member's ability to obtain a specific kind of relief.[57] The question recognizes that in the hypothetical described, the measure could be challenged, but it would be revoked before relief would become available. The question highlights that not every WTO breach results in a *remedy,* a position the EC itself recognized in *Australia – Leather (21.5)*. The United States notes that it has not argued that the EC is prevented from bringing claims against administrative reviews. The United States has argued that, in respect of *implementation*, retroactive relief is not authorized.

46. The United States also notes that Japan refers to "final assessment" in the context of a prospective system. Article 9.3.2 does not refer to "final assessment." It refers to "assessment" only. Assessment in a prospective system occurs at the time of entry. By contrast, Article 9.3.1 does refer both to "final liability" and "final assessment." The United States recalls that at the third party session of the Panel's meeting with the parties, the United States asked Japan to identify where in Article 9.3.2 the phrase "final liability" appears, and Japan was unable to do so. Similarly, the phrase "final assessment" does not appear in Article 9.3.2. Further, Japan asserts, without justification, that "final assessment on all entries would have occurred, before the end of any RPT, in both a retrospective and prospective system."[58] It is not clear why that would necessarily be the case. Thus, Japan's attempt to distinguish the hypothetical from the current dispute is unsubstantiated.[59]

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

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[55] EC Replies to the Panel's Questions, para. 43.
[56] U.S. Answers to Panel Questions, para. 22.
[57] Korea Answer to the Third Party Question 4; Norway Answer to Third Party Question 4.
[58] Japan Answers, para. 13.
[59] Japan Answers, para. 15.

entries, and second, they set a cash deposit rate for future entries of the subject product?

47. The Parties and the Third Parties agree on this point.[60]

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 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?

48. The EC contends that "all elements of an administrative review bear the same 'close nexus' with the measures in dispute (where that measure is the final anti-dumping determination and the issuance of the original anti-dumping order) . . . ."[61] Specifically, the EC contends that the close nexus exists because the duty assessment is dependent on the original antidumping duty order.[6263]

49. The answers of the EC and the third parties, however, ignore the Appellate Body's guidance that "not . . . every assessment review will necessarily fall within the jurisdiction of an Article 21.5 panel."[64] As discussed in response to the EC's answer to question 9 above, the Appellate Body's finding in *US – Softwood Lumber CVD Final (Article 21.5)*, was based on: (1) the timing of the determinations at issue; (2) the specific issue involved in both determinations; 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.[65] A proper review of the facts in this dispute leads to the conclusion that none of these factors is present here, and that the determinations in the subsequent reviews are not within the scope of this Article 21.5 Panel.

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

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[60] EC Replies to the Panel's Questions, para. 46; Korea, Answers to Questions from the Panel, Question 5(a); Japan, Response to First Set of Questions from the Panel to the Third Parties, para. 17; Norway, Answers to the First Set of Questions from the Panel to the Third Parties, p. 5.

[61] EC Replies to the Panel's Questions, para. 48.

[62] EC Replies to the Panel's Questions, para. 49.

[63] Norway, Answers to the First Set of Questions from the Panel to the Third Parties, p. 5.

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

[65] *US – Softwood Lumber CVD Final (Article 21.5) (AB)*, para. 84. *See also* U.S. Answers to the Panel's Questions, paras. 27-34.

"closely connected" to the measures at issue in the original dispute and to the DSB's recommendations and rulings?

50. First, as discussed more fully in the U.S. comment to the EC's answer to question 2, and contrary to the EC's assertion,[66] Commerce determinations in sunset reviews are not "amendments" as the EC used that term in its original panel request. Moreover, the Appellate Body made no findings in this dispute concerning determinations in sunset reviews.[67]

51. With respect to the substance of the responses, the EC and the third parties ignore the different functions of sunset reviews, the different factors examined, the different analysis involved, the different time period concerned, and the different WTO obligations that apply. Yet these are all factors that confirm that sunset reviews are not "measures taken to comply" for purposes of this proceeding.

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?***

52. The EC's contention that "investigations and administrative reviews are part of a *continuum*" – which apparently stretches for "the life of the anti-dumping measure"[68] –

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[66] EC Replies to the Panel's Questions, para. 51.

[67] *See* U.S. Answers to the Panel's Questions, para. 35.

[68] EC Replies to the Panel's Questions, para. 53. *See also* Norway, Answers to the First Set of Questions from the Panel to the Third Parties, p. 7.

essentially confirms that the EC is seeking to treat the "as applied" findings against the determinations in the investigations as applying to the antidumping orders and the continuing administration of those orders.[69] Such an outcome, however, runs contrary to the Appellate Body's rejection of the EC's "as such" claim. We also note that in any case, the Appellate Body did not refer to a "continuum" or in any other way suggest the "continuum" theory that the EC advances.

> ***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?***

53. The EC and the Third Parties fail to recognize that Article 9.3 and footnotes 21 and 22 demonstrate that different types of proceedings have different functions and do not necessarily pre-determine the results of other proceedings.[70] Thus, such proceedings are not necessarily sufficiently interrelated to create the "continuum" to which the EC refers.[71]

> ***Q17. EC: In its Oral Statement, paragraph 14, the US asserts that "it cannot be said in this dispute that the 54 additional determinations were made "in view of" the DSB's recommendations and rulings." Could the EC please respond, and consider in particular the timing of those determinations with respect to the date of adoption of the DSB's recommendations and rulings.***

54. The EC states that the timing of the 54 determinations with respect to the adoption of the DSB's recommendations and rulings is "irrelevant" to the issue of whether these determinations fall within the jurisdiction of this Article 21.5 Panel.[72] This plainly contradicts the Appellate Body's analysis in *Softwood Lumber*, the report upon which the EC bases its claims in respect of the subsequent reviews.[73] Timing was one critical factor in the Appellate Body's reasoning that the administrative review in that dispute was within the scope of the Article 21.5 proceeding.

55. Moreover, as a matter of logic, determinations made prior to the DSB's recommendations and rulings, and indeed those made prior to the Appellate Body's report, simply could not be made "in view of" those recommendations and rulings. Indeed, prior to the adoption of the

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[69] *See* U.S. Answers to the Panel's Questions, para. 15.
[70] *See* U.S. Answers to the Panel's Questions, paras. 44-47.
[71] EC Replies to the Panel's Questions, para. 53.
[72] EC Replies to the Panel's Questions, para. 57.
[73] *US – Softwood Lumber (21.5)(AB),* para. 77, 84.

DSB's recommendations and rulings, the United States had prevailed on the issue of zeroing in administrative reviews when that issue was addressed by the original Panel.[74] Thus, it is simply unreasonable for the EC to suggest that determinations made before the adoption of the DSB's recommendations and rulings were made "in view of" some future event and that this sequence of events is irrelevant to this Panel.

56. For a further discussion of this issue, please see the U.S. comments to the EC's answers to questions 9 and 13.

> ***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?***

57. The majority of the EC's answer does not respond to the question and simply repeats the EC's arguments concerning the scope of this proceeding. In paragraph 61 of its answer, the EC continues to disregard the fact that the Appellate Body expressly declined to make a finding against "the zeroing methodology" and that its findings were therefore limited to the as applied determinations in the original proceeding.

58. The EC states that "the fact that the adopted DSB report in the original dispute contained 'as applied' findings with respect to the use of simple zeroing in administrative reviews does not imply that the use of the *same methodology* by the United States in subsequent review proceedings . . . was not covered by the DSB recommendations and rulings." However, the fact that the Appellate Body expressly declined to make finding *in respect of that methodology* does.[75] Therefore, the EC's attempts to analogize this dispute to *US – Upland Cotton* fail.

59. Norway contends that there is "in principle, no difference between reviews of an anti-duming [sic] measure and reviews of an SPS measure" and refers to *Australia – Salmon (Article 21.5)*.[76] As the United States explained in its answers, there is in fact a significant difference between antidumping reviews and SPS measures such as those in *Australia – Salmon:* the former

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[74] *US – Zeroing (EC) (Panel)*, paras. 8.1(d)-(h).
[75] Appellate Body Report, para. 263(c)(ii).
[76] Norway Answer to Third Party Question 9.

are required by the Antidumping Agreement and are conducted on a schedule independent of WTO dispute settlement. That is not true of SPS measures, or of subsidies.

> ***Q21 EC: Please explain more precisely what the EC means when its "notes", in paragraph 40 of its Oral Statement, "that the distinction between 'as such' and 'as applied' findings suggested by the United States should not be mechanistically applied in this case"? The Panel notes that, in that paragraph, the EC quotes from the panel report in US – Upland Cotton (21.5). The Panel in that case explained that in order to properly analyze the effect of a subsidy for the purposes of Articles 5 and 6 of the SCM Agreement, the subsidy must be examined in light of the conditions and criteria contained in the legal and regulatory framework governing the granting of that subsidy. But the US – Cotton (21.5) panel also considered that the original panel had not made "as such" findings with respect to the programmes at issue.***

60. The United States has addressed the EC's attempt to back away from the "as such" and "as applied" distinctions that it sought, and that the Panel and the Appellate Body adopted.[77] The EC is simply attempting to undo the findings in the original proceeding. Moreover, *Cotton* is of no assistance to the EC. The panel concluded that the United States failed to comply with the recommendations and rulings in respect of those payments not because the panel rejected the distinction between "as such" and "as applied" measures, but because Article 7.8 of the Subsidies Agreement required the United States to "remove the adverse effects or . . . withdraw the subsidy."[78] No corresponding provision exists in the Antidumping Agreement. Therefore, the EC's attempt to the analogize the two situations fails.

> ***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?***

61. The United States also responded to this question and has nothing more to add, other than to note the following. The EC states that "[m]easures, acts or omissions that occurred, took effect or ceased to exist after the date of establishment of the Panel may be taken into account in issuing

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[77] *See, e.g.,* U.S. comments on Question 2(b), *infra*.

[78] *US – Upland Cotton (21.5)*, para. 9.80.

recommendations."[79] However, this proceeding is an Article 21.5 proceeding, and recommendations typically are not provided in such proceedings.[80]

Q23 EC: What is the EC's response to the US argument that some of the measures identified by the EC are no longer in effect (see, e.g., paragraph 94 of the US' First Written Submission)? Please precisely identify what aspects of these measures you consider the Panel should take into consideration in assessing the US' implementation of the DSB recommendations.

62. With respect to the revoked orders identified in paragraph 94 of the U.S. first written submission, the EC has failed to offer any evidence in support of its contention that "the collection of duties based on zeroing resulting from the order itself or any of its subsequent reviews still remains . . . ."[81] This is true even *after* the Panel expressly asked the EC, in Question 5, to identify any unliquidated entries. A party asserting a fact bears the burden of proving that it is true. The EC has not done so.

63. The EC relies on *EC – Poultry* in support of its argument that the Panel should make findings in respect of the revoked measures. However, the very limited reasoning in the *EC – Poultry* report does not provide any assistance on this issue. Moreover, in that dispute, Brazil did not merely advance a vague allegation of "lingering effects", but instead, as the EC itself notes, argued that license allocation was based on past imports.[82] In any event, the panel ultimately rejected Brazil's claim;[83] that report therefore provides no support for the EC's suggestion that findings on a revoked measure are permissible.

64. The EC argues that "even if a measure has been revoked, the Panel should examine the conformity of those measures [sic] with the covered agreements." The logic of this argument is difficult to follow. If a measure has been found to be inconsistent with a covered agreement, and a Member revokes that measure at the end of the reasonable period of time, then examining the revoked measure would simply repeat the exercise undertaken during the original proceeding. That is not consistent with Article 21.5, which calls for an examination of the existence or consistency of measures *taken to comply,* as distinguished from the measures at issue in the original proceeding. If no measures have been taken to comply, then a panel may so find. But that does not require a reexamination of the original measures.

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[79] EC Replies to the Panel's Questions, para. 68.

[80] *See*, *e.g.*, *US – FSC (Article 21.5 II) (AB)*, para. 100(b) (the Appellate Body upheld the Article 21.5 panel's conclusion that the United States continued to fail to implement fully the operative DSB recommendations and rulings, and the Appellate Body made no recommendation itself).

[81] EC Replies to the Panel's Questions, para. 70.

[82] EC Replies to the Panel's Questions, para. 71, quoting *EC – Poultry (AB),* para. 153.

[83] *EC – Poultry (AB),* para. 256.

65. The EC also introduces here an argument concerning the potential effects of a finding on municipal law.[84] This argument is similar to the one advanced by the EC in support of its request for a finding that no measure taken to comply existed between two particular dates.[85] The EC states that the Panel should make findings because such findings could have an effect in municipal law, but the EC then states that the municipal law of any particular Member is not germane to the Panel's inquiry.[86] The logic of the EC's argument is difficult to follow, and in any case has no relationship to any provision of the DSU – and in particular, no relationship to the task of the Panel as defined Articles 21.5 and 11 of the DSU.

66. Japan argues that findings in respect of measures no longer in effect would "assist an arbitrator" in evaluating nullification or impairment.[87] Japan fails to explain how that could be so, given that the measures are no longer in effect. Japan also states that such findings would assist the parties in resolving the dispute.[88] Again, Japan fails to explain how.

> ***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;***

67. The EC's response clarifies its view that there is a "per se" rule that all administrative reviews are always measures taken to comply. Without regard to the facts of the individual reviews in question, the EC asserts that all subsequent reviews come within the scope of the DSB recommendations and rulings, even though those recommendations and rulings pertain to only one review. This argument confirms that the EC's arguments that the specific facts of these reviews establish a "close nexus" are beside the point, and that the EC is in fact seeking to erase the distinctions between "as applied" and "as such" claims and findings. The conclusion that all administrative reviews are necessarily measures taken to comply squarely contradicts the Appellate Body's admonition to the contrary in *Softwood Lumber*.

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[84] EC Replies to the Panel's Questions, para. 74.
[85] *See, e.g.,* EC First Written Submission, paras. 105-106.
[86] EC Replies to the Panel's Questions, para. 74.
[87] Japan Answers, para. 80.
[88] Japan Answers, para. 80.

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;

68. The EC refers to whether liquidations are "final and conclusive."[89] As the United States has noted, and as the EC itself has recognized, liquidation is not a WTO concept, and the existence of liquidation resulting from domestic litigation is not germane to the evaluation of WTO obligations.[90] Further, as discussed more fully in our comment on the EC's answer to question 5 above, in the U.S. system, the antidumping duty assessment rate becomes final and conclusive at the conclusion of litigation challenging an administrative review. A customs protest may only challenge decisions by CBP, and cannot be used to challenge Commerce determinations concerning the assessment rate.

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.

69. The EC provides no justification on the basis of the text of the Antidumping Agreement or the DSU for asserting that compliance applies to unliquidated entries made prior to the end of the RPT.

70. The EC argues that among the acts an implementing Member should take is to "release any pending cash deposit made in the amounts set in the administrative review at issue."[91] A Member, however, is under no obligation to take such an act.

71. To ensure a "level playing field" among Members with retrospective systems, prospective *ad valorem* systems, and prospective normal value systems, prospective implementation requires that duties levied on imports occurring on or after the date of implementation be made consistently with the DSB's recommendations and rulings.

If your response is different in (b) and (c), please explain why. Does such a difference suggest that implementation is different in retrospective and prospective duty assessment systems? Why or why not?

72. The EC argues that if liquidations are pending after the end of the RPT, the Member should apply newly calculated rates to those prior entries.[92] First, as the United States stated in answer to this question, the concept of "liquidation" is not universal, and is not found in the

[89] EC Replies to the Panel's Questions, para. 76.
[90] EC Replies to the Panel's Questions, para. 90.
[91] EC Replies to the Panel's Questions, para. 77.
[92] EC Replies to the Panel's Questions, para. 79.

Antidumping Agreement.[93] Moreover, the situation contemplated by the question would not exist in a prospective duty assessment system, because there is no distinction between potential and final liability in such systems.[94] Thus, the "level playing field" would require that the DSB's recommendations and rulings be applied only to imports made on or after the date of implementation.

73. The EC asserts that if a refund request were still pending in the jurisdiction of a Member which utilizes a prospective duty assessment system, the result of the refund proceeding should apply to entries made prior to the end of the RPT.[95] This statement it at odds with EC law, which provides that "[a]ny measure adopted pursuant to this Regulation shall take effect from the date of their [sic] entry into force and shall not serve as basis for the reimbursement of the duties collected prior to that date, unless otherwise provided for."[96] This aspect of EC law was recently confirmed by the European Court of Justice in the *Ikea* case, which denied the reimbursement of antidumping duties based on the DSB's recommendations and ruling in connection with the *EC – Bed Linens* dispute.[97]

> ***Q25. EC: What support is there, in the Agreements or in prior WTO dispute settlement, for the EC's argument that judicial review proceedings should be taken into account in assessing a Member's implementation of DSB recommendations and rulings, in particular with respect to anti-dumping measures? (see, inter alia, para. 82 of the EC's First Written Submission, paras. 73-75 of the EC's Rebuttal Submission).***

74. The United States disagrees with the EC,[98] and some of the third parties,[99] that there is any support for the argument that judicial review proceedings should be taken into account in assessing a Member's implementation of the DSB's recommendations and rulings. Where judicial review is to be taken into consideration in the Antidumping Agreement, there are express provisions to address that. In particular, footnote 20 to Article 9.3.1 recognizes that observance of the time periods set forth in the Antidumping Agreement may not be possible because of judicial review.

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[93] U.S. Answers to the Panel's Questions, para. 68.

[94] *See* U.S. Answers to the Panel's Questions, para. 78.

[95] EC Replies to the Panel's Questions, para. 79. The EC answer does not actually say that the refund would be provided in respect of past entries, but that is what the United States understands the EC to mean by the phrase "recalculating the new rates in a WTO-consistent manner and applying them to those entries."

[96] Article 3, Council Regulation (EC) 1515/2001 of 23 July 2001, *On the Measures that May be Taken by the Community Following a Report Adopted by the WTO Dispute Settlement Body Concerning Anti-Dumping and Anti-Subsidy Matters*, 2001 O.J. (L 201) 10. (Exhibit US-19).

[97] *See* Paragraphs 35, 67, and 69 (Exhibit US-34).

[98] EC Replies to the Panel's Questions, para. 82.

[99] Japan, Answers to the Questions from the Panel to the Third Parties, paras. 73-77; Korea, Answers to the Questions from the Panel to the Third Parties, question 12.

75. Moreover, if the DSB's recommendations and rulings called for compliance with respect to determinations made prior to the end of the RPT, but subject to pending judicial review, this would create an incentive for private parties to abuse the Member's judicial review system. That is, private parties would be encouraged to make requests for judicial review of antidumping determinations solely for the purpose of delaying finality in the hope that a favorable ruling could be obtained through the WTO dispute settlement system.

> ***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?***

Q37. EC: The Panel understands the EC to have indicated, during the Panel's meeting with the parties, that prospective and retrospective systems are similar and achieve the same result by slightly different mechanisms. What is the relevant same "result"? Should this same "result" be assessed in terms of the process, or in terms of the amount of duty collected or collectible under the two systems? For instance, assume two WTO Members, one with a retrospective system, the other with a prospective system, impose anti-dumping measures on the same product from the same exporter on the same day, each based on a dumping margin of 10 percent. The volume of imports under the measure into the two Members is the same, and remains the same following the imposition of the measure. Both measures are challenged in the WTO, and both are found to be inconsistent with the Anti-Dumping Agreement for the same reason. If implementation of the DSB recommendation and ruling in both Members, consistently with the EC's position in this dispute, results in the two Members being entitled to collect different amounts of duty with respect to imports which occurred during the same time period, is this, in the EC's view, the same result?

38. EC: In paragraph 49 of its Oral Statement, the EC states that "what the United States argues in this case is that it can collect duties based on zeroing after the end of the reasonable period of time even if the original anti-dumping order has been revoked precisely because, absent zeroing, no dumping was found". If the Panel understands the EC's view correctly, the EC considers that the collection of duty in this circumstance is a failure to implement, regardless of whether that duty is collected with respect to imports that entered the United States prior to the end of the RPT. Would the equivalent implementation in a

prospective duty assessment system not require the Member to refund duties collected prior to the end of the RPT under the now-revoked anti-dumping measure? If not, does the EC consider as irrelevant the fact that the amount of duty collected under the two systems is different?

76. Due to the related nature of these questions, the United States will comment on the EC's answers to Questions 37 and 38 together.

77. The United States and the EC agree that there should be a "level playing field" among the different antidumping duty systems authorized by the Antidumping Agreement.[100] Indeed, the EC argues that the implementation obligations should be the same among the systems,[101] and that "the amount of duty finally collected should be the same."[102] Nonetheless, the EC's argument would actually create disparity among the systems.[103]

78. Consider a situation in which the RPT in the Panel's scenario ends in the same period when the opportunity to request an Article 9.3 review occurs and assume that no review is requested by any party. In the EC's view, the Member operating a retrospective system must refund any cash deposits from the revoked order, because final assessment would require the Member to take the ministerial act of "ordering liquidation." By contrast, the Member operating a prospective system would be entitled to retain all payments because there is no "suspension of liquidation" and no need to take action to effect the liquidation.

79. The differences, of course, are broader than this simple illustration. In a retrospective system, an exporter or importer may request an Article 9.3 review by right – even if their desire is nothing more than to delay "liquidation" while a WTO dispute regarding the investigation is pending. In a prospective system, no such right exists. Only importers may request an Article 9.3.2 review and that request must be "duly supported by evidence." Moreover, as the United States has previously noted, EC domestic law provides that a change in the antidumping duty margin based on implementation of a WTO dispute report does not provide a basis for

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[100] EC Replies to the Panel's Questions, para. 83.

[101] EC Replies to the Panel's Questions, para. 85.

[102] EC Replies to the Panel's Questions, par. 104.

[103] Japan argues that this "level playing field" could be accomplished if the importing Member is required to "re-calculate the margin of dumping that will be applied in future liquidation procedures under the relevant system as long as there are unliquidated entries covered by the review at the time of the expiration of the RPT." Japan, Answers to the Questions from the Panel to the Third Parties, para. 85. However, as the United States discussed in its answer to question 34, "liquidation" is not a term that appears in the Antidumping Agreement. US Answers to the Questions from the Panel to the Parties, para. 92. Indeed, the concept is not universal as there is no distinction between potential and final liability in prospective duty assessment systems. Japan's argument, therefore, would not create a "level playing field," but instead would create greater disparity by imposing greater implementation obligations on Members utilizing a retrospective system.

requesting a refund of duties on entries predating the end of the RPT.[104] Consequently, while the EC might say that "In both cases, there is no basis for definitively collecting duties after the end of the RPT", the reality is that it seeks to have this Panel impose an interpretation that would ensure that only Members operating retrospective systems would be obligated to refund duties on pre-implementation entries, while Members operating prospective systems retain all such duties.

> ***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.)***

80. The EC contends that it "has refunded duties on entries made before the end of the RPT applying the new WTO-consistent methodology as a result of the *EC-DRAMS* case."[105] The EC, however, has provided no support for this statement. Indeed, the only concrete example before this Panel of whether the EC refunds duties collected prior to the end of the RPT based on a finding of WTO-inconsistency is the *Ikea* case. As the United States has demonstrated, however, this case does not stand for the principle that the EC will provide such refunds based on the DSB's recommendations and rulings. To the contrary, in *Ikea*, the European Court of Justice specifically declined to provide refunds on that basis. While the Court found that refunds were in order, that finding was based on an application of EC municipal law, not the DSB's recommendations and rulings.[106]

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[104] Exhibit US-34.

[105] EC Replies to the Panel's Questions, para. 88.

[106] *See* Paragraphs 35, 67, and 69 (Exhibit US-34). The EC also appears to imply that the WTO Agreement obligates a Member to maintain within its domestic legal system a particular rule of interpretation, which the EC refers to as an "interpretation in conformity" rule. The EC does not elaborate on the nature of this supposed obligation, nor does it cite the provisions of the WTO Agreement that allegedly give rise to it. Indeed, the *Ikea* case appears to indicate that the EC itself would be in breach of such a provision if one existed.

81. In answering this question, some of the Third Parties use terms such as "finally liquidated."[107] This concept, however, has no relevance to prospective duty assessment systems, where there is no distinction between potential antidumping duty liability and final liability.

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. The United States and the EC agree that the Antidumping Agreement treats assessment proceedings in a retrospective system and refund proceedings in a prospective system analogously.[108] The EC, however, fails to explain how such analogous treatment supports its argument. The reason for such failure is obvious. The analogous treatment of these systems under the Antidumping Agreement cannot support the conclusion that Members utilizing the different systems should have different implementation obligations, which is the result that obtains if liquidation, rather than entry, forms the basis for evaluating WTO implementation obligations.

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?

(b) EC: In its response at the meeting, the EC appeared to indicate that a tariff is different from an anti-dumping measure, because the anti-dumping measure is a response to importer behaviour in the past, and is based on the evaluation of historical data to assess that importer behaviour and determine whether the measure should be imposed, and then subsequently, assessment is made whether the remedy matches the behaviour, again by looking back. Is this is a correct understanding of the EC comment? If so, does the EC suggest that implementation of DSB recommendations and rulings is different in the

[107] Korea Answers to the Questions from the Panel to the Third Parties, question 16(a).
[108] EC Replies to the Panel's Questions, para. 89.

anti-dumping context than in the context of the hypothetical because of the difference identified by the EC?

83. This question squarely addresses the relevance of liquidation to the implementation of WTO obligations. The EC's response – that liquidation or the lack thereof is not pertinent to the implementation of WTO obligations – is consistent with the arguments the United States has made throughout these proceedings.

84. However, the EC attempts to distinguish this question from the question before this Panel – whether the fact that entries are liquidated or unliquidated affects U.S. dispute settlement implementation obligations – by stating that the "specific characteristics" of the Antidumping Agreement should be taken into account.[109] However, the EC fails to explain what those characteristics are. The EC has therefore provided no basis for treating unliquidated entries differently in an antidumping context.

85. The EC further notes that the "litigation [is] national" and therefore has "nothing to do with the consequences of WTO litigation nor the correct interpretation of Article 21 of the DSU."[110] This statement provides direct support for the U.S. position in this dispute: The United States has repeatedly stated that the status of entries as unliquidated is not germane to a Member's implementation obligations. The EC fails to explain why litigation to keep entries unliquidated constitutes a basis for evaluating the U.S. obligations here, but does not constitute a basis for evaluating a Member's tariff obligations. In fact, this answer highlights that the status of entries as liquidated or unliquidated should have no bearing on a WTO Member's obligations. The United States would further note that when the EC *was* confronted with the question of implementing recommendations and rulings to provide the tariff treatment required under its Schedule, the EC declined to do so on a retrospective basis, but instead did so as of the end of the reasonable period of time, and no earlier.[111]

86. Japan avoids answering the question about the relevance of liquidation in the circumstances described in the question, but rather seeks to distinguish the question on the basis of the date of the entry into force of the obligations. It is not clear why that distinction makes a difference in respect of the question of the relevance, or lack thereof, of the status of the entries as liquidated or unliquidated. Japan contends that "at the time the contentious entries occurred, the United States was not permitted to collect import duties on those entries in excess of its bound tariffs, unless it acted consistently with its [WTO] obligations . . . ."[112] Japan appears to suggest, therefore, that entries made prior to the expiry of the RPT are subject to the obligation to comply,

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[109] EC Replies to the Panel's Questions, para. 91.
[110] EC Replies to the Panel's Questions, para. 90.
[111] U.S. First Written Submission, para. 100.
[112] Japan Answers, para. 107.

notwithstanding the fact that the very purpose a reasonable period of time exists is to allow a Member sufficient time to bring its measures into compliance.

87. Surely Japan is aware of that fact, having recently argued that it required 15 months to re-conduct a countervailing duty investigation in order to bring a measure into compliance with the recommendations and rulings in the *Japan – DRAMs* dispute.[113] Moreover, nothing in Japan's arguments in that proceeding suggests that Japan is allowing the subject merchandise to enter during the pendency of the redetermination without being subject to the existing countervailing duty order.

88. Japan confirms that the date of entry is the appropriate point for evaluating compliance. Japan bolsters this position by referring to Article II of the GATT, which evaluates obligations as of the "date of importation." Article II:2(b), to which Japan refers, specifically provides that antidumping measures are imposed "on the importation" of the product.[114] Importation does not occur at the time of final assessment – it occurs when the good is entered. Thus, Japan correctly identifies the date of importation as being the relevant date; where Japan errs is in contending that a Member is obligated to be in compliance prior to the end of the RPT.

89. Japan's grievance in respect of the alleged lack of "prospective relief of continuing violations of WTO law," as Japan describes it, is attributable to the fact that the EC prevailed only in respect of its as applied findings.[115] Japan provides further confirmation that the EC is simply rejecting the express findings of the Appellate Body in this dispute and seeking an "as such" finding in the compliance proceeding that it did not obtain in the original proceeding.

90. In its combined answers to third party questions 15, 17, and 18, Japan engages in an extensive but ultimately irrelevant discussion of certain provisions of the ILC Articles on State Responsibility. Japan acknowledges that the ILC Articles are "not directly applicable to these proceedings."[116]

91. Korea is the only party that considers the tariff to be applicable. However, Korea provides no textual basis in support of its conclusion.

> ***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?***

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[113] *Japan – DRAMs (21.3(c))*, para. 5.
[114] Japan Answers, para. 106.
[115] Japan Answers, heading (v), p. 38.
[116] Japan Answers, para. 127.

92. The EC relies on *Brazil – Aircraft (21.5),* but in doing so undermines its argument in this proceeding. In that dispute, Canada argued that Brazil was under an obligation *pursuant to the SCM Agreement* to cease issuing bonds after November 19, 1999, the date on which Brazil was obligated to withdraw the subsidy. Canada's argument was not based on implementation obligations found in the DSU, but rather was based on the obligation *unique to the SCM Agreement* that a Member "withdraw the subsidy" without delay. Specifically:

> Canada notes that Brazil is required to withdraw the prohibited export subsidies, and submits that the word "withdraw", in its plain meaning, conveys as a minimum the notion of ceasing to grant or maintain the illegal subsidies. Article 3.2 of the SCM Agreement provides that a Member shall not "grant or maintain" prohibited subsidies. Canada recalls that the Appellate Body had found that PROEX subsidies are granted for the purposes of Article 27.4 of the SCM Agreement when Brazil issues NTN-I bonds. There is no reason in Canada's view to interpret the word "grant" differently for the purposes of Article 3.2 than for the purposes of Article 27.4. Accordingly, Brazil must, in Canada's view, cease issuing NTN-I bonds in respect of pre-18-November-1999 letters of commitment.[117]

93. It is in this context that the panel concluded that the remedy in question was prospective, rather than retrospective. However, the Antidumping Agreement contains no obligation corresponding to that found in the *SCM Agreement* to "withdraw the subsidy." Instead, Article 19.1 of the DSU applies, which calls for a recommendation "that the Member concerned bring the into conformity" with the relevant agreement.[118] Therefore, the EC's answer tends to confirm that there is no basis here for reaching back to entries made before the end of the RPT.

94. For reasons that are unclear in the context of the question, the EC cites to a case decided under U.S. municipal law, *Parkdale*, to argue that "the definition of what is 'prospective' is not limited to future entries . . . ."[119] *Parkdale*, however, is both irrelevant in light of the question and inapposite. The issue at hand is what prospective implementation means within the context of the WTO dispute settlement system. *Parkdale* does not address that issue. Rather, *Parkdale* concerns the application of a rule of U.S. domestic law that a new rule or policy of an administrative agency may not be applied retroactively unless specifically authorized by statute. *Parkdale* did not address the implementation of a WTO dispute settlement report pursuant to U.S. law, and whether such implementation was prospective. Thus, the Federal Circuit's holding in *Parkdale* is not relevant to this dispute.

95. The United States notes that Japan and Norway declined to answer this question at all, while Korea provided an answer that did not respond to the question. While these third parties

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[117] *Brazil – Aircraft (21.5)*, para. 6.5.
[118] *Chile – Price Band System (Article 21.5) (AB)*, para. 134 (footnotes omitted).
[119] EC Replies to the Panel's Questions, para. 97.

have much to say about retrospective relief in the context of dumping, they appear to have nothing to say about retrospective relief in the context of subsidies.

> ***Q36. EC: How does the EC answer the US argument that, under the EC's theory of implementation, there would be no "final action" to challenge under Article 17.4 of the Anti-Dumping Agreement when the USDOC issues a determination in an AD investigation and that US determinations could only be challenged after an administrative review was concluded? (see US Rebuttal Submission, para. 47).***
>
> ***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).***

96. Due to the related nature of these questions, the United States will comment on the EC's answers to Questions 36 and 41 together.

97. At the outset, the United States recalls that it is the EC's theory of implementation that would lead to an interpretation of Article 17.4 that would exclude investigations from the scope of that provision.[120] It is not a U.S. argument, but the logical result of the EC's argument. Therefore, when the EC says that the panel in *US – Shrimp Bonding* has rejected the argument,[121] that means it has rejected the *EC's* argument, not the U.S. argument.

98. Further, the EC's citation to the *Mexico – Rice* dispute supports the position of the United States.[122] Specifically, both the panel and the Appellate Body found that an antidumping duty has been imposed once there is a final determination to impose the duty.[123]

99. The EC's focus appears to be on whether an action is a "final action,"[124] as opposed to a "final action . . . to *levy* definitive anti-dumping measures."[125] The term "levy" is specifically defined, as used in the Antidumping Agreement, as "the definitive or final legal assessment or

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[120] U.S. Rebuttal Submission, para. 47.

[121] EC Replies to the Panel's Questions, para. 99.

[122] EC Replies to the Panel's Questions, paras. 100-01.

[123] *Mexico – Rice (AB)*, para. 345; *Mexico – Rice (Panel)*, para. 7.295. *See also* U.S. Answers to the Panel's Questions to the Parties, para. 100.

[124] *See, e.g.,* EC, Replies to the Panel's Questions, paras. 103 and 110-11.

[125] Antidumping Agreement, Article 17.4 (emphasis added).

collection of a duty or tax."[126] The United States is surprised that the EC is willing to ascribe such flexibility and variation in meaning to the defined term "levy"[127] given the importance of a monolithic, invariable interpretation and application of the terms "dumping," and "margins of dumping" (which are defined in the GATT 1994 and the Antidumping Agreement[128]) to the substance of its "zeroing" claims.

100. Furthermore, the United States notes that the EC's answers to questions 36 and 41 appear to be inconsistent with each other with respect to the definition of a "provisional measure," which is also specifically defined in Article 7 of the Antidumping Agreement. In answer to question 36, the EC interprets the term "provisional measure" broadly to include a final determination in an investigation and the final results of administrative reviews in the U.S. system.[129] By contrast, in answer to question 41, the EC recognizes that the term "provisional measure" specifically refers to a measure adopted pursuant to Article 7.[130]

> ***Q39 EC: The EC argues that one of the reasons why the Panel should make findings with respect to measures which are no longer in effect is that such a finding may have repercussions in proceedings before the domestic courts of the responding Member. Is the EC aware of similar considerations having been relied upon by a WTO panel or by the Appellate Body as a reason why they should rule on a claim concerning measures that are no longer in effect?***

101. The question asked whether the EC was aware of prior reports that have considered the effect of findings on domestic courts of the responding Member. The EC has provided no such reports.[131]

102. The EC does not dispute that the measures have been revoked,[132] but argues that in respect of one measure, final liquidation has not taken place because the importer has filed a protest.[133] However, as noted above, as a matter of law, that protest cannot challenge the underlying assessment rate determined by Commerce.

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[126] Antidumping Agreement, Article 4.2, fn. 12.

[127] *See, e.g.,* EC Replies to the panel's Questions, paras. 102-03, 110-11.

[128] GATT 1994, Article VI:1; Antidumping Agreement, Article 2.1; *US – Zeroing (EC) (AB)*, paras. 124-27.

[129] EC Replies to the Panel's Questions, para. 103.

[130] EC Replies to the Panel's Questions, para. 110.

[131] The EC's quotation from *Japan – Film* – which was not an Article 21.5 proceeding – undermines its argument. There, the panel's comments were in regards to "old 'measures' that were never officially revoked . . . ." *Japan – Film,* para. 10.59, quoted in EC Replies to the Panel's Questions, para. 108. The EC has acknowledged that the measures in this instance were in fact revoked.

[132] EC Replies to the Panel's Questions, para. 107.

[133] EC Replies to the Panel's Questions, para. 107.

103. The EC further states that it has provided "sufficient indication that there may be cases where, even if the measure has been revoked, entries are still subject to the payment of duties based on zeroing."[134] The EC provides no citation in support of this assertion but rather offers just one example (also without citation to the record). Moreover, whether there "may" be cases is not sufficient to sustain the EC's burden of proving the facts that it asserts.

> ***Q42 EC: Could you please clarify paragraph 103 of the EC's First Written Submission? Is the Panel correct in understanding that the EC is requesting a finding regarding the existence of measures taken to comply during a period of time (9 April to 23 April/31 August 2007) as opposed to a finding regarding the existence of measures taken to comply on a given date (9 April 2007)? Why is the EC making this distinction? What are the practical implications of such a distinction?***

104. The question asked the EC to confirm that it was requesting a finding that no measure taken to comply existing *during* a particular period of time, as opposed to a finding that no measure taken to comply existed as of a given date (*i.e.,* the end of the RPT). The answer is "yes."[135]

105. The question also asks about the practical implications of such a finding. The EC stated that "a finding by the Panel regarding the inexistence of measures taken to comply on a given date . . . would be useless in those cases . . . where the relevant act taken by the United States contrary to the DSB's recommendations and findings in the original dispute took place *after* such a date."[136] This appears to be an admission by the EC that the United States was in compliance as of the end of the RPT. Therefore, it is unclear how the Panel could conclude that a measure taken to comply did *not* exist between the end of the RPT and April 23/August 31, 2007.

106. The United States would further note that the EC's answer to this question is at odds with other of the EC's answers. The EC has argued that implementation obligations should not vary according to each Member's municipal law.[137] Yet the EC's answer to this question depends upon "implications for interested parties in the US municipal law jurisdiction."[138] The EC's arguments further depend on the unique circumstance under U.S. municipal law in which importers may protest entries after liquidation and without regard to the assessment rate calculated by Commerce.[139] The EC acknowledges that in *Australia – Salmon (21.5)* the panel made a finding

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[134] EC Replies to the Panel's Questions, para. 107.
[135] *See, e.g.*, EC Rebuttal Submission, para. 98.
[136] EC Replies to the Panel's Questions, para. 115.
[137] EC Replies to the Panel's Questions, para. 74.
[138] EC Replies to the Panel's Questions, para. 113.
[139] EC Replies to the Panel's Questions, para. 113.

"that no measures taken to comply existed in the sense of Article 21.5 of the DSU" rather than a finding that a measure taken to comply did not exist between two particular dates.[140]

107. Thus, the EC has not provided the Panel with an explanation of why it is seeking this particular finding. Indeed, its arguments in this answer are at odds with its answers to other of the Panel's questions.

> ***Q43 EC: Please explain what, in your view, would be the practical effect, on the US' obligation to implement the DSB's recommendations and rulings, of a finding that no measures taken to comply existed during the period of time identified by the EC?***

108. The EC has requested the Panel to make a finding that the Panel is not obligated to make; *i.e.,* that no measure taken to comply existed between two dates. The EC justified its request with the vague assertion that the finding could have relevance under municipal law.[141] Now the Panel has asked the EC to substantiate that assertion. In response, the EC takes the position that "the Panel is not called upon to examine the practical effects . . . of a finding that no measures taken to comply existed during the period of time identified by the European Communities."[142] The EC is evidently unable to defend its request that the Panel exercise its discretion to make the finding in question.

109. The EC goes on to state that a "finding that no measures to comply existed during the period between 9 April and 23 April/31 August 2007 could imply that the United States should apply the results of its Section 129 Determinations, *at least*, to entries made on or after 9 April 2007. . . . ."[143] The logic of this statement is elusive. It is unclear why a determination that a measure taken to comply did not exist *between* two dates leads to the conclusion that the United States should apply its Section 129 determination to entries made after April 9. That argument would appear to be more consistent with a request that the Panel find that no measure to comply existed *on* April 9.[144]

110. The EC also states that "in the case of measures that no longer exist at the time a panel has to issue its report, it may be useful to solve the dispute at hand that a panel issues a finding that such a measure is contrary to certain provisions of the WTO Agreements."[145] That statement does not address the question, which does not concern a request for a finding that a measure is contrary to certain provisions of the WTO Agreements, but rather a request for a finding that a measure

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[140] EC Replies to the Panel's Questions, para. 116.
[141] EC First Written Submission, para. 105.
[142] EC Replies to the Panel's Questions, para. 119.
[143] EC Replies to the Panel's Questions, para. 120.
[144] EC Replies to the Panel's Questions, para. 115.
[145] EC Replies to the Panel's Questions, para. 120.

taken to comply did not exist between two particular dates. Further, the EC fails to explain *why* such a finding may be useful to solve the dispute at hand.

> ***Q44 EC: Please expand on why, in the EC's view, Article 21.3 of the DSU and subparagraph (b) thereof provide the necessary legal basis for the findings sought by the EC (inexistence of any measures taken to comply during the period 9 April 2007-23 April 2007/31 August 2007). In particular, please respond to the US argument that these provisions do not impose obligations on Members.***

111. The EC's answer contains several statements concerning Article 21 that are at odds with the text of that provision. The EC states that "the main obligation for the losing Member as contained in Article 21.1 of the *DSU* remains*, i.e.,* prompt compliance with [sic] DSB's recommendations and rulings . . . ."[146] Article 21.1 states that "prompt compliance . . . is essential." That statement does not impose an obligation. Thus, a Member cannot be found in breach of Article 21.1.

112. The EC's answer also states that "undisputedly, Article 21.3 contains an *obligation* for the Member subject to [sic] DSB' recommendations and rulings to comply with its WTO commitments . . . ."[147] This statement is in fact disputed (as the question itself recognizes), and has been since the United States filed its first written submission. Article 21.3 does not impose obligations on a Member charged with bringing its measures into conformity with the recommendations and rulings of the DSB. The only obligation in Article 21.3 is to inform the DSB of the Member's intentions regarding implementation. With respect to the reasonable period of time, Article 21.3 confers upon the responding Member the *right* to a reasonable period of time. The United States made these arguments in its first submission, and the EC has not addressed them.

113. Thus, a "careful reading" of these provisions does not "imply" obligations that are not there. To the contrary, a careful reading confirms the U.S. reading of the provisions, which the EC has been unable to rebut.

> ***Q45. EC: Please confirm the Panel's understanding of the facts underlying the claims of the EC with respect to the Section 129 determination in case 11: The Panel understands that neither the EC nor TKAST raised the issue of the calculation error in the context of the original investigation before the USDOC (including as a "ministerial error"), nor raised it in the context of subsequent administrative reviews or in the context of the original dispute, and that the EC brought the calculation error to the***

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[146] EC Replies to the Panel's Questions, para. 123. The United States would note that the "losing Member" could be the complaining Party. Article 21 does not apply in situations in which the complaining party does not prevail.

[147] EC Replies to the Panel's Questions, para. 125.

attention of the USDOC for the first time in the context of the Section 129 determination proceedings. Please explain why the calculation error alleged by the EC was not raised sooner, in particular why the EC did not make any claim in this respect in the original dispute.

114. The allegation of a ministerial error was never made in the context of WTO dispute settlement until the section 129 proceeding. There, TKAST alleged that Commerce made a clerical error in the original investigation and that the agency should correct that error as part of the section 129 proceeding. To accommodate the Italian respondent and permit it access to the information needed to present its argument, Commerce extended the Section 129 proceeding with respect to Stainless Steel Sheet and Strip from Italy.[148] Petitioners thereafter argued that Commerce should correct other alleged errors. After considering the interested parties' arguments, Commerce ultimately rejected their requests because they were not related to the purpose of the section 129 proceeding (which was limited to zeroing). Commerce, therefore, has never agreed that the alleged error was in fact an error.

115. The EC states that TKAST raised the issue in the investigation and Commerce "refused to correct the error."[149] The EC provides a reference to the determination, but does not identify where Commerce "refused to correct the error." In fact, that determination demonstrates that Commerce agreed with the respondent that certain ministerial errors were made, but disagreed in respect of others. Moreover, the EC fails to mention that TKAST litigated the issue of the alleged error, and the Court of International Trade rejected the claim. In addition, while the EC asserts that TKAST claimed that Commerce "overstate[d] of the value of the 84 US sales for which facts available was used"[150], it is not at all clear that this was connected to the alleged error identified in the EC's first written submission ("The USDOC, in its calculation, erroneously inverted the fraction: instead of dividing total value by total volume, it divided total volume by total value."[151]). And finally, regardless of whether the alleged error involved an overstatement of the value of 84 US sales, an inverted fraction, or an "arithmetical error in the normal value determination"[152], it is unrelated to any changes made in connection with the elimination of zeroing from the margin calculation program.

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[148] Issues and Decision Memorandum for the Final Results of the Section 129 Determinations. Final Results for the Section 129 Determinations: Certain Hot-rolled Carbon Steel from the Netherlands, Stainless Steel Bar from France, Stainless Steel Bar from Germany, Stainless Steel Bar from Italy, Stainless Steel Bar from the United Kingdom, Stainless Steel Wire Rod from Sweden, Stainless Steel Wire Rod from Spain, Stainless Steel Wire Rod from Italy, Certain Stainless Steel Plate in Coils from Belgium, Stainless Steel Sheet and Strip in Coils from Italy, Certain Cut-To-Length Carbon-Quality Steel Plate Products from Italy, Certain Pasta from Italy, Comment 5 (April 9, 2007) (Exhibit EC-7).

[149] EC Replies to the Panel's Questions, para. 127.

[150] EC Replies to the Panel's Questions, para. 127.

[151] EC First Written Submission, para. 113.

[152] EC Replies to the Panel's Questions, para. 134; *see also* paras. 135, 137 and 140, referring to an error in normal value.

116. Ultimately, however, whether TKAST raised the alleged error with Commerce in the original investigation is not relevant to whether this Panel should consider it as part of this Article 21.5 proceeding. More importantly, the EC did not raise it in the original dispute. In fact, the EC did not raise it in the original dispute as a *conscious litigation decision* because the EC miscalculated the margin of dumping.[153]

> ***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).***

117. The Appellate Body in *EC – Bed Linen (21.5)* found that an element of a redetermination was not necessarily part of a "measure taken to comply." The EC has attempted to distinguish *Bed Linen*, but its argument fails as a matter of logic.

118. According to the EC, the Appellate Body considered the "other known factors" analysis to be separable because that analysis had no "impact" on the EC's ability to consider the effect of the dumped imports.[154] Here, the EC argues that the alleged error has an impact on the dumping determination and thus is distinguishable from the circumstances in *Bed Linen*.[155] However, that analogy is false.

119. If one were to apply the EC's reasoning in this dispute to the reasoning in *Bed Linen*, then the Appellate Body would have assessed whether the other known factors analysis had an effect on the *injury determination*, not just the known factors analysis. The other known factors analysis would have been – to use the EC's phrase – part of the "bundle of fact and evidence" to be considered for purposes of the *injury determination*. Following the logic set out by the EC in paragraph 137, it would not have been possible, in *Bed Linen*, to "separate in the re-determination made by" the EC pursuant to its implementation proceeding "one of the elements (*i.e.,* the [dumped imports analysis]) from the rest of the [causation analysis]."[156]

120. By contrast, the correct analogy is whether the alleged error had an impact on Commerce's ability to calculate the margin of dumping *without zeroing* – since that was what the DSB recommendations and rulings required. It is clear that the alleged error had no such effect, as Commerce was in fact able to calculate the margin of dumping without zeroing, and without resolving the question of whether the alleged error was in fact an error.

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[153] EC Replies to the Panel's Questions, para. 128.
[154] EC Replies to the Panel's Questions, para. 133.
[155] EC Replies to the Panel's Questions, para. 135.
[156] EC Replies to the Panel's Questions, para. 137.

121. The EC contends that because Commerce agreed to consider whether it was possible to take into account the raising of the alleged error for the first time in a section 129 proceeding, this somehow constitutes evidence that the alleged error was part of the measure taken to comply.[157] That is not so. It simply demonstrates that the respondents raised the question for the first time during the section 129 process. As *Bed Linen* makes clear, the fact that a particular element appears in a redetermination does not make it part of the measure taken to comply. The EC has not proven otherwise.

122. The EC's reliance on *US – Privatization (21.5)* is misplaced. As the quotation the EC includes in its submission indicates, the panel had already concluded – based on the facts of that dispute – that the *entire* redetermination was a measure taken to comply.[158] The EC does not explain how the panel reached that conclusion, yet that is the question presented here. The question is *whether* the entire redetermination is a measure taken to comply. According to the reasoning in *Bed Linen*, the answer is "no."

123. Korea does not answer the question but rather offers an unsubstantiated opinion on municipal law.[159]

> ***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?***

124. The EC states that making findings in respect of measures no longer in effect would "provide 'security and predictability' to the multilateral trading system' . . . as contained in Article 3.2 of the DSU. To be clear, Article 3.2 states that "the dispute settlement system . . . is a central element in providing security and predictability to the multilateral trading system." The dispute settlement system is such an element when the rules set out in the DSU are followed, not abandoned. If measures are not within the terms of reference of a dispute, and the EC is asking for findings in respect of those measures on the basis that doing so would "provide security and predictability," then the EC would be asking the Panel to *disregard* the rules of the dispute settlement in favor of security and predictability. It is nonsensical to reason that disregarding the rules of a system enables that system to fulfill its function as a central element in providing security and predictability to the multilateral trading system.

125. The EC contends that "in the present case, even if certain 129 Determinations have been

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[157] EC Replies to the Panel's Questions, para. 131.
[158] EC Replies to the Panel's Questions, para. 138, quoting *US – Privatization (21.5)*, para. 138.
[159] Korea Answer to Third Party Question 22.

revoked [sic],[160] the alleged WTO violations . . . arising from the unjustified increase in the all others rates and the failure to reassess the injury may be repeated because the US legislative framework allowing for it still remains in force."[161] The EC agrees that the revoked orders are terminated and cannot be resuscitated. The EC's concerns are not that the all others rate and injury claims in respect of *these* measures may be resuscitated. Instead, the EC argues that its grievances with the all others rate and injury could arise again in other disputes involving other measures.[162] Here, however, the EC has made no claims regarding the "US legislative framework" or measures other than those the EC agrees are permanently revoked. Thus, the EC, by its own admission, is requesting nothing more than an advisory opinion.

> ***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?***
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> ***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?***

126. Due to the related nature of these questions, the United States will comment on the EC's answers to Questions 49 and 50 together.

127. The EC denies that a lacuna exists in Article 9.4,[163] and contends that the condition that margins which are zero or *de minimis*, or calculated pursuant to Article 6.8 must be excluded "always applies."[164] If the Panel were to accept the EC's argument, then when a Member limits its investigation pursuant to Article 6.10, and all of the margins calculated for the investigated companies are either zero or *de minimis*, or calculated pursuant to Article 6.8, that Member would

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[160] To be clear, the EC errs in stating that the section 129 determinations have been revoked. To the contrary, those determinations have not been revoked; they resulted in the revocation of certain antidumping duty orders.

[161] EC Replies to the Panel's Questions, para. 148.

[162] *See also*, EC Replies to the Panel's Questions, para. 161.

[163] EC Replies to the Panel's Questions, para. 153.

[164] EC Replies to the Panel's Questions, para. 152.

have no method available for calculating a margin of dumping to be applied to the non-investigated companies.

128. The fact remains that the Antidumping Agreement does not provide any specific obligations for the calculation of a margin of dumping to be applied to non-investigated companies, when the only margins calculated during the investigation are either zero or *de minimis*, or calculated pursuant to Article 6.8. Silence has meaning, as the Appellate Body has recognized in the context of sunset reviews. In *US – Corrosion-Resistant Steel,* Japan had argued that the United States was obligated to calculate margins of dumping in sunset reviews. The Appellate Body rejected that argument, noting that:

> Article 11.3 does not expressly prescribe any specific methodology for investigating authorities to use in making a likelihood determination in a sunset review. Nor does Article 11.3 identify any particular factors that authorities must take into account in making such a determination.[165]

The Appellate Body concluded that "[t]his silence in the text of Article 11.3 suggests that no obligation is imposed on investigating authorities to calculate or rely on dumping margins in a sunset review."[166]

129. The obligation the EC seeks to attribute to Article 9.4 simply does not exist.

> ***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?***

130. The EC states that in *US – OCTG from Argentina (21.5)*, the Appellate Body "held that a claim relating to an aspect of a measure on which the panel in the original proceeding had not ruled was *properly* within the scope of Article 21.5 of the DSU."[167] That is incorrect. The point of the Appellate Body's analysis in that dispute is that the panel *had* ruled on the claim – the Article 11.3 claim – in that determination and that the panel concluded that the factual basis of the determination was flawed. Thus, this attempt to analogize *US – OCTG from Argentina (21.5)* is of no help to the EC in this dispute. Here, the original panel made a very specific finding regarding the claims which it declined to address further, a finding not present in *US – OCTG*

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[165] *US – Corrosion-Resistant Steel (AB)*, para. 123 (footnote omitted).
[166] *US – Corrosion-Resistant Steel (AB)*, para. 123.
[167] EC Replies to the Panel's Questions, para. 158.

from Argentina, in which the original panel stated that making further findings would not assist the United States for purposes of implementation. As the United States has explained, that finding means that the United States was under no obligation to reconsider injury. To so require would contradict the original panel's express finding to the contrary.

131. Indeed, that is just what the EC asks this Panel to do when it states that "it may be questioned whether the conclusion of the original Panel was appropriate in light of the measures adopted by the United States afterwards."[168] However, this is a *compliance* proceeding. The question is whether the United States has complied with the actual recommendations and rulings that the DSB made, and not recommendations and rulings that, in the view of the EC, the DSB could or should have made. One of those findings is that further consideration of the injury claims would not assist the United States for purposes of implementation. The Appellate Body did not disturb these findings. They are therefore final and must be accepted as such. They cannot be reversed during a *compliance* proceeding. To do so would require the United States to take action *contrary to* the findings of the original Panel – the very opposite of what is required in a proceeding designed to evaluate *compliance* with those findings. Accordingly, there is no basis for a compliance panel to overturn the findings of an original panel, as the EC is requesting.

> ***Q52 EC: Please comment on the US statement, in paragraph 67 of its Rebuttal, that "[n]ow, as in the original proceeding, it is not necessary for the Panel to address dependent claims where the United States has implemented the DSB's recommendations with respect to the violations found".***

132. As noted above, the EC is asking this Panel to overturn findings that were final in the original dispute. That is not permitted.

133. Furthermore, the United States notes that the EC has failed to substantiate its assertions. The EC's arguments on injury assume that an "incorrect" volume of imports *automatically* constitutes a breach of Articles 3.1, 3.2, 3.5, and Article VI:1 of the GATT 1994.[169] Nothing in the text of those provisions suggests that the mere existence of differences in the volume of the dumped imports suffices to prove that the entire injury determination is flawed.

134. Finally, the EC's request that the ITC take into account the revised volumes is moot. In the sunset review on stainless steel bar from France, Germany, Italy, and the United Kingdom, instituted on February 1, 2007, the ITC took into account information concerning the likely volume of dumped imports in light of Commerce's Section 129 Determination, including information that the EC itself had provided in the ITC proceeding. (See, e.g., Exhibit EC-27). Based on the information in the sunset record, the ITC issued a negative likely injury sunset determination. As a result, Commerce revoked the orders on stainless steel bar from France,

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[168] EC Replies to the Panel's Questions, para. 160.
[169] EC Replies to the Panel's Questions, para. 149.

Germany, Italy, and the United Kingdom in their entirety, effective March 7, 2007. As noted in the United States' response to panel question 48, the appeal of the ITC's determination in the sunset review was dismissed and no further appeal is possible. The revocation of the antidumping duty orders is therefore final and conclusive and, the orders cannot be reintroduced.