

***UNITED STATES – LAWS, REGULATIONS AND METHODOLOGY FOR CALCULATING
DUMPING MARGINS (“ZEROING”):
RECOURSE TO ARTICLE 21.5 OF THE DSU
BY THE EUROPEAN COMMUNITIES***

WT/DS294

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

May 8, 2008

[Note to the reader: I played a large part in the writing of the final product submitted to the WTO. However, I cannot claim the entire submission as my writing. I have deleted the portions that I did not write.]

Table of Reports

<i>Australia – Leather (Article 21.5)</i>	Panel Report, <i>Australia – Subsidies Provided to Producers and Exporters of Automotive Leather – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS126/RW and Corr.1, adopted 11 February 2000
<i>Australia – Salmon (Article 21.5)</i>	Panel Report, <i>Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS18/RW, adopted 20 March 2000
<i>Canada – Wheat Exports (AB)</i>	Appellate Body Report, <i>Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , WT/DS276/AB/R, adopted 27 September 2004
<i>EC – Bananas III (Article 21.5) (Ecuador)</i>	Panel Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 by Ecuador</i> , WT/DS27/RW/ECU, adopted 6 May 1999
<i>EC – Bed Linen (Article 21.5) (AB)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/AB/RW, adopted 24 April 2003
<i>EC – Biotech</i>	Panel Report, <i>European Communities – Measures Affecting the Approval and Marketing of Biotech Products</i> , WT/DS291/R, WT/DS292/R, WT/DS293/R, adopted 21 November 2006
<i>India – Patent Protection (US) (AB)</i>	Appellate Body Report, <i>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products</i> , WT/DS50/AB/R, adopted 16 January 1998
<i>Indonesia – Autos</i>	Panel Report, <i>Indonesia – Certain Measures Affecting the Automobile Industry</i> , WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, adopted 23 July 1998
<i>Korea – Dairy Safeguard (AB)</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 12 January 2000
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<i>US – Corrosion-Resistant Steel Sunset Review (AB)</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R, adopted 9 January 2004

<i>US – German Steel (AB)</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R, adopted 19 December 2002
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<i>EC – Salmon AD</i>	Panel Report, <i>European Communities – Anti-Dumping Measure on Farmed Salmon from Norway</i> , WT/DS337/R, adopted 15 January 2008
<i>US – Softwood Lumber CVD Final (Article 21.5) (AB)</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS257/AB/RW, adopted 20 December 2005
<i>US – Upland Cotton (Article 21.5)</i>	Panel Report, <i>United States – Subsidies on Upland Cotton – Recourse by Brazil to Article 21.5 of the DSU</i> , WT/DS267/RW, notice of appeal filed 12 February 2008
<i>US – Zeroing (Japan) (AB)</i>	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews</i> , WT/DS322/AB/R, adopted 23 January 2007

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

1. * * *

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

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

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

5. As discussed more fully in answer to question 13 below, the Appellate Body's finding in *US – Softwood Lumber CVD Final (Article 21.5) (AB)*, was not based entirely on the fact that through an investigation Commerce establishes the cash deposit rate and through an assessment

¹ Antidumping Agreement, Article 5.8.

review Commerce determines the final amount of the antidumping duties. Rather, the Appellate Body considered: (1) the timing of the Section 129 determination and the determination in the first assessment review at issue in that dispute; (2) the link with respect to the specific issue involved in both the Section 129 determination and the first assessment review; and (3) the acknowledgment of the United States that the determination in the first assessment review was made “in view of” the recommendations and rulings of the DSB.²

* * *

Q13. EC, US:

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

6. Yes.³

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?***

7. No. In addressing this question, the Panel should be guided by the Appellate Body’s admonition in *US – Softwood Lumber CVD Final (Article 21.5)* that “not . . . every assessment review will necessarily fall within the jurisdiction of an Article 21.5 panel.”⁴ Every administrative review of the same antidumping duty order will necessarily involve the same product from the same country. An administrative review may, or may not, involve the same companies that were examined in the investigation. However, if an overlap between product, exporting country, and exporter, was sufficient to establish a “close nexus,” then every administrative review would fall within the jurisdiction of an Article 21.5 panel. This would run counter to the Appellate Body’s admonition.

8. Investigations and administrative reviews serve different purposes, thus demonstrating a more limited nexus. That is, as discussed in the answer to question 10, the purpose of the investigation is to determine, among other things, if dumping exists in such a degree so as to justify the imposition of an antidumping duty. Under the U.S. system, the investigation will also establish the cash deposit rate applied as an estimate of antidumping duties. The United States

² *US – Softwood Lumber CVD Final (Article 21.5) (AB)*, para. 84.

³ U.S. First Written Submission, para. 10.

⁴ *US – Softwood Lumber CVD Final (Article 21.5) (AB)*, para. 93 (footnote omitted).

recalls that the original Panel discussed in some detail the factual differences between investigations and reviews.⁵

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

10. Turning to the Appellate Body's finding in *US – Softwood Lumber CVD Final (Article 21.5)*, the Appellate Body did not base its conclusion that the determinations from the Section 129 proceeding and the first assessment review were closely connected solely on the fact that the investigation established a prospective cash deposit rate, while the administrative review in question determined the final assessment rate on past entries. In making its finding, the Appellate Body considered the timing of the two determinations at issue. The Appellate Body noted that “[a]s a whole, Article 21 deals with events *subsequent* to the DSB’s adoption of recommendations and rulings in a particular dispute.”⁶ In that dispute, the determinations in both the Section 129 proceeding and the first administrative review occurred after the adoption of the DSB’s recommendations and rulings. More importantly, the Section 129 determination and the determination in the first administrative review both closely corresponded to the expiration of the reasonable period of time.⁷ Thus, the timing of these two determinations provided Commerce with the ability to take account of the DSB’s recommendations and rulings in the first administrative review.⁸ In fact, in that case, the United States expressly acknowledged that the determination in the first administrative review was made “in view of” the DSB’s recommendations and rulings.⁹

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

12. This is not the case with respect to the legal basis for the prohibition of zeroing in antidumping determinations. That is, the original panel’s finding that zeroing is prohibited in

⁵ Panel Report, para. 7.156-7.157.

⁶ *US – Softwood Lumber CVD Final (Article 21.5) (AB)*, para. 70 (italics in original).

⁷ *US – Softwood Lumber CVD Final (Article 21.5) (AB)*, para. 84.

⁸ *US – Softwood Lumber CVD Final (Article 21.5) (AB)*, para. 84.

⁹ *US – Softwood Lumber CVD Final (Article 21.5) (AB)*, para. 84.

¹⁰ *See US – Softwood Lumber CVD Final (Article 21.5) (AB)*, para. 15.

investigations and the Appellate Body's finding that zeroing is prohibited in assessment proceedings are based on different obligations. Concerning investigations, the original panel noted that the resolution of the issue involved the interpretation of the first sentence of Article 2.4.2, which provides that "the existence of margins of dumping during the investigation phase ... on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions" ¹¹ The panel recalled that when a Member has engaged in multiple averaging in the application of Article 2.4.2, the Appellate Body had found that the Member must include all of the results of the separate calculations in the margin of dumping. ¹² Based on these principles, the panel found that Commerce's zeroing methodology as applied in investigation was "as such" inconsistent with Article 2.4.2. ¹³ The United States did not appeal this finding.

13. By contrast, the Appellate Body found that Commerce's use of zeroing in administrative reviews was inconsistent with Article 9.3. ¹⁴

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

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

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

16. * * *

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

¹¹ *US – Zeroing (EC) (Panel)*, para. 7.26.

¹² *US – Zeroing (EC) (Panel)*, para. 7.27.

¹³ *US – Zeroing (EC) (Panel)*, para. 7.106.

¹⁴ *US – Zeroing (EC) (AB)*, para. 163(a)(i).

18. As discussed in answer to question 10 above, in an investigation a Member determines, among other things, whether dumping exists and at a sufficient level to justify the imposition of an antidumping duty.¹⁵ The United States accomplishes this by analyzing import transactions that occurred prior to the initiation of the investigation. An administrative review analyzes import transactions from a different period of time in order to determine the final amount of antidumping duties to be assessed. While they may look at different periods of time, different transactions, and possibly different companies, and may use different approaches (to which different WTO obligations may apply), both investigations and administrative reviews involve the calculation of margins of dumping.

19. By contrast, the Appellate Body has recognized that Members are not required to calculate fresh margins of dumping in a sunset review.¹⁶ Indeed, the United States does not calculate new margins of dumping in its sunset reviews. Consistent with Article 11.3, the purpose of a sunset review is to determine if the expiration of the antidumping duty would likely lead to the continuation or recurrence of dumping and injury. The analysis is essentially counterfactual and pertains to what is likely to happen in the future, rather than to determine what has happened in the past. Thus, a determination in a sunset review involves different factors, a different analysis, different obligations, and a different period of time – the future – than either an investigation or an administrative review.

20. Second, the timing of many of the sunset review determinations at issue in this dispute demonstrates that they cannot possibly be regarded as closely connected to the determinations originally challenged, or to the DSB's recommendations and rulings. As the United States discussed in its opening statement to the panel, of the 16 sunset review determinations identified by the EC as "subsequent reviews," 11 of them were made prior to the adoption of the DSB's recommendations and rulings.¹⁷ Thus, unlike the situation in *US – Softwood Lumber CVD Final (Article 21.5) (AB)*, as discussed in response to question 13, the timing of these determinations demonstrates that they cannot be connected to DSB recommendations and rulings that did not even yet exist.

21. Finally, the sunset review determinations were not made "in view of" the DSB's recommendations and rulings. The United States did not *choose* to make sunset review determinations at all, let alone with a view to dispute settlement proceedings. Sunset reviews are required by Article 11.3 of the Antidumping Agreement. Certainly Commerce could not have taken into consideration the DSB's recommendations and rulings in the 11 sunset review determinations that predated those recommendations and rulings. Four of the five sunset reviews that post-date the DSB's recommendations and ruling resulted in the revocation of the antidumping duty.¹⁸ In the one remaining sunset review determination, the interested parties did

¹⁵ See Antidumping Agreement, Articles 5.1 and 5.8.

¹⁶ *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 123.

¹⁷ US Opening Statement, para. 16.

¹⁸ Those are the antidumping duty orders on Stainless Steel Bar from France, Germany, Italy and the United Kingdom. As discussed in response to question 48, there is no possibility that these orders will be reintroduced as a result of domestic litigation.

not raise, and Commerce made no mention of, the issue of non-dumped sales.¹⁹ Accordingly, these sunset review determinations do not possess the required nexus to fall within this Panel's jurisdiction.

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

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

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

22. . . . As discussed more fully in response to question 13 above, the Appellate Body also considered the timing of the two determinations in question, as well as the acknowledgment of the United States that the determination in the first assessment review was made "in view of" the DSB's recommendations and rulings.²⁰

23. * * *

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?

24. As discussed more fully below in answer to question 28, the Antidumping Agreement recognizes retrospective duty assessment, prospective duty assessment, and prospective normal value systems. The Appellate Body has recognized that the Antidumping Agreement should not

¹⁹ See Issues and Decision Memorandum from Notice of Final Results of Expedited Sunset Reviews of the Antidumping Duty Orders: Certain Pasta from Italy and Turkey (February 5, 2007). (Exhibit US-25)

²⁰ US – Softwood Lumber CVD Final (Article 21.5) (AB), para. 84.

be construed so as to place one system at an advantage over the other.²¹ Thus, these systems should be treated equally, unless the Antidumping Agreement expressly provides otherwise.

Footnote 21 to Article 11.2 of the AD Agreement provides:

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

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

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

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

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

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

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

* * *

²¹ See *US – Zeroing (Japan)(AB)*, para. 163.

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

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

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

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

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

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

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

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

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

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

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

33. * * *

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

* * *

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

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

35. * * *

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

37. The EC's position, as reflected in its domestic legislation, is that relief based on WTO dispute resolution need not be granted for importations occurring prior to date of implementation.²² The United States agrees. However, the U.S. position is based on the Antidumping Agreement's treatment of the systems, and not on any label under municipal law.

38. * * *

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

39. Yes. The cash deposit rate for imports of merchandise manufactured or exported by NSK established by Commerce in its determination from the May 1, 2000 through April 30, 2001 administrative review of Ball Bearings from the United Kingdom²³ remains in effect. This was one of the determinations challenged by the EC in the original dispute.

* * *

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

40. On March 31, 2008, the U.S. Court of International Trade, at the domestic industry's request, dismissed the domestic court case challenging the USITC's sunset review determinations with respect to the antidumping duty orders on Stainless Steel Bar from France, Germany, Italy and the United Kingdom.²⁴ This dismissal permanently terminated all domestic litigation relating to the ITC sunset determination. Under U.S. law, the revocation of the antidumping duties on stainless steel bar from France, Germany, Italy, and the United Kingdom is therefore "final and conclusive," and may no longer be appealed. Because the underlying antidumping duty orders cannot be reintroduced, the EC's assertion is moot.

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

²² See Exhibit US-34.

²³ Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, 67 Fed. Reg. 55780 (August 30, 2002) (Exhibit US-35)

²⁴ See *Carpenter Technology Corp., et al. v. United States*, Ct. No. 08-00082, Notice of Dismissal (Ct. Int'l Trade March 31, 2008) (Exhibit US-33).

41. Article 9.4 provides a “ceiling” to the amount of the antidumping duty that may be applied to companies that have not been individually investigated when a Member has limited its investigation pursuant to Article 6.10. That is, the amount of the antidumping duty applied to non-investigated companies is based on the results of other companies. In order to determine this “ceiling,” certain results from the investigated companies must be excluded; namely zero and *de minimis* margins and margins based on the application of Article 6.8. However, when the only margins from investigated companies are zero or *de minimis* or based on an application of Article 6.8, this simply means that a ceiling cannot be determined pursuant to Article 9.4. A Member may still apply an antidumping duty to the non-investigated companies, and under the general principles of Article 9.4, that amount may be based on the results of other companies.

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

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

43. * * *

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

45. Article 9.4 also establishes that the “all others” rate cannot be arbitrary. Rather, a Member may apply an antidumping duty to non-investigated companies based upon the results of the exporters and producers who have been investigated. Article 9.4 does not specifically provide

for the situation where the only margins of dumping calculated in an investigation are either zero and *de minimis* or calculated in accordance with Article 6.8. Thus, in such a situation, the “ceiling” to be applied to the non-investigated companies cannot be determined by the specific methodology set forth in Article 9.4.