

**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**

**FIRST WRITTEN SUBMISSION OF  
THE UNITED STATES OF AMERICA**

[Note to the Reader: While I drafted a significant portion of this written submission, the entire submission included work from other attorneys. I have deleted those portions of this submission that I did not write. To aid the reader, I have kept the section titles.]

**February 8, 2008**

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## **I. INTRODUCTION**

1. Proceedings under Article 21.5 are meant to address disagreements “as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings [of the Dispute Settlement Body (“DSB”).” A panel composed under Article 21.5, therefore, begins with the recommendations and rulings of the DSB, and examines measures that a Member has taken pursuant to those recommendations and rulings to determine if that Member is in compliance.

2. The European Communities (“EC”), however, attempts to expand the scope of these proceedings by incorporating claims regarding measures entirely distinct from those measures it originally challenged in its “as applied” claims and which were not measures taken to comply.

3. As demonstrated below, the United States has implemented the recommendations and rulings of the DSB, and thus has complied with its obligations under the DSU. This Panel should therefore reject the EC’s claims of non-compliance and its effort to enlarge the obligations of the United States.

4. The United States has structured its First Written Submission as follows. First, the United States provides a brief overview of how its retrospective antidumping system operates. Next, the United States addresses the specific measures challenged by the EC in its original request for the establishment of a panel, the recommendations and rulings of the DSB, and the actions taken by the United States in response to those recommendations and rulings. The United States then addresses the terms of reference of this Panel and requests that the Panel find that the terms of reference are limited to the measures identified in the EC’s Article 21.5 panel request – the 15 original investigations and 16 administrative reviews. The United States next explains why it has complied with the recommendations and rulings of the DSB.

## **II. FACTUAL BACKGROUND**

5. The United States has already provided an explanation of its antidumping system in its First Written Submission in the underlying dispute. The United States will not repeat the full explanation in this submission. However, the United States highlights below those aspects of its antidumping system relevant to the issues in this Article 21.5 dispute.

### **A. The U.S. Antidumping System**

6. The United States maintains a retrospective antidumping duty system. Pursuant to this system, importers of products subject to an antidumping duty order post a cash deposit of the estimated amount of the antidumping duties at the time of importation.<sup>1</sup> The final amount of antidumping duties will be determined through a proceeding called an administrative review.<sup>2</sup>

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<sup>1</sup> See 19 U.S.C. § 1673e(a)(3). (Exhibit US-1)

<sup>2</sup> 19 C.F.R. § 351.213(a). (Exhibit US-5) There are several different types of administrative reviews in the U.S. system. The U.S. antidumping statute identifies periodic reviews of the amount of duty, reviews based on

(continued...)

## 1. The Investigation

7. In an antidumping investigation, the Department of Commerce (“Commerce”) determines an individual margin of dumping for each known exporter or producer of the subject merchandise.<sup>3</sup> Commerce will also determine an “all others” rate which applies to imports from those exporters or producers who were not investigated individually. The all-others rate is usually a weighted average of the margins of dumping determined for each of the exporters or producers actually investigated, excluding those margins of dumping which are zero or *de minimis*, or which were determined by applying an adverse inference in determining the facts otherwise available.<sup>4</sup> However, when such a calculation is not possible, Commerce may determine the all others rate by any reasonable method.<sup>5</sup>

8. If the margins of dumping determined by Commerce are above *de minimis*, and the International Trade Commission (“ITC”) determines that the domestic industry is being materially injured, or is threatened with material injury, because of the dumped imports, Commerce will publish an antidumping duty order.<sup>6</sup> The order provides the United States with the authority to collect cash deposits at the time of importation and assess antidumping duties.<sup>7</sup>

## 2. Administrative Reviews

9. Interested parties may request an administrative review of the antidumping duty order each year in the anniversary month of the publication of the order.<sup>8</sup> Through these administrative reviews, for each of the exporters or producers for whom a review has been requested, Commerce reexamines whether that exporter or producer was dumping.<sup>9</sup> The administrative review normally covers sales of the subject merchandise from the twelve months preceding the most recent anniversary month.<sup>10</sup>

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<sup>2</sup> (...continued)

changed circumstances, five-year (or sunset) reviews, and new shipper reviews. *See* 19 U.S.C. § 1675. In this First Written Submission, the United States uses the term “administrative review” to refer to the periodic review of the amount of duty, which may be requested every year during the anniversary month of the publication of the antidumping duty order. *See* 19 U.S.C. § 1675(a)(1). (Exhibit US-2)

<sup>3</sup> 19 U.S.C. § 1677f-1(c)(1). Where the number of known exporters or producers is so large so as to render the determination of margins of dumping for each impractical, Commerce may either limit its examination to a sample of exporters or producers, or to those exporters or producers who account for the largest volume of subject merchandise that can be reasonably examined. 19 U.S.C. § 1677f-1(c)(2). (Exhibit US-3)

<sup>4</sup> 19 U.S.C. § 1673d(c)(5)(A). (Exhibit US-4)

<sup>5</sup> 19 U.S.C. § 1673d(c)(5)(B). (Exhibit US-4)

<sup>6</sup> 19 U.S.C. § 1673e. (Exhibit US-1)

<sup>7</sup> 19 U.S.C. § 1673e(a). (Exhibit US-1)

<sup>8</sup> 19 C.F.R. § 351.213(b)(1). (Exhibit US-5)

<sup>9</sup> 19 C.F.R. § 351.213(b)(1). (Exhibit US-5)

<sup>10</sup> 19 C.F.R. § 351.213(e)(1)(i). (Exhibit US-5)

10. The results of the review serve as the basis for the calculation of the assessment rate for each importer of the subject merchandise covered by the review.<sup>11</sup> The results also establish new cash deposit rates for the collection of estimated antidumping duties on imports going forward, superceding any cash deposit rate already in effect for the exporters or producers reviewed.<sup>12</sup> If no review is requested, the estimated duties collected in the form of cash deposits are finally assessed.<sup>13</sup> Commerce communicates the results of its determinations to U.S. Customs and Border Protection (“CBP”) by issuing what are referred to as “instructions.”

### **3. Sunset Reviews**

11. Five years after the publication of the antidumping duty order, Commerce and the ITC will conduct a “sunset review”<sup>14</sup> to determine whether revocation of the antidumping duty order would be likely to lead to a continuation or recurrence of dumping,<sup>15</sup> and the recurrence or continuation of material injury.<sup>16</sup> The United States will revoke an antidumping duty order unless both Commerce and the ITC make an affirmative finding of likelihood in a sunset review.<sup>17</sup>

#### **B. The Current Dispute**

12. This Article 21.5 dispute arises from a challenge made by the EC against the United States concerning the calculation of the margins of dumping in antidumping duty proceedings.

#### **1. The EC’s Original Claims**

13. The EC challenged U.S. “laws, regulations, administrative procedures, measures and methodologies for determining the dumping margin in original investigations and review investigations” as being inconsistent with the AD Agreement, the GATT 1994, and the Marrakesh Agreement Establishing the World Trade Organization (“Marrakesh Agreement”) “as such.”<sup>18</sup> The EC also challenged “methodologies and the laws, regulations, administrative procedures and measures” “as applied” in the determinations made in fifteen specific antidumping investigations and sixteen specific administrative reviews.<sup>19</sup>

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<sup>11</sup> 19 U.S.C. § 1675(a)(2)(C) (Exhibit US-2); 19 C.F.R. § 351.212(b)(1). (Exhibit US-6)

<sup>12</sup> See 19 U.S.C. § 1675(a)(2)(C). (Exhibit US-2)

<sup>13</sup> 19 C.F.R. § 351.212(c)(1). (Exhibit US-6)

<sup>14</sup> 19 U.S.C. § 1675(c)(1). (Exhibit US-2)

<sup>15</sup> 19 U.S.C. § 1675a(c)(1). (Exhibit US-7)

<sup>16</sup> 19 U.S.C. § 1675a(a)(1). (Exhibit US-7)

<sup>17</sup> 19 U.S.C. § 1675(d)(2). (Exhibit US-2)

<sup>18</sup> WT/DS294/7/Rev.1, p. 2.

<sup>19</sup> WT/DS294/7/Rev.1, p. 4.

## **2. Panel Proceedings**

14. On October 31, 2005, the original panel issued its report, finding that Commerce’s methodology with respect to the calculation of margins of dumping in investigations was “as such” inconsistent with Article 2.4.2 of the AD Agreement.<sup>20</sup> The panel further found that the United States acted inconsistently with Article 2.4.2 with respect to its determinations in the fifteen antidumping investigations challenged by the EC.<sup>21</sup>

15. With respect to the determinations in the sixteen administrative reviews, the panel found that the United States did not act inconsistently with Articles 1, 2.4, 2.4.2, 9.3, 11.1, 11.2 and 18.4 of the AD Agreement, Articles VI:1 and VI:2 of GATT 1994, or Article XVI:4 of the Marrakesh Agreement.<sup>22</sup> Similarly, the panel found that Commerce’s methodology with respect to the calculation of the margin of dumping in administrative reviews, new shipper reviews, changed circumstances reviews and sunset reviews was not “as such” inconsistent with the covered agreements.<sup>23</sup>

## **3. Appellate Body Proceedings**

16. The EC appealed the panel’s “as such” and “as applied” findings with respect to administrative reviews. The United States appealed the panel’s “as such” findings with respect to antidumping investigations. The Appellate Body upheld the panel’s finding that Commerce’s methodology for determining margins of dumping in investigations was “as such” inconsistent with Article 2.4.2 of the AD Agreement. The Appellate Body reversed the panel’s “as applied” finding concerning the determinations in the sixteen administrative reviews, finding that these determinations were inconsistent with Article 9.3 of the AD Agreement and Article VI:2 of GATT 1994.<sup>24</sup> The Appellate Body found that it was unable to complete the analysis of whether Commerce’s methodology for calculating margins of dumping in administrative reviews was inconsistent with the AD Agreement, GATT 1994 or the Marrakesh Agreement, and declined to make an “as such” ruling concerning this methodology.<sup>25</sup> The DSB adopted the panel report, as modified by the Appellate Body, on May 9, 2006. The EC and the United States agreed to a reasonable period of time, ending April 9, 2007, for the United States to implement the rulings and recommendation of the DSB.

## **4. Implementation of the DSB Recommendations and Rulings**

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<sup>20</sup> *US – Zeroing (EC) (Panel)*, para. 8.1(c).

<sup>21</sup> *US – Zeroing (EC) (Panel)*, para. 8.1 (a).

<sup>22</sup> *US – Zeroing (EC) (Panel)*, paras. 8.1 (d), (e) and (f).

<sup>23</sup> *US – Zeroing (EC) (Panel)*, paras. 8.1 (g) and (h).

<sup>24</sup> *US – Zeroing (EC) (AB)*, para. 263(a)(i).

<sup>25</sup> *US – Zeroing (EC) (AB)*, paras. 263(c) and (g)(ii).

17. On December 27, 2006, Commerce announced that it would no longer calculate the margin of dumping in antidumping investigations using comparisons of weighted average normal values and weighted average export prices without providing offsets for sales made at greater than normal value.<sup>26</sup> This modification of Commerce’s methodology became effective for all future investigations and those pending before Commerce as of February 22, 2007.<sup>27</sup>

18. On March 1, 2007, Commerce initiated proceedings pursuant to Section 129 of the Uruguay Round Agreements Act<sup>28</sup> covering twelve of the fifteen antidumping investigation determinations found to be inconsistent with the AD Agreement.<sup>29</sup> Commerce noted that the antidumping orders resulting from three of the investigations originally challenged by the EC had already been revoked.<sup>30</sup> Commerce announced that in these Section 129 determinations, it intended solely to recalculate the margins of dumping by applying the modification of its calculation methodology described in the December 26, 2006 Federal Register notice.<sup>31</sup>

19. Commerce issued its determinations with respect to eleven of the Section 129 determinations on April 9, 2007.<sup>32</sup> These eleven Section 129 determinations became effective on April 23, 2007.<sup>33</sup> The Section 129 determinations resulted in the full revocation of the antidumping duty orders on Certain Hot-Rolled Carbon Steel Products from the Netherlands and Stainless Steel Wire Rod from Sweden. In addition, the Section 129 determinations resulted in the partial revocation of the antidumping duty orders on Stainless Steel Bar from France, Stainless Steel Bar from Germany, Stainless Steel Bar from Italy, and Stainless Steel Bar from

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<sup>26</sup> Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 Fed. Reg. 77722 (December 27, 2006). (Exhibit EC-1)

<sup>27</sup> Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Change in Effective Date of Final Modification, 72 Fed. Reg. 3783 (January 26, 2007). (Exhibit EC-2)

<sup>28</sup> 19 U.S.C. § 3538. (Exhibit US-8)

<sup>29</sup> Implementation of the Findings of the WTO Panel in US – Zeroing (EC): Notice of Initiation of Proceedings Under Section 129 of the URAA; Opportunity to Request Administrative Protective Orders; and Proposed Timetable and Procedures, 72 Fed. Reg. 9306 (March 1, 2007). (Exhibit US-9)

<sup>30</sup> Commerce revoked the antidumping orders with respect to Certain Cut-to-length Carbon-quality Steel Plate from France (A-427-816), Certain Stainless Steel Sheet and Strip in Coils from France (A-427-814), and Certain Stainless Steel Sheet and Strip in Coils from the United Kingdom (A-412-818). Implementation of the Findings of the WTO Panel in US – Zeroing (EC): Notice of Initiation of Proceedings Under Section 129 of the URAA; Opportunity to Request Administrative Protective Orders; and Proposed Timetable and Procedures, 72 Fed. Reg. 9306, 9306 (March 1, 2007). (Exhibit US-9)

<sup>31</sup> Implementation of the Findings of the WTO Panel in US – Zeroing (EC): Notice of Initiation of Proceedings Under Section 129 of the URAA; Opportunity to Request Administrative Protective Orders; and Proposed Timetable and Procedures, 72 Fed. Reg. 9306, 9306 (March 1, 2007). (Exhibit US-9)

<sup>32</sup> Implementation of the Findings of the WTO Panel in US – Zeroing (EC): Notice of Determinations Under Section 129 of the Uruguay Round Agreements Act and Revocations and Partial Revocations of Certain Antidumping Duty Orders, 72 Fed. Reg. 25261 (May 4, 2007). (Exhibit EC-1)

<sup>33</sup> Implementation of the Findings of the WTO Panel in US – Zeroing (EC): Notice of Determinations Under Section 129 of the Uruguay Round Agreements Act and Revocations and Partial Revocations of Certain Antidumping Duty Orders, 72 Fed. Reg. 25261, 25263 (May 4, 2007). (Exhibit EC-1)

the United Kingdom with respect to certain individual companies for which Commerce had found *de minimis* margins in the Section 129 determinations.

20. With respect to the antidumping duty investigation of Stainless Steel Sheet and Strip in Coils from Italy, Commerce continued the Section 129 proceeding in order to permit the interested parties to address allegations of certain errors in the original investigation determination. Commerce issued its Section 129 determination with respect to this investigation on August 20, 2007, recalculating the margin of dumping under its modified methodology and declining to address the substance of any of the errors alleged by either the Italian respondent or the U.S. domestic industry.<sup>34</sup> This Section 129 determination became effective August 31, 2007.<sup>35</sup>

21. With respect to the determinations in the sixteen administrative reviews challenged by the EC, the cash deposit rates established by those reviews, with the exception of one company, were no longer in effect because they had been superceded by determinations made in later administrative reviews.

#### **5. The EC’s Request for the Establishment of a Panel Under Article 21.5**

22. On September 13, 2007, the EC submitted its request for the establishment of a panel under Article 21.5 of the DSU. In its Article 21.5 panel request, the EC contends that “‘there is a disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings’ of the DSB.”<sup>36</sup>

23. Among the issues raised in the Article 21.5 panel request, the EC contends, “‘With regard to the 15 original investigations and 16 administrative reviews, the US has continued zeroing in the reviews related to the measures in question. . . . Details of the reviews in question are set out in the annex.’”<sup>37</sup> The annex of the Article 21.5 panel request contains the same two charts that the EC attached to its original panel request. However, the EC added a column to these charts which listed distinct determinations made by Commerce.

24. First, Chart I of the annex lists the determinations made in the fifteen antidumping investigations challenged by the EC in its original panel request. However, in Chart I, the EC identifies determinations made in eleven administrative reviews and eight sunset reviews which

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<sup>34</sup> Implementation of the Findings of the WTO Panel in *US – Zeroing (EC)*; Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Duty Order on Stainless Steel Sheet and Strip in Coils From Italy, 72 Fed. Reg. 54640 (September 26, 2007). (Exhibit EC-6)

<sup>35</sup> Implementation of the Findings of the WTO Panel in *US – Zeroing (EC)*; Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Duty Order on Stainless Steel Sheet and Strip in Coils From Italy, 72 Fed. Reg. 54640, 54641 (September 26, 2007). (Exhibit EC-6)

<sup>36</sup> EC, Request for the Establishment of a Panel Under Article 21.5 of the DSU, p. 3 (WT/DS294/25).

<sup>37</sup> EC, Request for the Establishment of a Panel Under Article 21.5 of the DSU, p. 5 (WT/DS294/25).

it now seeks to challenge in this Article 21.5 proceeding. For example, case number two in this chart is the antidumping investigation of Stainless Steel Bar from France. In addition to identifying the determination made concerning the investigation, the EC now identifies the determinations made in the administrative reviews covering the periods March 1, 2003 through February 29, 2004 and March 1, 2004 through February 28, 2005, as well as the continuation of the order reflecting the determination made in the sunset review, published on June 4, 2007.

25. Similarly, Chart II lists the determinations made in the sixteen administrative reviews challenged by the EC in its original panel request, and identifies the determinations made in an additional thirty administrative reviews, eight sunset reviews and two changed circumstances reviews. Case twenty-two, for example, is the determination made in the administrative review of Stainless Steel Sheet Strip Coils covering the sales made by Acciai Speciali Terni SpA during the July 1, 2000 through June 30, 2001 period. In Chart II, the EC now identifies the Commerce determinations in the administrative reviews covering July 1, 2001 through June 30, 2002 and July 1, 2002 through June 30, 2003, and the continuation of the order reflecting the determination made in the sunset review, published on August 5, 2004.

## **6. Further Actions**

26. In 2007, Commerce<sup>38</sup> and the ITC<sup>39</sup> instituted sunset reviews of the antidumping duty orders on Stainless Steel Bar from France, Germany, Italy and the United Kingdom. Pursuant to these sunset reviews, the ITC determined that revocation of the antidumping duty orders “would not be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.”<sup>40</sup> Accordingly, Commerce revoked these antidumping duty orders effective March 7, 2007.<sup>41</sup> All cash deposits on imports made on or after March 7, 2007 will be refunded. These importations will not be subject to a final assessment of antidumping duties in the future.<sup>42</sup>

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<sup>38</sup> Initiation of Five-Year (“Sunset”) Reviews, 72 Fed. Reg. 4689 (February 1, 2007). (Exhibit US-10)

<sup>39</sup> Stainless Steel Bar From France, Germany, Italy, Korea, and the United Kingdom, 72 Fed. Reg. 4293 (January 30, 2007). (Exhibit US-11)

<sup>40</sup> Stainless Steel Bar From France, Germany, Italy, Korea, and The United Kingdom, 73 Fed. Reg. 5869, 5869 (January 31, 2008). (Exhibit US-12)

<sup>41</sup> Revocation of Antidumping Duty Orders on Stainless Steel Bar From France, Germany, Italy, South Korea, and the United Kingdom and the Countervailing Duty Order on Stainless Steel Bar From Italy, 73 Fed. Reg. 7258 (February 7, 2008). (Exhibit US-13)

<sup>42</sup> Revocation of Antidumping Duty Orders on Stainless Steel Bar From France, Germany, Italy, South Korea, and the United Kingdom and the Countervailing Duty Order on Stainless Steel Bar From Italy, 73 Fed. Reg. 7258 (February 7, 2008). (Exhibit US-13)

### **III. PROCEDURAL BACKGROUND**

27. On May 9, 2006, the DSB adopted the Appellate Body report and the panel report, as modified by the Appellate Body, in this dispute. On April 24, 2007, the United States announced at a DSB meeting that it had taken all of the steps necessary to implement the DSB’s recommendations and rulings. On May 4, 2007, the United States and the EC concluded an agreement in this dispute concerning the procedures under Articles 21 and 22 of the DSU.<sup>43</sup>

28. The EC requested consultations on July 9, 2007. Consultations in response to this request were held on July 30, 2007.

29. On September 13, 2007, the EC requested the establishment of a panel under Article 21.5 of the DSU.<sup>44</sup> It was not possible to refer this matter to the original panel. On November 30, 2007, the Director-General composed this Panel.<sup>45</sup>

### **IV. PRELIMINARY RULING REQUEST**

30. Article 21.5 of the DSU applies when there is a disagreement as to the existence or consistency with a covered agreement of a measure taken to comply with recommendations and rulings of the DSB. Thus, the scope of an Article 21.5 compliance panel proceeding is inherently limited – it may only examine a measure that is taken to comply, and then only if that measure is specified in the request for the establishment of a panel.

31. The United States requests preliminary rulings concerning the EC’s apparent effort to include certain determinations within the terms of reference of this proceeding, including certain administrative reviews and sunset reviews that are not measures taken to comply with the recommendations and rulings of the DSB in the original proceeding. A number of these measures also were not identified in the EC’s Article 21.5 panel request.

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<sup>43</sup> Understanding between the United States and the European Communities Regarding Procedures under Articles 21 and 22 of the DSU (WT/DS294/21, 9 May 2007).

<sup>44</sup> WT/DS294/25.

<sup>45</sup> WT/DS295/26.

**A. Administrative Reviews**

\* \* \*

**1. The Reviews Are Not Identified in the Panel Request**

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**2. The Reviews Are Not Measures “Taken to Comply”**

32. The EC’s attempt to use its submission to expand the measures within the terms of reference of this proceeding is flawed for a second reason. The scope of an Article 21.5 proceeding is limited to the issue of the existence or consistency of measures to taken to comply.

33. Pursuant to Article 6.2 of the DSU, in its request for the establishment of a panel in the original proceeding, the EC was required to “identify *the specific measures at issue*” (emphasis added). That identification in turn informs the question of what is a “measure taken to comply.” The Appellate Body has discussed the scope of such Article 21.5 proceedings:

Proceedings under Article 21.5 do not concern just any measure of a Member of the WTO; rather, Article 21.5 proceedings are limited to those “measures *taken to comply* with the recommendations and rulings” of the DSB.<sup>46</sup>

34. There must be an express link between the alleged measures taken to comply and the recommendations and rulings of the DSB.<sup>47</sup> Accordingly, in assessing whether a challenged measure is a measure taken to comply, the Panel must first look to the recommendations and rulings of the DSB.<sup>48</sup> Nonetheless, not every measure that has some connection with, or could have some impact upon a measure taken to comply may be scrutinized in an Article 21.5 proceeding.<sup>49</sup> Rather, such measures falling within the competence of an Article 21.5 panel are those “taken *in the direction of, or for the purpose of achieving* compliance [with the recommendations and rulings of the DSB].”<sup>50</sup>

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<sup>46</sup> *Canada – Aircraft (Article 21.5)(AB)*, para. 36 (emphasis in original).

68. <sup>47</sup> *US – OCTG from Argentina (AB)*, para. 142; *US – Softwood Lumber CVD Final (Article 21.5) (AB)*, para.

68. <sup>48</sup> *US – OCTG from Argentina (AB)*, para. 142; *US – Softwood Lumber CVD Final (Article 21.5) (AB)*, para.

<sup>49</sup> *US – Softwood Lumber CVD Final (Article 21.5)(AB)*, para. 87.

<sup>50</sup> *US – Softwood Lumber CVD Final (Article 21.5)(AB)*, para. 66 (emphasis in original).

**a. The EC Adds Reviews that Are Distinct from the Measures that Are the Subject of the DSB Recommendations and Rulings**

35. Here, however, the EC seeks to expand the terms of reference beyond the inquiry into the existence or consistency of measures taken to comply. Precisely what the EC seeks to include is something of a moving target, as noted above, but in essence, it appears that the EC is arguing that subsequent reviews and assessment instructions are measures taken to comply and thus within the scope of this proceeding.

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

**b. The EC’s Panel Request in the Original Dispute Demonstrates that Each Administrative Review Is a Distinct Measure**

37. In the EC’s original panel request, the EC identified determinations made by Commerce in sixteen administrative reviews, but specifically challenged *particular margins* in those determinations. The EC also challenged *multiple reviews* of the same product.<sup>51</sup> Thus, in the original proceeding, the EC treated each review as a separate measure and in fact challenged specific margins within each such measure. Moreover, while the Appellate Body found that Commerce’s determination of margins of dumping “as applied” in the sixteen administrative reviews was inconsistent with certain WTO obligations,<sup>52</sup> the Appellate Body denied the EC’s request that it find Commerce’s methodology for calculating margins of dumping in administrative reviews to be “as such” inconsistent with any WTO obligations.<sup>53</sup>

38. This is consistent with the fact that in each administrative review, Commerce examines different facts, a different time period, and a different set of transactions. Thus, in its initial panel request, the EC recognized that a determination from one administrative review is separate and distinct from a determination made in a subsequent administrative review.

39. The EC cannot ignore the consequences of this. Accordingly, the EC cannot bring entirely new and distinct determinations concerning different periods of time into this

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<sup>51</sup> For example, the EC lists the 1999-2000 administrative review of Certain Pasta from Italy as case number 19, and the 2000-01 administrative review as case number 20. The EC does the same for the administrative reviews of Stainless Steel Sheet and Strip in Coils from Italy, Granular Polytetrafluethylene from Italy, Stainless Steel Sheet Strip in Coils from France, and Stainless Steel Sheet Strip in Coils from Germany.

<sup>52</sup> *US – Zeroing (EC) (AB)*, para. 263(a)(i).

<sup>53</sup> *US – Zeroing (EC) (AB)*, para. 263(c)(ii).

compliance proceeding simply because those determinations involved the same subject merchandise. Rather, the scope of the DSB’s “as applied” recommendations and rulings are limited to those specific determinations that the EC indicated that it was challenging in its original panel request. Anything else would be directly contrary to the fact that the DSB’s recommendations and rulings were limited to these 16 administrative reviews “as applied” and explicitly did not include an “as such” recommendation or ruling.

40. The EC apparently understood this, as it filed a second challenge to Commerce’s calculation methodology in an entirely separate DSB proceeding.<sup>54</sup> In the *US – Zeroing (EC) II* panel request, for example, the EC identifies the determination in the administrative review of Certain Pasta from Italy covering sales made by PAM from July 1, 2002 through June 30, 2003 as an “as applied” measure.<sup>55</sup> This very same determination is also identified by the EC as a review in the annex to its panel request that is “related to” the “measures in question.” The EC recognized that these subsequent determinations are distinct measures and not measures taken to comply with the DSB’s recommendations and rulings in this dispute.

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**c. Measures Pre-dating the Recommendations and Rulings are Not Measures Taken to Comply**

41. Many of the distinct administrative review determinations identified by the EC in its 21.5 panel request cannot be considered measures taken to comply because they pre-date the adoption of the DSB’s recommendations and rulings. “As a whole, Article 21 deals with events *subsequent* to the DSB’s adoption of recommendations and rulings in a particular dispute.”<sup>56</sup> Thus, determinations made by a Member prior to the adoption of a dispute settlement report are not taken for the purpose of achieving compliance and cannot be within the scope of an Article 21.5 proceeding.

42. For example, in its Article 21.5 panel request, the EC identifies the Commerce determination in the administrative review of Certain Pasta from Italy covering the period of July 1, 2000 through June 30, 2002. This determination was not identified by the EC in its original panel request. The DSB adopted the Appellate Body’s report in this dispute on May 6, 2006. Commerce, however, made and published the final results of the 2001-02 administrative review of Certain Pasta from Italy in February 2004, more than two years before the adoption of the Appellate Body’s report. This measure, therefore, cannot possibly have any connection with the DSB’s recommendations and rulings, and cannot be a measure taken to comply. The same is

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<sup>54</sup> *United States - Continued Existence and Application of Zeroing Methodology (DS350) (US – Zeroing (EC) II)*.

<sup>55</sup> WT/DS350/6, p. 13.

<sup>56</sup> *US – Softwood Lumber CVD Final (Article 21.5)(AB)*, para. 70 (emphasis in original).

true for all of the additional measures identified by the EC in its Article 21.5 panel request where the determinations were made prior to the DSB’s recommendations and rulings.<sup>57</sup> Accordingly, these measures are beyond the terms of reference of this Panel.

### **3. The EC Attempts to Treat an “As Applied” Finding As An “As Such” Finding**

43. According to the EC, the United States’ implementation obligations with respect to the “as applied” claims extend to distinct determinations which supercede the measures described in its original panel request.<sup>58</sup> To this end, the EC is attempting to use these Article 21.5 proceedings to obtain the effect of an “as such” finding that the Appellate Body expressly declined to make.

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<sup>57</sup> The Commerce determinations which were made prior to the adoption of the Appellate Body’s report are: (1) the determinations in the 2001-02 and 2002-03 administrative reviews of Certain Hot-rolled Carbon Steel from the Netherlands, which were made on July 22, 2004 and April 11, 2005 respectively; (2) the determination in the 2003-04 administrative review of Stainless Steel Bar from France, which was made on August 10, 2005; (3) the determination in the 2001-03 administrative review of Stainless Steel Bar from Germany, which was made on June 14, 2004; (4) the determination in the 2001-03 administrative review of Stainless Steel Bar from Italy, which was made on June 14, 2004; (5) the determination in the sunset review of Stainless Steel Wire Rod from Sweden, which was made on August 13, 2004; (6) the determination in the 1998-99 administrative review of Stainless Steel Wire Rod from Spain, which was made on February 21, 2001; (7) the determination in the sunset review of Stainless Steel Wire Rod from Spain, which was made on August 13, 2004; (8) the determination in the sunset review of Stainless Steel Wire Rod from Italy, which was made on August 13, 2004; (9) the determination in the sunset review of Certain Cut-to-length Carbon-quality Steel Plate from Italy, which was made on December 6, 2005; (10) the determinations in the 2002-03 and 2003-04 administrative reviews of Stainless Steel Plate in Coils from Belgium, which were made on January 19, 2005 and December 7, 2005 respectively; (11) the determination in the sunset review of Stainless Steel Plate in Coils from Belgium, which was made on July 18, 2005; (12) the determinations in the 2001-02 and 2002-03 administrative reviews of Certain Pasta from Italy as it relates to PAM, which were made on February 10, 2004 and February 9, 2005 respectively; (13) the determination in the 2001-02 administrative review of Certain Pasta from Italy as it relates to Pastifi Garofalo, which was made on April 27, 2004; (14) the determinations in the 2001-02 and 2002-03 administrative reviews of Stainless Steel Sheet and Strip in Coils from Italy, which were made on December 12, 2003 and March 17, 2005 respectively; (15) the determination in the sunset review of Stainless Steel Sheet and Strip in Coils from Italy, which was made on August 4, 2005; (16) the determination in the sunset review of Granular Polytetrafluethylene from Italy, which was made on December 22, 2005; (17) the determinations in the 2001-02, 2002-03, and 2003-04 administrative reviews of Stainless Steel Sheet and Strip in Coils from France, which were made on December 12, 2003, February 11, 2005 and February 7, 2006 respectively; (18) the determinations in the 2001-02, 2002-03 and 2003-04 administrative reviews of Stainless Steel Sheet and Strip in Coils from Germany, which were made on February 10, 2004, December 20, 2004 and December 13, 2005 respectively; (19) the determination in the sunset review of Stainless Steel Sheet and Strip in Coils from Germany, which was made on August 4, 2005; (20) the determinations in the 2001-02, 2002-03 and 2003-04 administrative reviews of Ball Bearings from France, which were made on July 24, 2003, September 15, 2004 and September 16, 2005 respectively; (21) the determinations in the 2001-02, 2002-03 and 2003-04 administrative reviews of Ball Bearings from Italy as they relate to both FAG Italia SpA and SKF Industrie SpA, which were made on June 16, 2003, September 15, 2004 and September 16, 2005 respectively; and (22) the determinations in the 2002-03 and 2003-04 administrative reviews of Ball Bearings from the United Kingdom, which were made on September 15, 2004 and September 16, 2005 respectively.

<sup>58</sup> EC, First Written Submission, paras. 59-60.

44. The panel will recall that the EC made an “as such” claim against Commerce’s methodology for calculating margins of dumping in administrative reviews in its initial panel request. The original panel rejected this claim.<sup>59</sup> The Appellate Body also declined to find that Commerce’s calculation methodology in administrative reviews was inconsistent with U.S. WTO obligations “as such.”<sup>60</sup> Rather, the Appellate Body limited itself to “as applied” findings concerning the sixteen Commerce determinations originally challenged by the EC.<sup>61</sup>

45. The EC, however, would have the United States recalculate the margins of dumping in any subsequent determination which happened to involve the same products that were the subject of the measures challenged in the initial panel request. For example, the EC originally challenged Commerce’s determination in the administrative review of PAM’s sales of Certain Pasta from Italy between July 1, 1999 and June 30, 2000. The EC would now have this Panel presume that Commerce’s calculation of the margin of dumping for PAM in its determinations regarding the 2001-02 and 2002-03 administrative reviews are also inconsistent with the covered agreements, without the EC having brought a challenge to either determination. That is, the EC seeks the benefit of an “as such” finding, when neither the original panel nor the Appellate Body made one in this dispute. The panel should reject the EC’s efforts.

## **B. Sunset Reviews**

46. The EC also attempts to challenge certain sunset reviews.<sup>62</sup> The United States recalls that the EC did not challenge any sunset reviews in the original proceeding and, thus, there are no DSB recommendations or rulings relating to sunset reviews. Consequently, the sunset reviews identified in the EC’s 21.5 panel request cannot be within the terms of reference of this panel.

47. The EC relies on *US – Zeroing (Japan)* for support. However, that dispute only confirms the fundamental flaw in the EC’s posture. In *US – Zeroing (Japan)*, Japan in its panel request in the original proceeding expressly challenged sunset reviews and included a claim that the United States had acted inconsistently with Article 11.3.<sup>63</sup> By contrast, in its panel request in the original proceeding, the EC did not challenge sunset reviews nor set out a claim concerning Article 11.3. . . . The EC cannot cure its failure to pursue a claim in the original proceeding by seeking to include it in a compliance proceeding.

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## **C. Conclusion**

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<sup>59</sup> *US – Zeroing (EC) (Panel)*, para. 8.1(g).

<sup>60</sup> *US – Zeroing (EC) (AB)*, para. 263(c)(ii).

<sup>61</sup> *US – Zeroing (EC) (AB)*, para. 263(a)(i).

<sup>62</sup> EC First Written Submission, paras.69-74.

<sup>63</sup> WT/DS322/8.

48. For the foregoing reasons, the United States respectfully requests the Panel to find that the only measures within the terms of reference of this proceeding are the 15 original investigations and 16 administrative reviews referenced in paragraph 7 of the EC’s Article 21.5 panel request.

## **V. ARGUMENT**

### **A. Investigations**

#### **1. Stainless Steel Bar from France, Germany, Italy and the United Kingdom**

49. The EC’s claims regarding the Section 129 determinations on Stainless Steel Bar from France, Germany, Italy and the United Kingdom should be rejected because these claims concern measures that are no longer in effect. Specifically, Commerce revoked the antidumping duty orders covering Stainless Steel Bar from France, Germany, Italy and the United Kingdom and that revocation is effective as of March 7, 2007.

##### **a. The All Others Rate**

50. With respect to Stainless Steel Bar from France, Italy and the United Kingdom, the EC contends that the Section 129 determinations resulted in an unjustifiable increase in the all others rates.<sup>64</sup> With the revocation of these antidumping duty orders, the all others rates resulting from the Section 129 determinations have been removed and will have no effect on trade. Moreover, the EC has failed to point to any obligation under the AD Agreement with which the United States has acted inconsistently.

##### **i. The Cash Deposit Requirements Based on the New All Others Rates Have Been Removed**

51. The Section 129 determinations, which resulted in a change to the all others rates, became effective on April 23, 2007. Thus, imports made on or after April 23, 2007, from exporters or producers who did not have their own cash deposit rate were subject to the posting of a cash deposit at the new all others rate. However, the revocation of the antidumping duty orders on Stainless Steel Bar from France, Italy and the United Kingdom became effective as of March 7, 2007. Pursuant to this revocation, the United States will refund any cash deposits posted on imports of stainless steel bar from these countries made on or after March 7, 2007 and those imports will not be subject to any final assessment of antidumping duties.

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<sup>64</sup> EC, First Written Submission, para. 124.

52. Accordingly, the United States requests that this Panel reject the EC’s claims because the measure has been removed.

**ii. The EC Has Failed to Show that the United States Acted Inconsistently with the AD Agreement**

53. Alternatively, the EC also has failed to demonstrate that the calculation of the all others rates from the Section 129 determinations was inconsistent with the AD Agreement.

54. Consistent with Article 6.10, in the original investigations, Commerce limited its examination to the largest percentage of the volume of the exports from the country in question which could reasonably be investigated. Commerce then calculated an all others rate to apply to imports from those exporters or producers who did not have their own margin of dumping, consistent with Article 9.4. In the Section 129 Determinations, Commerce recalculated the rates for the selected respondents as well as the all others rate. For the three stainless steel bar determinations challenged by the EC, each of the margins of dumping Commerce calculated, however, were either zero or *de minimis*, or based on facts otherwise available. Article 9.4 does not address this situation. Accordingly, Commerce determined the simple average of the margins of dumping calculated in each of the Section 129 Determinations to establish the all others rate for that determination.

55. The EC’s contention here is not with the reasonableness of the methodology Commerce employed. Rather, the EC’s arguments are merely results-oriented, pointing to the fact that the resulting all others rates were higher than those calculated in the original investigations. Thus, if the panel reached this claim, which it need not, the EC has failed to demonstrate that Commerce acted inconsistently with Articles 6.8, 6.10 or 9.4 of the AD Agreement, and the Panel should find accordingly.

**b. Injury**

56. The EC contends that the United States acted inconsistently with the AD Agreement and GATT 1994 by maintaining the antidumping duty orders with respect to Stainless Steel Bar from France, Germany, Italy and the United Kingdom without reconsidering the issue of injury after the Section 129 Determinations found that some of the exporters originally investigated were not dumping.<sup>65</sup> The Panel should reject this contention because it concerns measures that are no longer in effect.

57. Pursuant to the sunset reviews discussed above, the United States revoked the antidumping duty orders on Stainless Steel Bar from France, Germany, Italy and the United

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<sup>65</sup> EC, First Written Submission, para. 144.

Kingdom effective March 7, 2007. Thus, contrary to the EC’s contention,<sup>66</sup> the United States no longer maintains antidumping duties on products subject to these orders. Indeed, the revocation is effective more than one month prior to the end of the reasonable period of time. The United States will refund the cash deposits on any imports occurring on or after March 7, 2007. Additionally, these imports will not be subject to any final assessment of antidumping duties in the future.

58. Accordingly, the United States requests that this Panel reject the EC’s claims.

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## **2. Certain Hot-Rolled Carbon Steel Products from the Netherlands**

59. Turning to the EC’s claims regarding the determination in the investigation of Certain Hot-Rolled Carbon Steel Products from the Netherlands, the United States has complied with the recommendations and rulings of the DSB by providing offsets for non-dumped sales when it recalculated the margin of dumping in the Section 129 determination. As a result of the Section 129 determination, the antidumping duty order was revoked effective April 23, 2007. Moreover, as a result of a subsequent Commerce determination in a sunset review, the revocation of the antidumping duty order became effective as of November 29, 2006.<sup>67</sup> All cash deposits made on imports occurring on or after November 29, 2006 have been or will be refunded. Additionally, imports made on or after November 29, 2006 are not subject to any final assessment of antidumping duties. Thus, the EC’s claims concern a measure that is no longer in effect.

60. In its First Written Submission, the EC raised two arguments concerning the determination in the investigation of Certain Hot-Rolled Carbon Steel Products from the Netherlands. First, the EC argued that the United States has assessed antidumping duties pursuant to determinations made in subsequent administrative reviews, where Commerce continued to deny offsets for non-dumped sales.<sup>68</sup> Second, the EC contends that as a result of a rescission of an administrative review, the United States assessed antidumping duties at the cash deposit rate established in the original investigation.<sup>69</sup>

61. These final assessments, however, are the result of determinations distinct from the determination made in the investigation. With respect to the EC’s first argument, those assessment instructions were issued pursuant to the determination made in the 2004-05 administrative review. With respect to the EC’s second argument, those assessment instructions

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<sup>66</sup> EC, First Written Submission, para. 144.

<sup>67</sup> Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of the Sunset Review of Antidumping Duty Order and Revocation of the Order, 72 Fed. Reg. 35220, 35221-22 (June 27, 2007). (Exhibit US-14)

<sup>68</sup> EC, First Written Submission, para. 78.

<sup>69</sup> EC, First Written Submission, para. 79.

were issued pursuant to the determination (in that case to terminate) the 2005-06 administrative review.

62. Neither of these two subsequent determinations are within the scope of this Article 21.5 proceeding. The EC’s original panel request identified only Commerce’s determination in the investigation of Certain Hot-Rolled Carbon Steel Products from the Netherlands. Similarly, the original panel’s “as applied” findings only covered Commerce’s determination from the investigation.<sup>70</sup> Thus, the Panel should reject the EC’s claims as beyond the scope of this Article 21.5 dispute.

### **3. Stainless Steel Wire Rod from Sweden**

63. Turning to Commerce’s Section 129 determination concerning the investigation of Stainless Steel Wire Rod from Sweden, Commerce complied with the recommendations and rulings of the DSB by providing offsets for non-dumped sales in the recalculation of the margin of dumping. As a result of the Section 129 determination, Commerce revoked the antidumping duty order on Stainless Steel Wire Rod from Sweden effective April 23, 2007.

64. The EC contends that the United States has established new cash deposit rates in Stainless Steel Wire Rod from Sweden based on an administrative review that Commerce published after concluding the Section 129 determination.<sup>71</sup> The EC’s statement of facts, however, is in error.

65. Commerce did publish the amended final results of the 2004-05 administrative review of Stainless Steel Wire Rod from Sweden on May 9, 2007.<sup>72</sup> In those amended final results, Commerce did state that it would notify CBP of the revised cash deposit resulting from the review, that the cash deposit rate would be effective as of the date of publication, and that “the cash deposit requirement shall remain in effect until further notice.”<sup>73</sup> However, on May 10, 2007, Commerce provided “further notice” by issuing instructions to CBP informing it of the

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<sup>70</sup> *US – Zeroing (EC) (Panel)*, para. 8.1(a).

<sup>71</sup> EC, First Written Submission, para. 80.

<sup>72</sup> Amended Final Results of the Antidumping Duty Administrative Review: Stainless Steel Wire Rod from Sweden, 72 Fed. Reg. 26337 (May 9, 2007). Commerce determinations are published in the Federal Register sometime after they are issued. The Section 129 determinations, for example, were issued on April 9, 2007, but not published until May 4, 2007. Commerce issued its amended final results in the 2004-05 administrative review of Stainless Steel Wire Rod from Sweden on May 2, 2007, two days before the Section 129 determination was published. The amended final results were not published in the Federal Register, however, until May 9, 2007. (Exhibit EC-16)

<sup>73</sup> Amended Final Results of the Antidumping Duty Administrative Review: Stainless Steel Wire Rod from Sweden, 72 Fed. Reg. 26337, 26337 (May 9, 2007). (Exhibit EC-16)

revocation resulting from the Section 129 determination.<sup>74</sup> These instructions informed CBP that any cash deposits paid on imports of wire rod from Sweden made on or after April 23, 2007, were to be refunded. All imports made on or after April 23, 2007, would not be subject to the final assessment of antidumping duties.

66. As a result of the revocation of the antidumping duty order on stainless steel wire rod from Sweden, Commerce did not issue new cash deposit instructions to CBP based on the determination made in the 2004-05 administrative review. Accordingly, the United States requests that this Panel reject the EC’s claim regarding the Section 129 determination in Stainless Steel Wire Rod from Sweden because Commerce provided offsets for non-dumped sales in the recalculation of the margin of dumping and that measure is no longer in effect.

**4. Stainless Steel Sheet and Strip in Coils from Italy**

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**a. EC’s Claim Is Not Part of the Terms of Reference**

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**b. The EC Failed to Present a Prima Facie Case**

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**c. Proceedings Must Have Finality**

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**B. Administrative Reviews**

67. In the underlying dispute, the EC obtained DSB recommendations and rulings with respect to Commerce determinations in sixteen administrative reviews. For the reasons set forth in this section, the United States has taken measures to comply with respect to each of those determinations, and as a result of those measures, the United States has complied with those recommendations and rulings.

68. In some instances, the United States has revoked the antidumping duty order giving rise to the determinations challenged by the EC. Under U.S. law, the United States no longer has the

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<sup>74</sup> Instructions to U.S. Customs and Border Protection, Revocation of Antidumping Duty Order on Stainless Steel, Wire Rod from Sweden (A-401-806) Pursuant to Final, Results in Section 129 Determination (May 10, 2007) (Exhibit US-15).

authority to collect cash deposits, or assess antidumping duties, on products subject to a revoked antidumping order which are imported on or after the date of revocation. This is the situation with respect to the four of the sixteen determinations challenged by the EC.<sup>75</sup> With respect to the remaining reviews that the EC challenged, the cash deposit rate established in the challenged determination (the only aspect of the administrative review that could – absent the U.S. compliance – have continued beyond the expiration of the RPT), is no longer in effect. To the extent that a cash deposit rate is currently in effect with respect to these same products from the same Member States of the EC, that is the result of a separate determination of dumping made in a separate administrative review examining distinct facts during a subsequent period of time.

69. Turning first to the antidumping duty orders revoked by the United States, these orders form the basis under U.S. law for the authority to impose antidumping duties. That is, without an antidumping duty order in place, the United States cannot collect cash deposits and assess antidumping duties on imports made on or after the date of revocation.

70. In its annex to its panel request, the EC acknowledges that the following antidumping orders have been revoked in whole or with respect to certain companies identified in the EC’s original panel request:

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

71. By way of example, with regard to Industrial Nitrocellulose from France, the United States revoked the antidumping duty order effective August 1, 2003.<sup>76</sup> This means that the United States ceased collecting cash deposits on imports occurring on or after that date, and such imports incur no antidumping duty liability. Therefore, as of the date of the EC’s panel request in this Article 21.5 proceeding (and, in fact, as of the expiry of the reasonable period of time

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<sup>75</sup> Those four determinations are: (1) Industrial Nitrocellulose From France: Final Results of Antidumping Duty Administrative Review, 66 Fed. Reg. 54213 (October 26, 2001) (EC case number 16); (2) Industrial Nitrocellulose From the United Kingdom: Final Results of Antidumping Duty Administrative Review, 67 Fed. Reg. 77747 (December 19, 2002) (EC case number 17); (3) Notice of Amended Final Results of Antidumping Duty Administrative Review: Certain Pasta from Italy, 67 Fed. Reg. 5088 (February 4, 2002) (EC case number 19); and (4) Notice of Amended Final Results of Antidumping Duty Administrative Review: Stainless Steel Sheet and Strip in Coils from France, 68 Fed. Reg. 4171 (January 28, 2003) (EC case number 26).

<sup>76</sup> Industrial Nitrocellulose from Brazil, France, Germany, the Republic of Korea, Japan, the People’s Republic of China, and the United Kingdom: Notice of Final Results of Changed Circumstances Review and Revocation of the Antidumping Duty Orders, 69 Fed. Reg. 52231, 52232 (August 25, 2004). (Exhibit US-16)

established in this dispute), no imports are affected by that antidumping duty order, and the measure challenged by the EC in the underlying proceeding has been terminated. The same is true with respect to the other antidumping duty orders that the United States has revoked. The elimination of these orders has thus brought the United States into compliance with the recommendations and rulings related to those orders.

72. Turning to Commerce’s determinations in the remaining administrative reviews challenged by the EC in its initial panel request, the United States has implemented the recommendations and rulings because each of those reviews has been superseded by Commerce determinations in subsequent administrative reviews. The chart attached as Exhibit US-17 specifies the subsequent Commerce determinations that have superseded each of the administrative reviews subject to the DSB’s recommendations and rulings. The determinations in these subsequent reviews cover the same merchandise and the same exporters or producers identified by the EC.<sup>77</sup> As noted above, however, the subsequent reviews examined a wholly different set of sales transactions occurring during a different period of time. In these subsequent determinations, Commerce calculated new margins of dumping, and put in place new cash deposits for the companies examined. As a result, the cash deposit rates that had been established in the determinations that the EC originally challenged have been superseded, because cash deposit rates from a determination in one administrative remain in effect only until a determination in a subsequent administrative review establishes a new cash deposit rate – once Commerce issues a determination in a subsequent administrative review involving the same merchandise and the same exporter or producer, the former cash deposit rate is terminated.

73. Consequently, as of the date of the EC’s panel request in this Article 21.5 proceeding (and in fact, as of the expiry of the reasonable period of time established in this dispute), no further entries are subject to antidumping rates established in the administrative reviews that the EC challenged in the underlying proceeding. Accordingly, because the challenged determinations, and in particular their cash deposit rates, have been superseded, the United States has brought the challenged measures into compliance with the DSB’s recommendations and rulings.

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74. Indeed, this EC position follows logically from the fact that the WTO dispute settlement provides prospective relief, not retrospective relief. As the United States has noted on other occasions, the language of the DSU demonstrates that when a Member’s measure has been found to be inconsistent with a WTO Agreement, the Member’s obligation extends only to providing prospective relief. For example, Article 19.1 of the DSU provides, “Where a panel or the

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<sup>77</sup> The cash deposit rate established by the administrative review of ball bearings from the United Kingdom covering sales from May 1, 2000 through April 30, 2001, as it applies to NSK Bearings Europe, however, still remains in place.

Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement” (footnotes omitted). The ordinary meaning of the term “bring” is to “[p]roduce as a consequence,” or “cause to become.”<sup>78</sup> These definitions give an indication of future action. Furthermore, under DSU Article 3.7, “the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements.” The withdrawal of the inconsistent measure is meant to provide a prospective solution to the nullification or impairment of the benefits accruing under the covered agreements, and not to provide compensation for any past harm.<sup>79</sup>

75. Furthermore, in a WTO dispute challenging an antidumping or countervailing duty measure, the measure in question is a border measure.<sup>80</sup> Accordingly, eliminating a WTO-inconsistent antidumping or countervailing duty measure prospectively at the border will constitute “withdrawal” of the measure within the meaning of DSU Article 3.7. And in this case, by superceding the administrative reviews at issue in the underlying proceeding, the United States has withdrawn the challenged measures.

### **C. Alleged Breach of Article 21.3**

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### **D. The EC’s Request for a Suggestion**

76. This Panel should decline to make the suggestion requested by the EC.<sup>81</sup> A Member retains the right to determine the manner of implementing DSB recommendations and rulings.

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<sup>78</sup> The New Shorter Oxford English Dictionary, Clarendon Press, Oxford, 1993. (Exhibit US-21)

<sup>79</sup> Other provisions of the DSU further support this analysis. For instance, nothing in Article 21.3 suggests that Members are obliged during the course of the reasonable period of time to suspend application of the offending measure, much less to provide relief for past effects; rather, in the case of antidumping and countervailing duty measures, entries that take place during the reasonable period of time will continue to be liable for the payment of duties. Moreover, Articles 22.1 and 22.2 of the DSU confirm not only that a Member may maintain the WTO-inconsistent measure until the end of the reasonable period of time for implementation, but also that neither compensation nor the suspension of concessions or other obligations are available to the complaining Member until the conclusion of that reasonable period of time.

<sup>80</sup> Antidumping and countervailing measures are border measures. That is, they are applied to counteract the dumping or subsidization of the goods at the national border. *See* GATT 1994, Arts. VI:2 and VI:3; SCM Agreement, Art. 10, note 36. Thus, when a good is being sold at less than normal value and causes injury to domestic producers, the importing country may apply an antidumping duty at the time and place of entry. Similarly, when an exporting country grants a countervailable subsidy that causes injury to domestic producers, the importing country may apply a countervailing duty at the time and place of entry. Thus, liability for antidumping and countervailing duties attaches at the time of entry.

<sup>81</sup> *See* EC, First Written Submission, para. 157.

The question in this proceeding is the existence or consistency of the measure taken to comply,<sup>82</sup> not what future actions the United States should take to ensure compliance.

## **VI. CONCLUSION**

77. For the foregoing reasons, the United States respectfully requests that this Panel find that the United States has met its obligations to bring the measures found to be inconsistent with the AD Agreement and GATT 1994 into conformity. The United States has therefore complied with the recommendations and rulings of the DSB.

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<sup>82</sup> DSU, Article 21.5.

## Table of Exhibits

- US-1 Section 735 of the Tariff Act of 1930 (19 U.S.C. § 1673e)
- US-2 Section 751 of the Tariff Act of 1930 (19 U.S.C. § 1675)
- US-3 Section 777A of the Tariff Act of 1930 (19 U.S.C. §1677f-1)
- US-4 Section 735 of the Tariff Act of 1930 (19 U.S.C. §1673d)
- US-5 19 C.F.R. § 351.213
- US-6 19 C.F.R. § 351.212
- US-7 Section 752 of the Tariff Act of 1930 (19 U.S.C. §1675a)
- US-8 Section 129 of the Uruguay Round Agreements Act (19 U.S.C. § 3538)
- US-9 Implementation of the Findings of the WTO Panel in US Zeroing (EC): Notice of Initiation of Proceedings Under Section 129 of the URAA; Opportunity to Request Administrative Protective Orders; and Proposed Timetable and Procedures, 72 Fed. Reg. 9306 (March 1, 2007)
- US-10 Initiation of Five-Year (“Sunset”) Reviews, 72 Fed. Reg. 4689 (February 1, 2007)
- US-11 Stainless Steel Bar From France, Germany, Italy, Korea, and the United Kingdom, 72 Fed. Reg. 4293 (January 30, 2007)
- US-12 Stainless Steel Bar From France, Germany, Italy, Korea, and The United Kingdom, 73 Fed. Reg. 5869 (January 31, 2008)
- US-13 Revocation of Antidumping Duty Orders on Stainless Steel Bar From France, Germany, Italy, South Korea, and the United Kingdom and the Countervailing Duty Order on Stainless Steel Bar From Italy, 73 Fed. Reg. 7258 (February 7, 2008).
- US-14 Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of the Sunset Review of Antidumping Duty Order and Revocation of the Order, 72 Fed. Reg. 35220 (June 27, 2007)
- US-15 Instructions to U.S. Customs and Border Protection, Revocation of Antidumping Duty Order on Stainless Steel, Wire Rod from Sweden (A-401-806) Pursuant to Final, Results in Section 129 Determination (May 10, 2007)

- US-16 Industrial Nitrocellulose from Brazil, France, Germany, the Republic of Korea, Japan, the People's Republic of China, and the United Kingdom: Notice of Final Results of Changed Circumstances Review and Revocation of the Antidumping Duty Orders, 69 Fed. Reg. 52231, 52232 (August 25, 2004)
- US-17 Chart of Commerce Determinations
- US-18 *United States – Section 129(c)(1) of the Uruguay Round Agreements Act (DS221)*, Replies to Questions by the Panel from the European Communities (March 4, 2002)
- US-19 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
- US-20 Commission Regulation (EC) No. 949/2006
- US-21 Excerpts from the New Shorter Oxford English Dictionary, Clarendon Press, Oxford, 1993