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

REBUTTAL 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.]

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EC – Bananas III (AB)	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997
EC – Bed Linen (Article 21.5) (AB)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003
EC – Chicken Cuts (AB)	Appellate Body Report, *European Communities - Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005
Indonesia – Autos	Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry,* WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, adopted 23 July 1998
US – Cotton Subsidies (Panel)	Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, adopted 21 March 2005, as modified by the Appellate Body Report, WT/DS267/AB/R
US – Cotton Subsidies (Article 21.5) (Panel)	Panel Report, *United States – Subsidies on Upland Cotton: Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267/RW, circulated 18 December 2007
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US – Softwood Lumber CVD Final (Article 21.5) (AB)	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS257/AB/RW, adopted 20 December 2005
US – Wool Shirts (AB)	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R and Corr.1, adopted 23 May 1997
US – Zeroing (EC) (Panel)	Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins*, WT/DS294/R, adopted 9 May 2006, as modified by the Appellate Body Report, WT/DS294/AB/R
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I. Introduction

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II. The EC's Claims under Articles 8.3 and 21.5

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III. The EC's Arguments Go Beyond the Terms of Reference of this Panel

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A. The Terms of Reference Do Not Include the Subsequent Determinations Listed by the EC in its Article 21.5 Panel Request

1. The EC contends that the "subsequent determinations" identified in the Annex to its panel request in this proceeding were part of the terms of reference of the original proceeding, that they are measures taken to comply, and that they are "omissions". . . .

* * *

1. The EC Did Not Identify the "Subsequent Reviews" as Measures in the Article 21.5 Panel Request

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2. The Subsequent Reviews are Not Amendments and Thus Were not Part of the Original Proceeding

2. In the view of the EC, the subsequent reviews listed in the Annex to its panel request were actually measures from the *original* dispute.[1] It appears that the EC relies upon the use of the phrase "amendments" from the original proceeding as support for this proposition.[2] The EC has failed to establish that these subsequent reviews are "amendments." The EC has failed to establish that the subsequent reviews were part of the original proceeding.

3. The United States recalls that in its original panel request, the EC referred to specific determinations as "amended." For example, the determination listed in the annex to the original panel request as case 1 is Commerce's final determination regarding the antidumping investigation of Certain Hot-Rolled Steel Product from the Netherlands. Commerce initially published its final determination on October 31, 2001. After correcting a ministerial error, however, Commerce published an amended determination on November 2, 2001. The EC's original panel request referred to amended determinations in the investigations of Stainless Steel

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[1] EC Second Written Submission, para. 43.
[2] EC Second Written Submission, para. 40.

Bar from Germany (case 3), the investigation of Stainless Steel Bar from Italy (case 4), the administrative review of Certain Pasta from Italy (case 19), the administrative reviews of Stainless Steel Sheet and Strip in Coils from France (cases 25 and 26), and the administrative reviews of Stainless Steel Sheet and Strip in Coils from Germany (cases 27 and 28). The EC's original panel request also included an amended final determination in the investigation of Certain Pasta from Italy which resulted from domestic litigation (case 15).

4. The EC, in its original panel request, directly referenced amended determinations in the context of U.S. antidumping law. U.S. law provides a procedure to correct or remove any faults or errors in a Commerce antidumping determination. For example, Commerce's regulations provide for a procedure to address and correct any "ministerial errors" that may be present in a published final determination.[3] In this procedure, interested parties may submit comments on the alleged ministerial errors.[4] Commerce will analyze these comments, and correct any ministerial errors by publishing an amended determination.[5]

5. Thus, the reference to "amendments" has a precise meaning in the context of this dispute. It refers to corrections to the measures identified in the original proceeding; but it does not refer to *subsequent* determinations, which involve different entries, different time periods, and perhaps even different parties. The Annex to the original dispute itself reflects this fact. In Annex II, the EC lists *as separate "cases"* multiple administrative reviews relating to the same order. Thus, case number 21 is the administrative review for stainless steel sheet and strip in coils for the period January 4, 1999 to June 30, 2000; case number 22 is the subsequent administrative review, for the period July 1, 2000 to June 30, 2001. Cases 23 and 24 are both administrative reviews for the same order, as are cases 25 and 26, 27 and 28, and 29 through 31. Similarly, the EC listed both the investigation for Stainless Steel Sheet and Strip in Coils, case 10, *and* one administrative review in connection with that order, case 25. Again, if the EC truly considered reviews to be amendments, rather than separate determinations, there would have been no need to list the investigation and the review separately.

6. The EC's own original panel request therefore confirms that the phrase "amendments" did not refer to subsequent determinations, and that the argument that they make in this proceeding is therefore incorrect.

7. Similarly, sunset reviews are not amendments "to the original measures" either, despite the EC's assertion to the contrary.[6] As noted above, administrative reviews are distinct proceedings because they involve different time periods and transactions. Sunset reviews are distinct from investigations and administrative reviews because they determine whether the

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[3] *See* 19 C.F.R. § 351.224(c). (Exhibit US-22)
[4] 19 C.F.R. § 351.224(d). (Exhibit US-22)
[5] 19 C.F.R. § 351.224(e). (Exhibit US-22)
[6] EC Second Written Submission, para. 48.

expiration of an antidumping duty would be likely to lead to the continuation or recurrence of dumping and injury.[7] They do not determine antidumping duty liability.

8. Thus, a determination in a sunset review is not a mere correction or removal of the faults or errors from an investigation, but rather a separate determination for a separate purpose based on different evidentiary standards. Like many of the other determinations listed in the EC's annex to its Article 21.5 panel request, these sunset review determinations did not exist at the time of the establishment of the original panel.[8]

3. Determinations Made After the Establishment of the Original Panel Are Not Within the Terms of Reference

9. A further flaw with the EC's attempt to expand the terms of reference to include the subsequent determinations listed in the Annex is that many of these determinations did not yet exist at the time of the establishment of the original panel. A matter may only be referred to a panel if "final action has been taken by the administering authority."[9] Measures that are not yet in existence at the time of panel establishment are not within a panel's terms of reference under the DSU.[10]

10. The EC's original "as applied" claims could not be a broad as the EC now contends because that would mean that the EC's claim encompassed Commerce determinations and actions that were not in existence at the time of the establishment of the original panel. The original panel was established at the March 19, 2004 DSB meeting.[11] Yet most of the subsequent determinations identified by the EC in its annex to its Article 21.5 panel request were made *after* March 19, 2004. Thus, because they did not exist when the original panel was established, these determinations could not have been part of the original panel's terms of reference. Accordingly, none of the determinations made after March 19, 2004 could have been the subject of the DSB's recommendations and rulings. Likewise, the DSB's recommendations and rulings could not have covered any liquidation instructions that were not issued as of March 19, 2004.[12]

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[7] AD Agreement, Art. 11.3.

[8] * * *

[9] AD Agreement, Art. 17.4.

[10] *See, e.g, EC – Chicken Cuts (AB)*, para. 156; *US – Cotton Subsidies (Panel)*, para. 7.158 (finding that a measure that had not yet been adopted could not form a part of the Panel's terms of reference); *Indonesia – Autos (Panel)*, para. 14.3 (agreeing with the responding party that a measure adopted after the establishment of the panel was not within the panels terms of reference). . . .

[11] WT/DS294/8, para. 1.

[12] In this regard, the Panel should likewise reject the EC's suggestion that this Panel has the authority to review the sunset review determinations regarding Stainless Steel Bar from France, Germany, Italy and the United Kingdom. *See* EC Rebuttal Submission, para. 125. The determination to revoke these antidumping duty orders occurred well after the establishment of the original panel, indeed after the establishment of this Panel. Therefore,

(continued...)

11. The United States would further note that those determinations listed in the Annex were made *prior* to the EC's original corrected panel request. Thus, the EC is using the concept of "subsequent determinations" to include in this proceeding determinations that it *could* have included not only in its original panel request, but in its corrected request. This is still a further expansion of the findings in the original proceeding.

4. The Subsequent Determinations Are Not Measures Taken to Comply

12. The EC further maintains that the subsequent determinations listed in its annex to its Article 21.5 panel request are measures taken to comply, and are thus within the scope of this proceeding.[13]

13. The EC has asserted that these determinations are "closely connected" to the original investigations and administrative reviews identified in the original proceeding.[14] Whether a determination has *a* connection to the DSB recommendations and rulings is not sufficient to bring that determination within the scope of an Article 21.5 proceeding. As the Appellate Body noted in *US – Softwood Lumber CVD Final (Article 21.5)* , "not . . . every assessment review will necessarily fall within the jurisdiction of an Article 21.5 panel."[15] Indeed, the Appellate Body stated that not every measure that has "some connection with," "could have an impact on," or could "possibly undermine" a measure taken to comply may be scrutinized in an Article 21.5 proceeding.[16] "Indeed, such an approach would be too sweeping."[17]

14. In the *Softwood Lumber* dispute, Commerce issued a Section 129 determination to implement the DSB's recommendations and rulings regarding a particular type of methodology. Commerce also issued its determination from the first administrative review, which was effective ten days after the Section 129 determination became effective. The Appellate Body found it significant that the United States acknowledged that the " methodology used by USDOC in the First Assessment Review was adopted 'in view of' the recommendations and rulings of the DSB."[18] This was evident by the fact that the Section 129 determination and the determination in the first administrative review both closely corresponded to the expiration of the reasonable

[12] (...continued)
this Panel cannot examine the conformity of that determination in these Article 21.5 proceedings.

[13] EC First Written Submission, para. 47; EC Rebuttal Submission, paras. 38, 44.

[14] EC Second Written Submission, para. 110.

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

[16] *US – Softwood Lumber CVD Final (Article 21.5) (AB)*, para. 87.

[17] *US – Softwood Lumber CVD Final (Article 21.5) (AB)*, para. 87 (footnote omitted).

[18] *US – Softwood Lumber CVD Final (Article 21.5) (AB)*, para. 84 (citing United States' additional written memorandum, para. 12).

period of time,[19] which provided Commerce with the ability to take account of the DSB's recommendations and rulings in the first administrative review.[20]

15. The situation in this dispute does not resemble the situation in *Softwood Lumber.* As the United States demonstrated in its First Written Submission, many of the subsequent determinations were made prior to the adoption of the DSB's recommendations and rulings.[21] Indeed, the EC seeks to include reviews dating as far back as *1998*.[22] Thus, these subsequent determinations could not have taken into consideration the recommendations and rulings of the DSB. Indeed, the EC has failed to provide any evidence that these subsequent determinations were adopted "in view of" such recommendations and rulings. Accordingly, there is no sufficient nexus for this Panel to consider these subsequent determinations to be measures taken to comply.

* * *

B. The EC Attempts to Gain the Benefits of an "As Such" Finding that it Never Obtained

16. The EC maintains that it is not only challenging these subsequent determinations as measures taken to comply. Rather, the EC argues that its is challenging the "*omissions or deficiencies*" of the United States as reflected in these subsequent determinations.[23] This only further demonstrates, however, that the EC is attempting to gain the benefits of an "as such" finding, when the Appellate Body declined to make one.[24]

17. That is, the "as applied" findings made by the original panel and the Appellate Body covered the determinations made in the 15 investigations and 16 administrative reviews identified by the EC in its original panel request. As demonstrated above, the "as applied" findings did not cover the subsequent determinations identified by the EC in its annex to the its Article 21.5 panel request.

18. An "as applied" challenge concerns the "application of a general rule to a specific set of facts."[25] By contrast:

> an "as such" claim challenges laws, regulations, or other instruments of a Member that have general and prospective application, asserting that a Member's

[19] *US – Softwood Lumber CVD Final (Article 21.5) (AB)*, para. 84.
[20] *US – Softwood Lumber CVD Final (Article 21.5) (AB)*, para. 84.
[21] US First Written Submission, para. 47, n. 62.
[22] Panel Request Annex, Stainless Steel Wire Rod, Case No. 7, p. 3.
[23] EC Rebuttal Submission, para. 38 (emphasis in original).
[24] U.S. First Written Submission, paras 48-50.
[25] *US – OCTG from Argentina (AB)*, para 6, n. 22.

> conduct—not only in a particular instance that has occurred, but in future situations as well—will necessarily be inconsistent with that Member's WTO obligations. In essence, complaining parties bringing "as such" challenges seek to prevent Members *ex ante* from engaging in certain conduct.[26]

As demonstrated in the U.S. First Written Submission, the United States has removed the cash deposit rate established by the challenged determinations, and thus complied with the DSB's recommendations and rulings concerning the "as applied" claims.[27]

19. The EC, however, complains of the "continued" use of the allegedly "same methodology" that was the subject to the DSB recommendations and rulings "when carrying out dumping determinations in the subsequent review proceedings."[28] That is, the EC complains of the general and prospective application of the so-called "zeroing" methodology. Thus, despite the EC's contentions to the contrary, by seeking the application of the DSB's recommendations and rulings to "subsequent review proceedings,"[29] the EC is attempting to gain the benefit of an "as such" finding, when the Appellate Body declined to make one.

IV. The EC May Not Gain Retroactive Relief from the WTO Dispute Settlement System

20. When the DSB's recommendations and rulings concern a border measure, such as an antidumping duty, implementation occurs when the Member removes the border measure. Thus, the United States complied with the DSB's recommendations and rulings in two ways. First, with respect to some of the antidumping measures challenged by the EC, the United States revoked the antidumping duty orders, thereby removing the antidumping duty liability for entries occurring on or after the date of revocation. Second, the United States removed the border measure, the cash deposit rate, with respect to entries occurring on or after the date of implementation.

A. The United States Removed the Border Measure for Entries Occurring on or After the Date of Implementation

21. The text of GATT 1994 and the AD Agreement confirms that it is the legal regime in existence at the time that an import enters the Member's territory that determines whether the import is liable for the payment of antidumping duties. Article VI:2 of GATT 1994 provides:

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[26] *US – OCTG from Argentina (AB)*, para. 172.
[27] US First Written Submission, paras. 91-102.
[28] EC Rebuttal Submission, para. 43.
[29] EC Rebuttal Submission, para. 58.

> In order to offset or prevent dumping, a contracting party may *levy* on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product.[30]

22. Article VI:6(a) of GATT 1994 reflects the fact that the levying of a duty generally takes place in connection with "the importation of any product." Nonetheless, the interpretive note to paragraphs 2 and 3 of Article VI states:

> As in many other cases in customs administration, 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 in any case of suspected dumping or subsidization.[31]

23. The interpretive note clarifies that, notwithstanding that duties are generally levied at the time of importation, Members may instead require a cash deposit or other security, in lieu of the duty, pending final determination of the relevant information. Thus, the cash deposit serves as a place-holder for the liability which is incurred at the time of entry. Consistent with the interpretive note, final assessment in the U.S. system occurs after the date of importation. Indeed, a Commerce determination in an administrative review normally covers importations of the subject merchandise during the 12 months prior to the month in which the review is initiated.

24. Several provisions of the AD Agreement further demonstrate that determining whether relief is "prospective" or "retroactive" can only be determined by reference to date of entry. For example, Article 10.1 of the AD Agreement states that provisional measures and antidumping duties shall only be applied to "products which *enter for consumption* after the time" when the provisional or final determination enters into force, subject to certain exceptions.[32] This limitation applies even though the dumping activity that forms the basis for the dumping and injury findings necessarily occurs *prior* to the time that the determination enters into force. As Article 10.1 demonstrates, the critical factor for determining whether particular entries are liable for the assessment of antidumping or countervailing duties is the legal regime in existence on the date of entry.

25. Similarly, Article 8.6 of the AD Agreement states that if an exporter violates an undertaking, duties may be assessed on products "*entered for consumption* not more than 90 days before the application of . . . provisional measures, except that any such retroactive

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[30] (Emphasis added).
[31] GATT, Ad Article VI, Paragraphs 2 and 3.
[32] (Emphasis added).

assessment shall not apply to imports *entered* before the violation of the undertaking."[33] Once again, the critical factor for determining the applicability of the provision is the date of entry.

26. In addition, Article 10.6 of the AD Agreement states that when certain criteria are met, "[a] definitive anti-dumping duty may be levied on products which were *entered for consumption* not more than 90 days prior to the date of application of provisional measures . . . ."[34] However, under Article 10.8, "[n]o duties shall be levied retroactively pursuant to paragraph 6 on products *entered for consumption* prior to the date of initiation of the investigation."[35] As with Articles 8.6 and 10.1, whenever the AD Agreement specifies an applicable date for an action, the scope of applicability is based on entries occurring on or after that date.

27. Thus, by implementing the DSB's recommendations and rulings regarding its antidumping measures with respect to entries made on or after the date of implementation, the United States has complied with those recommendations and rulings. The United States has acted consistently with the principle of prospective implementation, as understood in the antidumping duty context.

B. This is the Same Relief Available Under a Prospective Antidumping System

28. This result is consistent with the effect that a finding of inconsistency would have on an antidumping measure in a prospective antidumping system. Under such systems, the Member collects the amount of antidumping duties at the time of importation. If an antidumping measure is found to be inconsistent with the AD Agreement, the Member's obligation is merely to modify the measure as it applies at the border to imports occurring on or after the date of importation. That is, the Member changes the amount of antidumping duties to be collected on importations occurring after the end of the reasonable period of time. The Member need not remedy the effects of the measure on imports that occurred prior to the date of implementation. That is, the Member is under no obligation to refund any antidumping duties assessed on importations occurring prior to the end of the reasonable period of time.

29. The EC argues that prospective implementation of the DSB's recommendations and rulings with respect to U.S. administrative reviews would make the U.S. system of duty collection "*untouchable*" and a "moving target."[36] In this regard, the U.S. system is no different from a prospective antidumping system – the EC's system. An "as applied" challenge to the allegedly improper collection of antidumping duties in a prospective system would necessarily come after the duties have been collected. By that time, the complaining Member could not recover the duties collected. Morever, if the allegedly inconsistent collection continues during

[33] (Emphasis added).
[34] (Emphasis added).
[35] (Emphasis added).
[36] EC Rebuttal Submission, para. 90 (emphasis in original).

the pendency of the dispute, the complaining Member will be required to initiate further disputes in order to address the situation pursuant to the WTO dispute settlement system. This is the system to which the Members agreed, and it applies to all Members equally. This Panel should reject the attempts of the EC to gain a greater degree of relief from this system than that the Members provided for.

* * *

V. The New "All Others" Rate Resulting from the Section 129 Determinations in Stainless Steel Bar from France, Italy and the United Kingdom Is Consistent with the AD Agreement

30. Despite the revocation of the antidumping duty orders covering Stainless Steel Bar from France, Italy and the United Kingdom, the EC persists with its claim against the "all others" rate resulting from Commerce's Section 129 determinations.[37] The EC's claim continues to be unfounded.

31. The EC contends that under Article 9.4 of the AD Agreement, the United States could not use zero or *de minimis* margins or margins based on facts available in calculating the new all others rate.[38] This is despite the fact that these were the only margins remaining after Commerce recalculated the margins of dumping to implement the DSB's recommendations and rulings.

32. The EC contends that its alternative methods would be consistent with WTO obligations.[39] Namely, the EC argues that Commerce could have continued to use the original all others rates.[40]

33. The EC, however, ignores the inconsistency of its own argument. The EC originally challenged Commerce's determinations in these investigations because Commerce did not grant offsets for the non-dumped sales. The original all others rates were based on the very margins of dumping challenged by the EC. Following the EC's logic in the original dispute, therefore, the original all others rates were tainted with the same inconsistencies present in the challenged margins of dumping. Accordingly, when implementing the DSB's recommendations and rulings, Commerce could not simply use those same all others rates.

34. Indeed, had Commerce used the original all others rates, as advocated by the EC in this dispute, and had an average of zero or *de minimis* margins and margins based on facts available resulted in lower all other rates, the United States anticipates that the EC would have claimed

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[37] EC Rebuttal Submission, paras. 128-31.
[38] EC Rebuttal Submission, para. 128.
[39] EC Rebuttal Submission, para. 129.
[40] EC First Written Submission, para. 139.

that the use of the original all others rates was inappropriate as the underlying margins were tainted with "zeroing." The EC's arguments in this dispute are thus clearly results-oriented, and not based on the obligations found in the AD Agreement.[41]

VI. 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 Continues to Fail to Present a Prima Facie Case

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C. The Scope of an Article 21.5 Proceeding is Limited

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VII. The United States Should Prevail on the Claims Regarding Injury

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VIII. The EC Has Failed to Provide A Textual Basis for Its Article 21.3 Claim

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IX. Conclusion

35. For the reasons stated above, the EC's claims have no basis in the AD Agreement, the GATT 1994, or the recommendations and rulings of the DSB. Thus, the United States requests that the Panel find that the United States properly implemented the recommendations and rulings of the DSB and that the Panel reject the EC's claims.

[41] Moreover, in Annex I of it original panel request, the EC describes each of the Commerce determinations from the 15 investigations, and specifically refers to the all other rates. WT/DS297/7/Rev. 1, pp. 7-13. Thus EC might well have criticized Commerce for *not* addressing the all others rates.

Exhibit List

US-22	19 C.F.R. § 351.224
US-23	Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils from Italy, 64 Fed. Reg. 30750, 30755 (June 8, 1999)
US-24	Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order; Stainless Steel Sheet and Strip in Coils from Italy, 64 Fed. Reg. 40,567 (July 27, 1999)