

***United States – Laws, Regulations, and Methodology for Calculating  
Dumping Margins (“Zeroing”)***

**(AB-2009-1 / DS294)**

**Recourse to Article 21.5 of the DSU by the European Communities**

**Other Appellant Submission of the United States of America**

March 2, 2009

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Dumping Margins (“Zeroing”)***

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**(AB-2009-1 / DS294)**

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<i>Australia – Salmon (AB)</i>	Appellate Body Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/AB/R, adopted 6 November 1998
<i>Australia – Salmon (Article 21.5)</i>	Panel Report, <i>Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS18/RW, adopted 20 March 2000
<i>Canada – Aircraft (Article 21.5) (AB)</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU</i> , WT/DS70/AB/RW, adopted 4 August 2000
<i>EC – Bananas III (Article 21.5) (Ecuador)</i>	Panel Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by Ecuador</i> , WT/DS27/RW/ECU, adopted 6 May 1999
<i>EC - Bananas III (Article 21.5) (Ecuador II/US) (AB)</i>	Appellate Body Reports, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador</i> , WT/DS27/AB/RW2/ECU, adopted 11 December 2008, and Corr.1 / <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS27/AB/RW/USA and Corr. 1, adopted 22 December 2008
<i>EC – Salmon</i>	Panel Report, <i>European Communities – Anti-Dumping Measure on Farmed Salmon from Norway</i> , WT/DS337/R, adopted 15 January 2008
<i>US – Section 129</i>	Panel Report, <i>United States – Section 129(c)(1) of the Uruguay Round Agreements Act</i> , WT/DS221/R, adopted 30 August 2002

<p><i>US – Softwood Lumber CVD Final (Article 21.5) (Panel)</i></p>	<p>Panel Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 of the DSU</i>, WT/DS257/RW, adopted 20 December 2005, as modified by the Appellate Body Report, WT/DS257/AB/RW</p>
<p><i>US – Softwood Lumber CVD Final (Article 21.5) (AB)</i></p>	<p>Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 of the DSU</i>, WT/DS257/AB/RW, adopted 20 December 2005</p>
<p><i>US – Zeroing (EC) (Panel)</i></p>	<p>Panel Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)</i>, WT/DS294/R, adopted 9 May 2006, as modified by the Appellate Body Report, WT/DS294/AB/R</p>
<p><i>US – Zeroing (EC) (AB)</i></p>	<p>Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)</i>, WT/DS294/AB/R, adopted 9 May 2006</p>
<p><i>US – Zeroing (Japan) (AB)</i></p>	<p>Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews</i>, WT/DS322/AB/R, adopted 23 January 2007</p>

## **I. Introduction and Executive Summary**

1. The United States appeals from the findings by the compliance Panel in paragraph 9.1(b)(i) of its Report<sup>1</sup> with respect to the final results of two assessment reviews published by the U.S. Department of Commerce (“Commerce”) after the end of the reasonable period of time for compliance in this dispute. The compliance Panel erred by (1) finding that these two reviews fell within the scope of these compliance proceedings; (2) finding that the issuance of the final results of these reviews amounted to a failure by the United States to comply with the recommendations and rulings of the Dispute Settlement Body (“DSB”) in the original dispute; and (3) finding that the final results of these reviews are inconsistent with Article 9.3 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (“AD Agreement”) and Article VI:2 of the *General Agreement on Tariffs and Trade 1994* (“GATT 1994”). The United States briefly summarizes the argument made in this submission below.

2. In the original dispute, the DSB made recommendations and rulings that the use of average-to-average zeroing “as such,” and “as applied” in 15 original antidumping investigations individually identified by the European Communities (“EC”) is inconsistent with Article 2.4.2 of the AD Agreement, and that the use of average-to-transaction zeroing “as applied” in 16 assessment reviews individually identified by the EC is inconsistent with Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994. The EC sought, but did not obtain, a ruling that the use of average-to-transaction zeroing “as such” is inconsistent with the covered agreements. Two of the original investigations included among the 15 investigations at issue in the original

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<sup>1</sup> *United States – Laws, Regulations, and Methodology for Calculating Dumping Margins (“Zeroing”) – Recourse by the European Communities to Article 21.5 of the DSU*, WT/DS294/RW, circulated 17 December 2008 (“Panel Report”).

dispute were *Certain Hot-Rolled Carbon Steel from the Netherlands* and *Stainless Steel Wire Rod from Sweden*.

3. To comply with the DSB recommendations and rulings with respect to the individually identified antidumping investigations, Commerce made new determinations (“Section 129 determinations”) in these investigations. The Section 129 determinations in *Certain Hot-Rolled Carbon Steel from the Netherlands* and *Stainless Steel Wire Rod from Sweden* resulted in the revocation of these two antidumping orders, effective with respect to entries made on or after April 23, 2007. Prior to the DSB recommendations and rulings in the original dispute, Commerce, at the request of interested parties, had already begun assessment reviews of entries made under these two orders in 2004 and 2005. Those entries occurred prior to the end of the reasonable period of time and indeed prior to those DSB recommendations and rulings. The final results of these reviews were published after the end of the reasonable period of time.

4. The compliance Panel’s finding that the United States failed to implement the DSB recommendations and rulings with respect to these two 2004-2005 assessment reviews is in error, for two reasons. First, the compliance Panel ignores that the only recommendations and rulings with regard to these two cases related to the use of average-to-average zeroing in original investigations, and these recommendations and rulings do not extend to the application of Article 9.3 of the AD Agreement in assessment reviews subsequent to the two original investigations. The United States fully addressed the WTO-inconsistency found to exist in the original dispute by recalculating the dumping margins that had been challenged and withdrawing the orders in

accordance with the results of those recalculations. The assessment reviews at issue in this proceeding have not reinstated the antidumping duty orders.

5. Second, the approach taken by the compliance Panel effectively provides retroactive relief by requiring the United States to take action with respect to entries prior to the end of the reasonable period of time, and in fact prior to the DSB recommendations and rulings. This is contrary to the general understanding that implementation obligations do not extend to entries that occurred prior to the end of the reasonable period of time. The compliance Panel asserted that it was not providing retroactive relief because its finding applied only to determinations made after the end of the reasonable period of time. However, whether a Member has come into compliance with DSB recommendations and rulings with respect to the duties it imposes on particular merchandise should be evaluated by examining the Member’s treatment of the merchandise on the date that the merchandise enters its territory, not on the date that the final duty is determined. To conclude that an implementation obligation applies to past entries provides impermissible, retroactive relief, and thus disadvantages retrospective systems by imposing additional implementation obligations to the extent that similar requirements to refund antidumping duties levied prior to implementation would not arise under prospective antidumping duty systems.

6. In addition, the compliance Panel’s finding that the United States *acted inconsistently* with the covered agreements in these two 2004-2005 assessment reviews is in error, because these assessment reviews were outside the scope of this proceeding. These reviews did not call into question or undermine the “existence” (within the meaning of Article 21.5 of the



*Understanding on Rules and Procedures Governing the Settlement of Disputes (“DSU”)*) of the Section 129 determinations. There was no overlap between the Section 129 determinations in this case, which applied to entries made on or after April 23, 2007, and the two assessment reviews, which applied to entries made on or before October 31, 2005 (with respect to *Certain Hot-Rolled Carbon Steel from the Netherlands*) or August 31, 2005 (with respect to *Stainless Steel Wire Rod from Sweden*). Further, the assessment reviews did not establish new estimates of the antidumping duty for future entries, as the underlying orders had been revoked. Thus, the outcomes of these assessment reviews had no bearing on the compliance achieved by the Section 129 determinations.

7. This is made clear by the compliance Panel’s application of the “nexus-based test” it drew from the Appellate Body report in *US – Softwood Lumber CVD Final (Article 21.5)*. The compliance Panel identified only two factors, other than those that would apply to any administrative review subsequent to a modification of an original determination in light of DSB recommendations and rulings, that justified the inclusion of these two assessment reviews in the scope of these Article 21.5 proceedings – (1) both the original determinations and these administrative reviews involved “zeroing,” and (2) the administrative reviews could have affected the cash deposit rates set in the Section 129 determinations. But the first of these is inapposite, given the limited nature of the DSB recommendations and rulings in this dispute, and the second did not apply to these two assessment reviews, where the Section 129 determinations eliminated all future antidumping duty liability, and therefore any need for security in the form of cash deposits.

8. Accordingly, the Panel’s findings with respect to these two assessment reviews should be reversed.

## **II. Factual Background**

9. The United States provided a detailed explanation of its antidumping system in its First Written Submission before the compliance Panel. 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 proceeding.

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

10. The United States maintains a retrospective antidumping duty system. Pursuant to this system, an antidumping duty is owed as of the time of the entry of the product subject to an antidumping duty order, but the actual amount of the antidumping duty owed is calculated “retrospectively” (i.e., after the entry has occurred). In particular, while the amount of security required in the form of a cash deposit is calculated during the original investigation, importers of products subject to an antidumping duty may request a review of the duties due with respect to entries during a specific period. The proceeding to determine the final amount of antidumping duties due is called an assessment review.<sup>2</sup> As a result of the possibility of a review, importers

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<sup>2</sup> 19 C.F.R. § 351.213(a) (Exhibit US-5). There are several different types of assessment reviews in the U.S. system. The U.S. antidumping statute identifies periodic reviews of the amount of duty, reviews based on changed circumstances, five-year (or sunset) reviews, and new shipper reviews. *See* 19 U.S.C. § 1675 (Exhibit US-2). In this submission, the United States uses the term “assessment 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).

are not required to pay the antidumping duty at the time of importation. Instead each importer posts a security against the final determination and collection of the antidumping duty. That security is in the form of a cash deposit of the estimated amount of antidumping duties at the time of importation.<sup>3</sup> Where the importer requests a review, the duty assessed may or may not correspond to the amount of the security posted.

### **1. The Investigation**

11. 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>4</sup> Commerce also determines an “all others” rate which applies to imports from exporters or producers, if any, who were not investigated individually.

12. 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>5</sup> The order provides the United States with

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

<sup>4</sup> 19 U.S.C. § 1677f-1(c)(1) (Exhibit US-3). 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 produces 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>5</sup> 19 U.S.C. § 1673e (Exhibit US-1).

the authority to collect security at the time of importation (in the form of cash deposits) and assess antidumping duties.<sup>6</sup>

## **2. Assessment Reviews**

13. Interested parties may request an assessment review of the antidumping duty order each year in the anniversary month of the publication of the order.<sup>7</sup> Through these assessment 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>8</sup> The assessment review normally covers sales of the subject merchandise for the twelve months preceding the most recent anniversary month.<sup>9</sup>

14. 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>10</sup> The results also, where appropriate, establish new estimates of the antidumping duties that will be due on imports going forward. Those estimates in turn serve as the basis for the amount of security, in the form of cash deposits, to be posted, superseding any cash deposit rate already in effect for the exporters or producers reviewed.<sup>11</sup> If no review is requested, the estimated duty amount is collected, and

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

<sup>7</sup> 19 C.F.R. § 351.213(b)(1) (Exhibit US-5).

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

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

<sup>10</sup> 19 U.S.C. § 1675(a)(2)(C) (Exhibit US-2); 19 C.F.R. § 351.212(b)(1) (Exhibit US-6).

<sup>11</sup> *See* 19 U.S.C. § 1675(a)(2)(C) (Exhibit US-2).

collection may be accomplished by drawing against the cash deposits that have been made.<sup>12</sup>

Commerce communicates the results of its determinations to U.S. Customs and Border Protection (“CBP”) by issuing what are referred to as “instructions.”

**B. The Compliance Panel’s Findings with Respect to the 2004-2005 Assessment Reviews in “Cases” 1 and 6**

15. This Article 21.5 proceeding arises from the EC’s challenge with respect to the existence or consistency with the covered agreements of measures taken by the United States to comply with the recommendations and rulings of the DSB in the original dispute. This appeal is limited to the findings of the compliance Panel relating to the DSB’s recommendations and rulings related to what the EC calls “Case 1” (involving certain hot-rolled carbon steel from the Netherlands) and “Case 6” (involving stainless steel wire rod from Sweden).

**1. The EC Claims in the Original Dispute**

16. 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>13</sup> The EC also challenged “methodologies and the laws, regulations, administrative procedures and measures” “as applied” in the determinations made in fifteen specific

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<sup>12</sup> 19 C.F.R. § 351.212(c)(1) (Exhibit US-6).

<sup>13</sup> WT/DS294/7/Rev.1 at 2.

antidumping investigations and sixteen specific assessment reviews.<sup>14</sup> The original investigations of *Certain Hot-Rolled Carbon Steel from the Netherlands*<sup>15</sup> and *Stainless Steel Wire Rod from Sweden*<sup>16</sup> were included in the list of original investigations the EC challenged, but the EC did not challenge any assessment review determinations made pursuant to these two cases.<sup>17</sup>

## 2. Proceedings Before the Panel in the Original Dispute

17. On October 31, 2005, the original panel circulated its report, in which it found 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>18</sup> The panel further found that the United States acted inconsistently with Article 2.4.2 “as applied” with respect to its determinations in the fifteen individually identified antidumping investigations challenged by the EC.<sup>19</sup> This finding applied to, *inter alia*, the original investigations of *Certain Hot-Rolled Carbon Steel from the Netherlands* and *Stainless Steel Wire Rod from Sweden*.

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<sup>14</sup> WT/DS294/7/Rev.1 at 4.

<sup>15</sup> Notice of Final Determination at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products From The Netherlands, 66 Fed. Reg. 50,408 (Oct. 3, 2001).

<sup>16</sup> Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Wire Rod From Sweden, 63 Fed. Reg. 40,449 (July 29, 1998).

<sup>17</sup> WT/DS294/7/Rev.1 at 4, Annex 1.

<sup>18</sup> *US – Zeroing (EC) (Panel)*, para. 8.1(c).

<sup>19</sup> *US – Zeroing (EC) (Panel)*, para. 8.1(a).

18. The original panel made a separate finding with respect to the determinations in the sixteen assessment reviews, concluding 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 the GATT 1994, or Article XVI:4 of the Marrakesh Agreement.<sup>20</sup> Similarly, the original panel found that Commerce’s methodology with respect to the calculation of the margin of dumping in assessment reviews, new shipper reviews, changed circumstances reviews and sunset reviews was not “as such” inconsistent with the covered agreements.<sup>21</sup>

### **3. Proceedings Before the Appellate Body in the Original Dispute**

19. The EC appealed the original panel’s “as such” and “as applied” findings with respect to assessment reviews. The United States appealed the original panel’s finding that the zeroing methodology was a measure that could be challenged “as such”. The Appellate Body upheld the original panel’s finding that Commerce’s methodology for determining margins of dumping in investigations was a measure that could be challenged “as such,” and sustained the original panel’s finding that this measure was inconsistent with Article 2.4.2 of the AD Agreement. The Appellate Body reversed the original panel’s “as applied” finding concerning the determinations in the sixteen assessment reviews, finding that these determinations were inconsistent with Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994.<sup>22</sup> The Appellate Body

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<sup>20</sup> *US – Zeroing (EC) (Panel)*, paras. 8.1 (d), (e) and (f).

<sup>21</sup> *US – Zeroing (EC) (Panel)*, paras. 8.1 (g) and (h).

<sup>22</sup> *US – Zeroing (EC) (AB)*, para. 263(a)(i).

found that it was unable to complete the analysis of whether Commerce’s methodology for calculating margins of dumping in assessment reviews was “as such” inconsistent with the AD Agreement, the GATT 1994 or the Marrakesh Agreement, and declined to make an “as such” ruling concerning this methodology.<sup>23</sup> The DSB adopted the Appellate Body report and the original panel report, as modified by the Appellate Body report, 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 recommendations and rulings of the DSB.

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

20. On December 27, 2006, Commerce announced that it would “no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons.”<sup>24</sup> This modification of Commerce’s methodology became effective for all future investigations and those pending before Commerce as of February 22, 2007.

21. Pursuant to Section 129 of the Uruguay Round Agreements Act,<sup>25</sup> Commerce issued Section 129 determinations to implement the recommendations and rulings of the DSB with respect to individually identified original antidumping investigations, including in *Certain Hot-*

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<sup>23</sup> *US – Zeroing (EC) (AB)*, paras. 263(c) and (g)(ii).

<sup>24</sup> Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 Fed. Reg. 77,722 (Dec. 27, 2006) (Exhibit EC-1); Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margins in Antidumping Investigations; Change in Effective Date of Modification, 72 Fed. Reg. 3783 (Jan. 26, 2007) (Exhibit EC-2).

<sup>25</sup> 19 U.S.C. § 3538 (Exhibit US-8).



*Rolled Carbon Steel Products from the Netherlands and Stainless Steel Wire Rod from Sweden*, on April 9, 2007.<sup>26</sup> These 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*, with respect to entries on or after April 23, 2007.

22. After the end of the reasonable period of time, Commerce published the final results of assessment reviews of entries of hot-rolled steel from the Netherlands and stainless steel wire rod from Sweden that occurred in 2004 and 2005.<sup>27</sup> These entries occurred prior to the end of the reasonable period of time (April 9, 2007) and were not affected by the Section 129 determinations.

### **5. Findings of the Compliance Panel**

23. The compliance Panel determined that several assessment reviews, including the 2004-2005 assessment reviews in *Certain Hot-Rolled Carbon Steel from the Netherlands and Stainless Steel Wire Rod from Sweden*, were within its terms of reference.<sup>28</sup> According to the compliance Panel:

the use by [Commerce] of zeroing in the calculation of margins of dumping in the context of a “subsequent” administrative review potentially negates action taken by the United States in the form of a Section 129 determination recalculating the

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<sup>26</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. 25,261 (May 4, 2007) (Exhibit EC-5).

<sup>27</sup> Exhibits EC-11 to EC-12, EC-16 to EC-17.

<sup>28</sup> Panel Report, para. 8.126(a)(i), (v).

margin of dumping from the original investigation in order to implement the DSB’s recommendations in respect of that original investigation.<sup>29</sup>

24. With respect to the 2004-2005 assessment review in *Certain Hot-Rolled Carbon Steel from the Netherlands*, the compliance Panel stated:

we find that the United States acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 in its determinations in this administrative review and in issuing the consequent assessment instructions. As a result, we also find that the United States has failed to comply with the DSB's recommendations and rulings to bring the original investigation in case 1 into conformity with the covered agreements.<sup>30</sup>

25. Similarly, with respect to the 2004-2005 assessment review in *Stainless Steel Wire Rod from Sweden*, the compliance Panel stated:

[w]e therefore find . . . that the United States acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 in this administrative review determination and the assessment instructions issued pursuant to that determination. As a result, we also find that the United States has failed to comply with the DSB rulings and recommendations to bring the original investigation in case 6 into conformity with the covered agreements.<sup>31</sup>

26. These findings by the compliance Panel are the core of this appeal.

### **III. The Original DSB Recommendations and Rulings Related to “Cases” 1 and 6 Do Not Extend to Assessment Reviews of Entries Made Prior to the End of the Reasonable Period of Time**

#### **A. The United States Implemented the DSB’s Recommendations and Rulings with Respect to Entries on or After the Date of Implementation**

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<sup>29</sup> Panel Report, para. 8.108.

<sup>30</sup> Panel Report, para. 8.208.

<sup>31</sup> Panel Report, para. 8.213.

27. In the original dispute, the DSB made recommendations and rulings that the United States:

acted inconsistently with Article 2.4.2 of the *AD Agreement* when in the anti-dumping investigations listed in Exhibits EC-1 to EC-15 USDOC did not include in the numerator used to calculate weighted average dumping margins any amounts by which average export prices in individual averaging groups exceeded the average normal value for such groups.<sup>32</sup>

Specifically, the original panel relied on the first sentence of Article 2.4.2, which provides that “the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions.”<sup>33</sup> The original panel followed the reasoning of the Appellate Body,<sup>34</sup> which had found in other disputes that, based on the phrase “all comparable export transactions” in the first sentence of Article 2.4.2, using average-to-average comparisons in that context required aggregation of all results of comparisons made between export price and normal value to calculate a margin of dumping consistent with the first sentence of Article 2.4.2. The original panel, thus, found that Commerce’s zeroing methodology was both “as such” inconsistent with Article 2.4.2,<sup>35</sup> and inconsistent “as applied” in the original investigations individually identified and challenged by the EC, including the investigations of

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<sup>32</sup> *US – Zeroing (EC) (Panel)*, para. 8.1(a); WT/DS294/7/Rev.1 at 7, Annex 1.

<sup>33</sup> *US – Zeroing (EC) (Panel)*, para. 7.26.

<sup>34</sup> *US – Zeroing (EC) (Panel)*, para. 7.27.

<sup>35</sup> *US – Zeroing (EC) (Panel)*, para. 7.106.

*Certain Hot-Rolled Carbon Steel Products from the Netherlands and Stainless Steel Wire Rod from Sweden.*

28. With respect to case 1, *Certain Hot-Rolled Carbon Steel Products from the Netherlands*, the United States complied with the recommendations and rulings of the DSB by providing offsets 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. Additionally, 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>36</sup>

Accordingly, any imports made on or after November 29, 2006, are not subject to antidumping duties. Consequently, no security is needed any longer against the possible collection of antidumping duties on these imports and so any cash deposits made on imports occurring on or after November 29, 2006 have been refunded with interest.

29. With respect to case 6, *Stainless Steel Wire Rod from Sweden*, the United States similarly complied with the recommendations and rulings of the DSB by providing offsets for non-dumped sales in the recalculation of the margin of dumping in a Section 129 determination by Commerce. As a result of this Section 129 determination, Commerce revoked the antidumping duty order on stainless steel wire rod from Sweden effective April 23, 2007. Accordingly, any entries of stainless steel wire rod from Sweden occurring on or after April 23, 2007 are not subject to antidumping duties.

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<sup>36</sup> Certain Hot-Rolled Steel Flat Products from the Netherlands: Final Results of the Sunset Review of Antidumping Duty Order and Revocation of the Order, 72 Fed. Reg. 35,220, 35221-22 (June 27, 2007) (Exhibit US-14).

30. Antidumping and countervailing duty measures are border measures.<sup>37</sup> Accordingly, eliminating a WTO-inconsistent antidumping or countervailing duty measure at the border with respect to all future entries constitutes “withdrawal” of the measure within the meaning of DSU Article 3.7. With respect to cases 1 and 6, the United States complied with the DSB’s recommendations and rulings in a way that resulted in the complete withdrawal of the border measure. The United States revoked both antidumping duty orders, thereby ceasing the attachment of antidumping duty liability for entries occurring on or after the dates of revocation.

31. For these reasons, as of April 23, 2007,<sup>38</sup> the original investigations subject to the DSB’s recommendations and rulings in cases 1 and 6 were terminated as to all future entries, bringing the United States into compliance with the DSB’s recommendations and rulings with respect to cases 1 and 6 challenged by the EC in the original dispute.

32. However, the compliance Panel found that the United States both failed to comply with the recommendations and rulings of the DSB in the original dispute and acted inconsistently with Article 9.3 of the Antidumping Agreement and Article VI:2 of the GATT 1994 by assessing final antidumping duties in the 2004-2005 reviews in *Certain Hot-Rolled Carbon Steel Products from*

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<sup>37</sup> GATT 1994, Articles VI:2 and VI:3; SCM Agreement, Article 10, note 36. 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. Accordingly, liability for antidumping and countervailing duties attaches at the time of entry.

<sup>38</sup> As explained above, due to Commerce’s subsequent determination in a sunset review resulting in revocation of the order, imports made on or after November 29, 2006, are not subject to antidumping duties. *See* Exhibit US-14.

*the Netherlands and Stainless Steel Wire Rod from Sweden* based on the use of zeroing.<sup>39</sup>

However, these assessment reviews were limited to entries *prior* to the effective date of the Section 129 determinations revoking both antidumping orders – in fact, the entries were all made prior to the end of the reasonable period of time and indeed prior to the DSB recommendations and rulings in this dispute. As explained above, in the U.S. retrospective duty 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>40</sup> The final amount of antidumping duties is determined through an assessment review where one is requested.<sup>41</sup> The revocation of these two orders, with effect at the border from April 23, 2007, does not address the final amount of antidumping duties due on entries prior to the implementation date.

33. The compliance Panel’s finding that the United States failed to implement the DSB recommendations and rulings with respect to these two 2004-2005 assessment reviews is in error, for two reasons. First, the compliance Panel ignores that the only recommendations and rulings with regard to Case 1 and 6 related to the use of average-to-average zeroing in original investigations, and the United States addressed that inconsistency. Second, the compliance Panel’s approach effectively imposes an impermissible retroactive remedy. These two points are addressed in detail below.

## **B. The United States Withdrew the WTO-Inconsistent Measures**

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<sup>39</sup> Panel Report, para. 9.1(b)(i).

<sup>40</sup> *See* 19 U.S.C. § 1673e(a)(3). (Exhibit US-1)

<sup>41</sup> 19 C.F.R. § 351.213(a) (Exhibit US-5).

34. The compliance Panel’s findings ignore that the DSB’s recommendations and rulings in respect of Cases 1 and 6 pertain only to the use of zeroing in original investigations using weighted-average to weighted-average comparisons pursuant to Article 2.4.2. Although the DSB did make “as applied” recommendations and rulings in the original dispute with respect to the use of weighted-average to transaction comparisons in certain individually identified assessment reviews, none of these findings relate to *Certain Hot-Rolled Carbon Steel Products from the Netherlands* or *Stainless Steel Wire Rod from Sweden*.<sup>42</sup>

35. Additionally, the compliance Panel’s finding conflates investigations and assessment reviews, which are distinct proceedings that serve different purposes. Article 1 of the Antidumping Agreement provides that an antidumping measure can only be applied pursuant to an investigation initiated and conducted in accordance with the Antidumping Agreement. Pursuant to Article 5.1, the purpose of the investigation is “to determine the existence, degree and effect of any alleged dumping.” Thus, the nature of an investigation is to determine, among other things, whether the imposition of antidumping duties is appropriate because margins of dumping above *de minimis* levels exist.<sup>43</sup> In making this determination, Commerce analyzes import transactions occurring prior to the date of the initiation of the investigation, i.e., transactions that are not and will not be subject to any measure.

36. By contrast, the nature of an assessment review is to determine the final amount of the antidumping duties consistent with Article 9.3. To determine the final amount of the

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<sup>42</sup> *US – Zeroing (AB)*, para. 263(a)(i).

<sup>43</sup> AD Agreement, art. 5.8.

antidumping duties, Commerce examines a different set of import transactions than it examined in the investigation. These transactions will have occurred over a different period of time, and may not involve the same parties. Because assessment reviews examine different transactions, different issues may arise than those addressed in the investigation, or even in previous reviews. Interested parties may make different arguments, and Commerce may make different determinations, based on the particular facts that exist in that period of review. Accordingly, the effect of an assessment review will likewise vary depending on the particular facts established in the review.

37. Indeed, based on its analysis of the fundamental differences between (1) investigations that determine the existence, degree and effect of dumping, and (2) assessment reviews, which determine the final amount to be assessed, the original panel found the application of zeroing in assessment reviews was not inconsistent with Article 2.4.2 of the Antidumping Agreement.<sup>44</sup> Although this finding of the original panel was ultimately not upheld, the Appellate Body did not revisit the original panel’s analysis explaining the distinctions between original investigations and assessment reviews. Instead, the Appellate Body found that the distinctly different methodology for calculating dumping margins in assessment reviews, as it was applied in particular assessment reviews challenged by the EC, was inconsistent with Article 9.3 of the Antidumping Agreement and Article VI:2 of the GATT 1994.<sup>45</sup> Accordingly, the Appellate Body did not reverse the original panel’s finding that the obligation with which the United States

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<sup>44</sup> *US – Zeroing (Panel)*, para. 7.222.

<sup>45</sup> *US – Zeroing (AB)*, para. 263(a)(i).



acted inconsistently in these two cases, i.e., the first sentence of Article 2.4.2, was limited to original investigations using average-to-average comparisons.

38. Compliance with the findings of inconsistency with respect to these two cases, as adopted by the DSB, thus required that that inconsistency be removed. Thus, the U.S. compliance obligations with respect to cases 1 and 6, are to bring the challenged measures (i.e., the two challenged investigations) into conformity with those recommendations and rulings of the DSB, which adopted the original panel’s findings of inconsistency.

39. The compliance Panel’s findings of inconsistency with respect to cases 1 and 6 were, however, limited to WTO inconsistencies in the investigation – that is, to the U.S. use of a WTO-inconsistent basis for the imposition of the antidumping duty orders in those two cases. The United States has addressed those inconsistencies by recalculating the margins challenged and withdrawing the orders in accordance with the results of those recalculations. The assessment reviews at issue in this proceeding have not reinstated the antidumping duty orders. Therefore, the compliance Panel’s findings that those reviews constitute a failure by the United States to comply are, therefore, in error and should be reversed.

### **C. The Compliance Panel Erred by Imposing a Retroactive Remedy**

40. There is no dispute in this proceeding, between the parties or the compliance Panel, that implementation obligations and relief afforded by WTO disputes are prospective in nature.<sup>46</sup> The question, rather, is whether implementation obligations extend to entries made prior to the expiry of the reasonable period of time would constitute retroactive relief. As a general matter,

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<sup>46</sup> See Panel Report, para. 8.167.

implementation obligations do not extend to entries that occurred prior to the end of the reasonable period of time. This was the approach taken by the EC, for example, when it implemented the recommendations and rulings of the DSB in the dispute *EC – Customs Classification of Frozen Boneless Chicken Cuts*.<sup>47</sup>

41. In this dispute, the compliance Panel found that the United States “failed to comply with the recommendations and rulings of the DSB in the original dispute” by determining “after the end of the reasonable period of time, the amount of anti-dumping duty to be assessed based on zeroing in the 2004-2005 administrative review[s]” in cases 1 and 6.<sup>48</sup> The compliance Panel reasoned that because, in a retrospective duty system, duties are not determined at the time of entry, but rather determined at a later date, the relevant date for implementation of DSB recommendations and rulings “concerning anti-dumping duties by a Member operating a retrospective assessment system is the date of final determination of liability for anti-dumping

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<sup>47</sup> See Commission Regulation (EC) No. 949/2006 (Exhibit US-20). The EC referred to this regulation in a status report announcing compliance in that dispute, WT/DS269/15/Add.1. The regulation provides, in paragraph 9, that :

this regulation should enter into force . . . at the end of the reasonable period of time granted by the WTO . . . Recourse to the DSU is not subject to time limits. The recommendations in reports adopted by the DSB only have prospective effect. Consequently, this regulation cannot have retroactive effects nor provide interpretative guidance on a retroactive basis. Since it cannot operate to provide interpretative guidance for classification of goods which have been released for free circulation prior to [the end of the RPT] it cannot serve as a basis for the reimbursement of any duties paid prior to that date.

<sup>48</sup> Panel Report, para. 9.1(b)(i).

duties, *i.e.*, the date of the final determination in the administrative review proceeding.”<sup>49</sup> In the compliance Panel’s view, it did not impose a retroactive remedy because its finding applies to determinations made after the end of the reasonable period of time.<sup>50</sup>

42. As demonstrated below, whether a Member has come into compliance with DSB recommendations and rulings with respect to the duties it imposes on particular merchandise should be evaluated by examining the Member’s treatment of the merchandise on the date that the merchandise enters its territory, not on the date that the final duty is determined. Because both reviews at issue only concerned entries that occurred prior to the end of the reasonable period of time, and, in fact, prior to the DSB’s adoption of its recommendations and rulings (May 9, 2006), the 2004-2005 assessment reviews in cases 1 and 6 cannot be subject to a prospective implementation obligation flowing from those DSB recommendations and rulings. To conclude that an implementation obligation applies to past entries provides impermissible, retroactive relief, and thus disadvantages retrospective systems by imposing additional implementation obligations to the extent that similar requirements to refund antidumping duties levied prior to implementation would not arise under prospective antidumping duty systems.

**1. Several Provisions in the GATT 1994 and AD Agreement Demonstrate that Compliance Obligations Attach Based on the Date of Entry**

43. When considering whether relief is “retroactive” or “prospective” in the context of dumping duties, provisions contained in both the GATT 1994 and the AD Agreement support the

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<sup>49</sup> Panel Report, paras. 8.173-8.174.

<sup>50</sup> Panel Report, para. 8.175.

position that the date of entry, as opposed to the date the amount of final liability is calculated or collected, is determinative. The text of the 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.

44. Article VI:2 of the GATT 1994 provides: “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.”<sup>51</sup> Article VI:6(a) of the 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.<sup>52</sup>

45. 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. The liability, however, is incurred at the time of entry. Consistent with the interpretive note, determination and collection of final assessment in the U.S. system occurs after the date of importation. Indeed, a Commerce

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<sup>51</sup> Emphasis added.

<sup>52</sup> GATT 1994, Ad Article VI, Paragraphs 2 and 3.

determination in an assessment review normally covers importations of the subject merchandise during the 12 months prior to the month in which the review is initiated.

46. Several provisions of the AD Agreement further support that the date of entry is the relevant date for determining whether prospective implementation occurred, regardless of when the administering authority determines the amount of dumping liability. 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.<sup>53</sup> 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.

47. 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 assessment shall not apply to imports *entered* before the violation of the undertaking.”<sup>54</sup> Once again, the critical factor for determining the applicability of the provision is the date of entry.

48. In addition, Article 10.6 of the AD Agreement states that when certain criteria are satisfied, “[a] definitive anti-dumping duty may be levied on products which were *entered for*

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<sup>53</sup> Emphasis added.

<sup>54</sup> Emphasis added.

*consumption* not more than 90 days prior to the date of application of provisional measures.”<sup>55</sup>

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.”<sup>56</sup> 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.

49. The general understanding that prospective implementation obligations are triggered by the date of entry has also been recognized by both Members to this dispute. For instance, the panel in *US – Section 129* acknowledged that U.S. implementation of adverse WTO reports concerning antidumping or countervailing duties applies only to entries occurring after the end of the reasonable period of time, and that such implementation obligations would not apply to prior entries.<sup>57</sup> Indeed, the EC itself has taken the position, in its own domestic regulations, that because relief based on WTO dispute resolution is prospective, such relief need not be granted for entries made prior to the end of the reasonable period of time.<sup>58</sup>

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<sup>55</sup> Emphasis added.

<sup>56</sup> Emphasis added.

<sup>57</sup> *US – Section 129*, para. 5.52.

<sup>58</sup> *See Ikea Wholesale Ltd. V. Commissioners*, Case. C-351/04 (European Court of Justice, Sept. 27, 2007) (Exhibit US-34). In paragraph 8 of its judgment, the court quoted the relevant EC regulation on “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”:

The recommendations in reports adopted by the [DSB] only have prospective effect. Consequently, it is appropriate to specify that any measures taken under this Regulation will take effect from the date of their entry into force unless

50. The panel’s reasoning in *EC – Bananas III (Ecuador) (Article 21.5)* also supports the U.S. position. There, the panel expressly considered the appropriate date for ensuring that relief was *prospective* only. In that dispute, Ecuador argued that the EC had to make certain adjustments in connection with a license regime that predated (1994-1996)<sup>59</sup> the end of the reasonable period of time (January 1, 1999) because a failure to do so would mean that the regime adopted after the conclusion of the reasonable period of time would have a “carry-over” effect from the prior regime. The panel rejected Ecuador’s request, concluding that requiring corrections in respect of the period 1994-1996 “would create a retroactive effect of remedies *ex tunc* . . . [I]n our view, what the EC is required to ensure is to terminate discriminatory patterns of licence allocation with *prospective effect* as of the *beginning of the year 1999*.”<sup>60</sup> In a similar vein, the Commerce determinations found to be inconsistent by the compliance Panel only concern entries that occurred prior to the end of the reasonable period of time. Thus, these determinations do not have prospective effect; quite the contrary, they have effect with respect to entries that predated the conclusion of the reasonable period of time. Therefore, the panel’s reasoning in the *Bananas* dispute supports the proposition that compliance with a finding of inconsistency does not require remedial action with respect to entries that predate the expiry of the reasonable period of time.

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otherwise specified, and, therefore, do not provide any basis for the reimbursement of the duties collected prior to that date.

<sup>59</sup> *EC – Bananas III (Article 21.5) (Ecuador)*, para. 6.91.

<sup>60</sup> *EC – Bananas III (Article 21.5) (Ecuador)*, para. 6.105 (emphasis added).

51. By implementing the DSB’s recommendations and rulings regarding its antidumping measures for 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.

**2. The United States Provides the Same Relief As Is Available Under a Prospective Antidumping System**

52. The concept that implementation obligations apply only to future entries is not unique to retrospective systems. It is true of any system that conducts proceedings under Article 9.3.1 or 9.3.2. It is the nature of the proceeding itself, and not the particular antidumping system, that all entries subject to the proceeding will be *past* entries.

53. Focus on the date of entry as the appropriate date for implementation 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 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 end of the reasonable period of time. 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. Thus, the effect of implementation under the U.S. system is no



different from that available under a prospective antidumping system, such as, e.g., the EC’s system.

### **3. The Compliance Panel’s Approach Unfairly Disadvantages Members with Retrospective Antidumping Systems**

54. Under the AD Agreement, the different systems of duty assessment provided for in Article 9.3 – retrospective duty assessment, prospective duty assessment, and prospective normal value systems – are afforded analogous treatment. The Appellate Body has confirmed that the Antidumping Agreement does not favor one system over the other, or place one system at a disadvantage. Rather the Appellate Body recognized that, “[t]he Anti-Dumping Agreement is neutral as between different systems for levy and collection of anti-dumping duties.”<sup>61</sup> Thus, a proper interpretation of a Member’s implementation obligations requires that retrospective duty assessment, prospective duty assessment, and prospective normal value systems be placed on a “level playing field.” The compliance Panel wholly ignored this point, finding that “it may simply be unavoidable that the same legal provisions . . . have different consequences as a result of the different characteristics of each system.”<sup>62</sup>

55. The compliance Panel found that with respect to the 2004-2005 assessment reviews in cases 1 and 6, the United States had implementation obligations as to entries occurring prior to the reasonable period of time because, as a result of its retrospective system of assessment, the United States determined final liability after the end of the reasonable period of time. That is

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<sup>61</sup> *US – Zeroing (Japan) (AB)*, para. 163.

<sup>62</sup> Panel Report, para. 8.185.

only true of retrospective systems. Indeed, that is the main distinction between retrospective and prospective systems, as reflected in the text of Article 9.3.1 and 9.3.2. Article 9.3.1 provides:

When the amount of the anti-dumping duty is assessed on a retrospective basis, the determination of the *final* liability for payment of anti-dumping duties shall take place as soon as possible . . . after . . . a request for a final assessment . . . has been made.<sup>63</sup>

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

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

56. As the original panel noted, in the U.S. retrospective system, duties are not *assessed* at the time of entry.<sup>64</sup> Thus, only in retrospective systems does entry of a good trigger *potential* liability, because only in retrospective systems is *final* liability determined at a later date. Panels – including the original panel here – have recognized that this feature is unique to retrospective systems.<sup>65</sup>

57. The compliance Panel concedes that it has imposed an obligation different from what would be available under another duty assessment system, but instead insists that such divergence is acceptable.<sup>66</sup> The compliance Panel’s authorization of different implementation obligations for different systems of duty assessment allows for different antidumping duty

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<sup>63</sup> Emphasis added.

<sup>64</sup> Panel Report, para. 2.4.

<sup>65</sup> See, e.g., Panel Report, para 2.4; *EC – Salmon*, para. 7.744.

<sup>66</sup> Panel Report, para. 8.185.

liability even where normal values and export prices were the same. There is no textual justification for the compliance Panel’s interpretation, and it is contrary to the Appellate Body’s recognition that all systems of duty assessment must be afforded analogous treatment under the Antidumping Agreement.<sup>67</sup> If implementation obligations are found to apply to entries that occurred prior to the end of the reasonable period of time, as the compliance Panel has found here, retrospective systems would be subject to very different and more extensive implementation obligations than prospective duty assessment and prospective normal value systems. By contrast, recognizing that it is the date of entry that determines a Member’s implementation obligation would maintain neutrality among the divergent systems.

#### **IV. The 2004-2005 Assessment Reviews in Cases 1 and 6 Did Not Fall Within the Compliance Panel’s Terms of Reference**

58. The compliance Panel also erred in finding that it was within its terms of reference to examine whether the 2004-2005 assessment reviews in *Hot-Rolled Steel from the Netherlands* and *Stainless Steel Wire Rod from Sweden*, and the assessment instructions issued pursuant to these reviews, are consistent with Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994. The factual situation in the present proceeding is fundamentally different from previous proceedings in which panels and the Appellate Body have considered whether administrative reviews fall within the scope of Article 21.5 of the DSU, which applies “[w]here there is disagreement as to the *existence or consistency with a covered agreement* of measures

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<sup>67</sup> *US – Zeroing (Japan) (AB)*, para. 163.

taken to comply with the recommendations and rulings”<sup>68</sup> of the DSB. For example, in *US – Lumber CVD Final (21.5)*, the panel and the Appellate Body found significant (1) that the assessment review resulted in a cash deposit rate that superseded the cash deposit rate established in the Section 129 determination that modified the final determination in the original investigation,<sup>69</sup> and (2) that a particular aspect of the analysis in the assessment review was made “in view of” the DSB recommendations and rulings in that dispute that related to that type of analysis.<sup>70</sup> Neither of these is true in the present dispute; indeed – as the discussion below will explain – the present case is precisely the opposite.

59. There is no disagreement that, in the original proceeding, the DSB’s recommendations and rulings with respect to these two cases concerned only the original investigations carried out by Commerce. Furthermore, there is no disagreement that Commerce, in its Section 129 determinations, reconsidered the investigations to which those recommendations and rulings applied; that those Section 129 determinations resulted in the revocation of the relevant antidumping orders as well as the potential liability (and thus the cessation of any cash deposit requirement) for entries after the dates of those determination; and that the Section 129 determinations constitute measures taken to comply with respect to the DSB’s recommendations and rulings.

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<sup>68</sup> Emphasis added.

<sup>69</sup> *US – Softwood Lumber CVD Final (Article 21.5) (AB)*, para. 85.

<sup>70</sup> *US – Softwood Lumber CVD Final (Article 21.5) (AB)*, para. 84.

60. By contrast, the assessment reviews in question are not measures that the United States took to comply with the DSB’s recommendations and rulings. Consequently, it did not fall within the compliance Panel’s task to determine (in the words of DSU Article 21.5) their “consistency with a covered agreement.” Furthermore, for the reasons that are set out in more detail in Section IV.A below, these assessment reviews did not call into question or undermine the “existence” (within the meaning of DSU Article 21.5) of the Section 129 determinations. As a result, the administrative reviews in question fall within neither the “consistency” prong nor the “existence” prong of DSU Article 21.5, and thus were not within the scope of this compliance proceeding.

61. The compliance Panel chose to examine these issues by applying its understanding of the reasoning the Appellate Body developed in *Lumber*.<sup>71</sup> However, the compliance Panel’s application of that reasoning is severely flawed and unsustainable; Section IV.B describes those flaws in detail.

**A. The Assessment Reviews Do Not Undermine the Existence of the Measure Taken to Comply**

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<sup>71</sup> The compliance Panel also did not have the benefit of the Appellate Body’s recent report in *EC – Bananas III (Article 21.5 – Ecuador II/US) (AB)*, in which the Appellate Body “emphasized that the reasoning in *US - Softwood Lumber IV (Article 21.5 – Canada)* concerned the identification of closely connected measures so as to avoid circumvention” and that “[i]n the event that the measure at issue is found not to be in itself a measure taken to comply, our analysis will turn to the question whether a ‘particularly close relationship’ exists between the measure at issue and the declared measure taken to comply, which would warrant subjecting the measure at issue to the scope of Article 21.5 of the DSU.” *Id.*, para. 245. Pursuant to the text of Article 21.5 of the DSU, such a close relationship must be one that establishes that a declared measure taken to comply does not “exist” (within the meaning of DSU Article 21.5).

62. First, as noted above, the relevant DSB recommendations and rulings with respect to *Hot-Rolled Steel from the Netherlands* and *Stainless Steel Wire Rod from Sweden* relate to the use of weighted-average to weighted-average “zeroing,” as applied, in the original investigations.<sup>72</sup> To comply with these recommendations and rulings, the United States conducted Section 129 investigations, in which the United States modified the final determinations in the original investigations by calculating the margin of dumping without “zeroing.” For these two original investigations, the resulting margin of dumping was zero or *de minimis*, and accordingly the orders were revoked effective with respect to entries on or after April 23, 2007.<sup>73</sup> As explained in Part III of this submission, these Section 129 determinations constituted full and complete compliance by the United States, with effect as of April 23, 2007, with the relevant DSB recommendations and rulings.

63. Further, as also explained in Part III, because U.S. compliance was prospective in nature, the Section 129 determinations did not apply to entries prior to April 23, 2007.<sup>74</sup> Accordingly, Commerce completed certain ongoing assessment reviews, relating to entries made in 2004 and 2005, which were outside the scope of the Section 129 determinations, just as they were outside the scope of the original investigation. The assessment review in *Hot-Rolled Steel from the*

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<sup>72</sup> *US – Zeroing (EC)*, para. 8.1(a).

<sup>73</sup> 72 Fed. Reg. 25,261, 25,262-63 (May 4, 2007) (Exhibit EC-5).

<sup>74</sup> As a result of subsequent sunset review determinations, the antidumping order in *Hot-Rolled Steel from the Netherlands* was later revoked with respect to entries on or after November 29, 2006. Panel Report, para. 8.206; Exhibit US-14.

*Netherlands* covered entries from November 1, 2004 through October 31, 2005, inclusive.<sup>75</sup> In the relevant decision memorandum, Commerce expressly declined to extend the Section 129 determination, which by its terms applied only prospectively, in order to give it a retrospective effect on prior entries.<sup>76</sup> Thus, there was no overlap between the Section 129 determination, which applied to entries made on or after April 23, 2007, and the 2004-2005 assessment review, which applied to entries that occurred on or before October 31, 2005 – that is, prior to the end of the reasonable period of time, and indeed prior to the DSB recommendations and rulings in this dispute. Further, as explained above, the assessment review did not establish a new cash deposit rate for future entries, as the underlying order had been revoked. Therefore, the 2004-2005 assessment review in *Hot-Rolled Steel from the Netherlands* had no effect whatsoever on the continued validity and effect of the measure taken to comply, i.e., the Section 129 determination with respect to the original investigation in *Hot-Rolled Steel from the Netherlands*.

64. Similarly, the assessment review in *Stainless Steel Wire Rod from Sweden* covered entries from September 1, 2004 through August 31, 2005, inclusive.<sup>77</sup> The issue of “zeroing” was neither raised nor addressed in the relevant decision memorandum.<sup>78</sup> Thus, there was no overlap between the Section 129 determination, which applied to entries made on or after April 23, 2007, and the 2004-2005 assessment review, which applied to entries that occurred on or before August

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<sup>75</sup> 72 Fed. Reg. 28,676 (May 22, 2007) (Exhibit EC-12).

<sup>76</sup> Issues and Decision Memorandum at 14 (Exhibit EC-12).

<sup>77</sup> Panel Report, para. 8.210 n.811.

<sup>78</sup> Exhibit US-28.

31, 2005 – that is, prior to the end of the reasonable period of time, and indeed prior to the DSB recommendations and rulings in this dispute. Further, as explained above, the assessment review did not establish a new estimate of the antidumping duty for future entries, as the underlying order had been revoked. Therefore, the 2004-2005 assessment review in *Stainless Steel Wire Rod from Sweden* had no effect whatsoever on the continued validity and effect of the measure taken to comply, i.e., the Section 129 determination with respect to the original investigation in *Stainless Steel Wire Rod from Sweden*.

65. The compliance Panel, however, did not grasp the significance of these facts. To be sure, the compliance Panel said it recognized that “the application of a nexus-based test should primarily aim at bringing within the scope of the compliance dispute measures that potentially circumvent implementation or undermine measures officially taken to comply.”<sup>79</sup> But it did not apply that insight correctly.

66. In the prior proceedings in which the “nexus-based test” has been discussed, the purpose of the analysis is to determine whether certain measures, even if not declared to be measures taken to comply, are nonetheless “closely connected” to such measures such that these measures should be examined in the compliance proceedings “so as to avoid circumvention.”<sup>80</sup> For example, where (as in *Australia – Leather (Article 21.5)*) a measure that replaces a prohibited subsidy that has been withdrawn is itself a prohibited subsidy, such a measure would “circumvent” or “undermine” the compliance asserted to have been achieved by the withdrawal

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<sup>79</sup> Panel Report, para. 8.116.

<sup>80</sup> *EC – Bananas III (Article 21.5) (Ecuador II/US) (AB)*, para. 245.



of the original measure. Thus, a compliance panel would need to assess the WTO-consistency of the replacement measure in order to resolve the “disagreement as to the existence or consistency” of the measures taken to comply.<sup>81</sup>

67. Likewise, where (as in *Australia – Salmon (Article 21.5)*) if a measure imposing a ban on imports of a product is inconsistent with the *Agreement on the Application of Sanitary and Phytosanitary Measures* (“SPS Agreement”), such a measure would circumvent or undermine the compliance asserted to have been achieved by bringing other measures affecting those same imports into conformity with the SPS Agreement, and a compliance panel would therefore need to assess the consistency of the new ban with the SPS Agreement in order to fulfill its mandate under Article 21.5 of the DSU.<sup>82</sup>

68. By contrast, the final results of the 2004-2005 administrative reviews in *Hot-Rolled Steel from the Netherlands* and *Stainless Steel Wire Rod from Sweden* do not, and cannot, have any effect whatsoever on the compliance that was achieved by the declared measures taken to comply, namely the Section 129 determinations with respect to the original investigations in those two cases. This is the case *whether or not* those final administrative review results are consistent or inconsistent with Article VI:2 of the GATT 1994, Article 9.3 of the AD Agreement, or any other provision of a covered agreement.

69. To put it another way, these administrative results cannot establish that the U.S. measures taken to comply fail to “exist” within the meaning of Article 21.5 of the DSU. For that reason,

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<sup>81</sup> *Australia – Leather (Article 21.5)*, para. 6.5.

<sup>82</sup> *Australia – Salmon (Article 21.5)*, para. 7.10, sub-paras. 18.

these administrative review are precisely the types of measures that do not fall within the scope of an Article 21.5 proceeding.

70. Accordingly, the Appellate Body should *reverse* the compliance Panel’s finding in paragraph 8.126 of its report that these two administrative reviews fell within its jurisdiction, and *declare null and without legal effect* the compliance Panel’s findings in paragraphs 8.208, 8.213, and 9.1(b)(i) of its report with respect to the consistency of these two reviews with the covered agreements.

**B. The Compliance Panel Erred in Applying Its “Nexus-Based Test”**

71. In addition, to the extent that the compliance Panel considered the “nexus” of the two assessment reviews at issue in this Other Appeal to the declared measures taken to comply (the Section 129 determinations), the compliance Panel drew improper conclusions. Those, too, form a basis for reversing the compliance Panel’s analysis of its terms of reference.

72. We note that the compliance Panel did not undertake an analysis specific to the two assessment reviews at issue in this Other Appeal, but simply referred to a more general conclusion that nine administrative reviews and three sunset reviews were within its terms of reference.<sup>83</sup> Thus, the compliance Panel’s finding with regard to these two administrative reviews must be evaluated with respect to its more general analysis of the scope of its terms of reference.<sup>84</sup>

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<sup>83</sup> Panel Report, para. 208 n.809 (citing *id.*, para. 8.126); *id.* para. 212 n.814 (citing *id.*, para. 8.126).

<sup>84</sup> This more general analysis is set forth in the compliance Panel Report, paras. 8.87-8.126.

73. In this general analysis, the compliance Panel purported to apply the reasoning developed in the *Australia – Leather (21.5)*, *Australia – Salmon (21.5)*, *US – Lumber CVD Final (21.5)*, and *US – Cotton Subsidies (21.5)* reports to a number of measures identified in the EC’s compliance panel request, including the two 2004-2005 administrative reviews at issue.<sup>85</sup> As mentioned above, the compliance Panel referred to the approach it understood to have been used in these reports as a “nexus-based analysis.”<sup>86</sup> For the compliance Panel, although “there are inherent limits on the claims that may be submitted to an Article 21.5 panel, . . . ‘these limits should not allow circumvention by Members by allowing them to comply with one measure, while, at the same time, negating compliance through another.’”<sup>87</sup> Thus, the compliance Panel’s stated interpretation of the application of Article 21.5 in these past reports is consistent with that developed above. Where the declared measure taken to comply achieves compliance, but that compliance is “negat[ed]” by another measure, it is appropriate to consider the latter measure in an Article 21.5 proceeding in order to resolve the disagreement as to the “existence . . . of measures taken to comply.”

74. Further, the compliance Panel also acknowledged the limitations inherent in the approach that these prior reports had developed. For example, the compliance Panel noted that prior panel and Appellate Body reports under Article 21.5 do not “set[] forth a precise set of generally-

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<sup>85</sup> Panel Report, paras. 8.87-8.97.

<sup>86</sup> *E.g.*, Panel Report, para. 8.97.

<sup>87</sup> Panel Report, para. 8.97 (quoting *US – Softwood Lumber CVD Final (Article 21.5) (AB)*, para. 71).

applicable rules establishing when certain measures, *e.g.*, administrative reviews, are sufficiently ‘closely connected’ with original investigations to fall with[in] the purview of an Article 21.5 panel.”<sup>88</sup> The compliance Panel further recognized that “the application of a nexus-based analysis” risks unduly broadening the scope of the DSB’s recommendations and rulings, particularly in this dispute where the DSB recommendations and rulings at issue were made as to “the use of zeroing in the specific original investigations and administrative reviews at issue in that case, and not the US zeroing methodology ‘as such.’”<sup>89</sup> The United States does not dispute these statements by the compliance Panel. The difficulty arises, however, in the compliance Panel’s application of this approach.

75. In order to determine whether a “nexus” existed between the measures identified by the EC and the DSB recommendations and rulings, the compliance Panel examined the nature, effects, and timing of these measures. The Appellate Body has explained that an Article 21.5 panel’s task “may, depending on the particular facts, call for an examination of the timing, nature, and effects of the various measures.”<sup>90</sup> The compliance Panel appears to have used this Appellate Body statement to organize the elements of its analysis.

76. Turning to the first element of the compliance Panel’s analysis, the compliance Panel found certain connections between the nature of the measures identified by the EC, including the two 2004-2005 administrative reviews at issue in this appeal, and the measures that were the

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<sup>88</sup> Panel Report, para. 8.98.

<sup>89</sup> Panel Report, para. 8.100.

<sup>90</sup> *US – Softwood Lumber CVD Final (Article 21.5) (AB)*, para. 77.

subject of “as applied” findings in the original dispute. First, the compliance Panel noted that “the successive determinations of different types are made in the context of a single trade remedy proceeding” and therefore “form part of a continuum of events and measures that are all inextricably linked.”<sup>91</sup> However, with respect to the U.S. retrospective duty assessment system for antidumping and countervailing duties, the Appellate Body has stated that not “every assessment review will necessarily fall within the jurisdiction of an Article 21.5 panel.”<sup>92</sup> This is so, notwithstanding that an assessment review will generally have at least some connection with the original investigation that led to the imposition of antidumping or countervailing duties. For example, the assessment review will usually involve the same type of merchandise exported from the same country as the original investigation. Thus, a closer connection between the declared measure taken to comply and the alleged additional measure must exist before that additional measure can be within the scope of an Article 21.5 proceeding. This element identified by the compliance Panel, therefore, cannot support the conclusion that a particular subsequent assessment review falls within the scope of an Article 21.5 proceeding.

77. Next, the compliance Panel observed that the issue of “zeroing” arises in both the original investigations at issue in the original dispute and the assessment reviews that the EC claims are within the scope of the Article 21.5 proceeding.<sup>93</sup> The compliance Panel acknowledged, however, that the facts here are different from those in the *US – Lumber CVD Final (21.5)*

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<sup>91</sup> Panel Report, para. 8.103.

<sup>92</sup> *US – Softwood Lumber CVD Final (Article 21.5) (AB)*, para. 93.

<sup>93</sup> Panel Report, paras. 8.104-8.106.

dispute, in that obligations related to the “pass-through” analysis in *Lumber* applied equally to original investigations and assessment reviews, while the DSB recommendations and rulings in this dispute with regard to “zeroing” in original investigations are different in important ways from the DSB recommendations and rulings in this dispute with regard to “zeroing” in assessment reviews.<sup>94</sup> However, the compliance Panel dismissed this consideration because it considered that the Appellate Body’s findings with regard to original investigations and assessment reviews are based on similar legal reasoning.<sup>95</sup>

78. The compliance Panel ignored, however, that – at least with respect to the two 2004-2005 administrative reviews at issue in this appeal – the DSB recommendations and rulings with which these reviews are allegedly “measures taken to comply” relate *only* to the use of weighted-average to weighted-average “zeroing” “as applied” in particular original investigations.<sup>96</sup> While the DSB also made recommendations and rulings in the original dispute with respect to weighted-average to transaction “zeroing” “as applied” in particular assessment reviews,<sup>97</sup> none of those assessment reviews related to *Hot-Rolled Steel from the Netherlands* or *Stainless Steel Wire Rod from Sweden*. Moreover, in the original dispute the Appellate Body declined the EC’s request to make findings, recommendations, or rulings with respect to weighted-average to

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<sup>94</sup> Panel Report, para. 8.105.

<sup>95</sup> Panel Report, para. 8.106.

<sup>96</sup> *US – Zeroing (EC) (Panel)*, para. 8.1(a).

<sup>97</sup> *US – Zeroing (EC) (AB)*, para. 263(a)(i).

transaction “zeroing” “as such” in assessment reviews generally.<sup>98</sup> Thus, there are *no* DSB recommendations and rulings in the original dispute that relate to the use of “zeroing” in assessment reviews unrelated to the particular assessment reviews identified in the original dispute. The compliance Panel’s analysis does not take into account this aspect of the DSB recommendations and rulings in this dispute.

79. Turning to the second “nexus” element that prior reports have considered, the compliance Panel stated, with respect to assessment reviews where the original DSB recommendations and rulings related to original investigations, that the assessment review may have similar effects to the original investigations. Specifically, the compliance Panel explained:

the use by the USDOC of zeroing in the calculation of margins of dumping in the context of a "subsequent" administrative review potentially negates action taken by the United States in the form of a Section 129 determination recalculating the margin of dumping from the original investigation in order to implement the DSB's recommendations in respect of that original investigation, as it (i) allows for the assessment of anti-dumping duties at a rate that is based on zeroing, inconsistent with the provisions of the Anti-Dumping Agreement, despite alleged implementing action to eliminate such zeroing, and (ii) replaces the rate established in the original investigation (and any new rate established as a result of the implementation of the DSB recommendations and rulings) with a new cash deposit rate calculated with zeroing.<sup>99</sup>

Of these two issues, the compliance Panel considered that the establishment of a new cash deposit rate in a subsequent administrative review “is more closely connected” with the role of the original investigation.<sup>100</sup>

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<sup>98</sup> *US – Zeroing (EC) (AB)*, para. 263(c)(ii).

<sup>99</sup> Panel Report, para. 8.108.

<sup>100</sup> Panel Report, para. 8.108.

80. The first “effect” identified by the compliance Panel – the use of “zeroing” in both original investigations and assessment reviews – is similar to the “nature” argument with regard to “zeroing” already discussed, and the compliance Panel’s analysis suffers from the same flaws. The original DSB recommendations and rulings with respect to “zeroing” in original investigations are not identical to the original DSB recommendations and rulings with respect to “zeroing” in assessment reviews, neither in their legal conclusions nor in the particular determinations that were the subject of “as applied” findings.

81. With regard to the issue of cash deposits, the compliance Panel’s analysis omits a crucial element that applies in the case of the two 2004-2005 assessment reviews at issue in this appeal. The Section 129 determinations that constitute the declared measures taken to comply with the original DSB recommendations and rulings regarding the original investigations in *Hot-Rolled Steel from the Netherlands* and *Stainless Steel Wire Rod from Sweden* resulted in the prospective revocation of the underlying antidumping duty orders, effective for all entries on or after April 23, 2007.<sup>101</sup> No potential liability would accrue (and therefore no cash deposits would be required) for future entries of the merchandise that had been subject to these antidumping orders. Accordingly, the two 2004-2005 assessment reviews had *no effect* on the estimated amounts of antidumping duties for future entries (and therefore on the cash deposit rates) set in the Section 129 determinations, because the Section 129 determinations *eliminated* the potential antidumping duty liability (and therefore the cash deposit requirements) for future entries.

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<sup>101</sup> 72 Fed. Reg. 25,261, 25,262-63 (May 4, 2007) (Exhibit EC-5).



82. Indeed, the compliance Panel expressly recognized that the Section 129 determination eliminated the cash deposit requirement in *Hot-Rolled Steel from the Netherlands*.<sup>102</sup> With respect to *Stainless Steel Wire Rod from Sweden*, the compliance Panel found that the United States had provided unrebutted evidence that “no cash deposit was imposed on imports covered by the anti-dumping order in this case following the 2004-2005 administrative review.”<sup>103</sup> Inexplicably, however, the compliance Panel failed to take these facts into account when finding relevant to its “nexus-based analysis” that the effect of an administrative review subsequent to a Section 129 determination *could be* to alter the cash deposit rate determined in that Section 129 determination. Setting aside the question of whether this “effect” would be relevant in the case of a Section 129 determination that did not result in the full revocation of the antidumping order – a question not presented in this Other Appeal by the United States – it is indisputable that the 2004-2005 administrative reviews in *Hot-Rolled Steel from the Netherlands* and *Stainless Steel Wire Rod from Sweden* did not have, and could not have had, any effect on cash deposit rates that no longer existed.

83. Finally, with regard to the timing of the assessment reviews, the compliance Panel found that reviews completed after the adoption of the original DSB recommendations and rulings have “a sufficiently close nexus with the DSB’s recommendations and rulings” to be included in the

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<sup>102</sup> Panel Report, para. 8.206; *see also* 72 Fed. Reg. 34,441, 34,441 (June 22, 2007) (Exhibit EC-11) (explaining in final results of 2004-2005 administrative review that, due to revocation of order in the Section 129 determination, “there is no need to issue new cash deposit instructions”).

<sup>103</sup> Panel Report, para. 8.212.

scope of the proceeding. However, like the argument that original investigations and administrative reviews involve different stages of this same proceeding, it will always be the case that administrative reviews following modifications to original investigations made in order to comply with DSB recommendations and rulings will be issued after the adoption of the DSB recommendations and rulings. Thus – unless, contrary to the Appellate Body’s prior statements, all subsequent assessment reviews are automatically “measures taken to comply” for purposes of Article 21.5 – this factor alone is insufficient to justify inclusion of the 2004-2005 administrative reviews in the scope of this proceeding.

84. In sum, the compliance Panel identified only two factors, other than those that would apply to any administrative review subsequent to a modification of an original determination in light of DSB recommendations and rulings, that justified the inclusion of the 2004-2005 administrative reviews in *Hot-Rolled Steel from the Netherlands* and *Stainless Steel Wire Rod from Sweden* in the scope of these Article 21.5 proceedings – (1) both the original determinations and these administrative reviews involved “zeroing,” and (2) the administrative reviews could have affected the cash deposit rates set in the Section 129 determinations. As explained above, however, neither factor applies in this proceeding. The compliance Panel’s treatment of “zeroing” as a unitary phenomenon, allegedly existing in both original investigations and administrative reviews, is inconsistent with the DSB recommendations and rulings as they were adopted in this dispute.<sup>104</sup> Further, because the relevant Section 129 determinations revoked the

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<sup>104</sup> Of course, any DSB recommendations and rulings in *other* disputes are limited to those disputes and do not create any compliance obligations in *this* dispute.

underlying orders in their entirety, there was no potential antidumping liability, and therefore no “cash deposit” rate to be affected by the subsequent administrative reviews. Thus, the compliance Panel’s conclusion that these two 2004-2005 administrative reviews fell within the scope of the dispute was in error, and should be reversed on that basis as well.

## V. Conclusion

85. For the reasons set out above, the United States respectfully asks the Appellate Body to find, with respect to the 2004-2005 assessment reviews in *Hot-Rolled Steel from the Netherlands* and *Stainless Steel Wire Rod from Sweden*, that:

(1) the compliance Panel’s conclusion that the United States failed to comply with the DSB’s recommendations and rulings to bring the original investigations in *Hot-Rolled Steel from the Netherlands* and *Stainless Steel Wire Rod from Sweden* into compliance with the covered agreements by making determinations in these assessment reviews and issuing assessment instructions pursuant to those determinations,<sup>105</sup> is in error;

(2) the compliance Panel’s conclusion that the United States acted inconsistently with its obligations under Article VI:2 of the GATT 1994 and Article 9.3 of the AD Agreement in its determinations in these two assessment reviews and the assessment instructions issued pursuant to those determinations<sup>106</sup> is without legal effect, as the compliance Panel was without jurisdiction to examine these assessment reviews and make any findings with respect to them; and

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<sup>105</sup> See, e.g., Panel Report, paras. 8.208, 8.213, 9.1(b)(i).

<sup>106</sup> See, e.g., Panel Report, paras. 8.208, 8.213, 9.1(b)(i).

(3) the compliance Panel’s finding that these two assessment reviews fell within its terms of reference<sup>107</sup> is in error.

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<sup>107</sup> *See, e.g.*, Panel Report, para. 8.87-8.126.