

***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

Appellee Submission of the United States of America

March 10, 2009

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<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>Chile – Price Band System (AB)</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/AB/R, adopted 23 October 2002
<i>China – Auto Parts (Panel)</i>	Panel Reports, <i>China – Measures Affecting Imports of Automobile Parts</i> , WT/DS339/R, WT/DS340/R, WT/DS342/R, adopted 12 January 2009, as modified by the Appellate Body Report, WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R
<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 <i>Corr.1 / 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 <i>Corr. 1</i> , adopted 22 December 2008
<i>EC – Bed Linen (Article 21.5) (AB)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/AB/RW, adopted 24 April 2003

<i>EC – Chicken Cuts (AB)</i>	Appellate Body Report, <i>European Communities - Customs Classification of Frozen Boneless Chicken Cuts</i> , WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005
<i>EC – Commercial Vessels</i>	Panel Report, <i>European Communities – Measures Affecting Trade in Commercial Vessels</i> , WT/DS301/R, adopted 20 June 2005
<i>EC – Poultry (AB)</i>	Appellate Body Report, <i>European Communities – Measures Affecting the Importation of Certain Poultry Products</i> , WT/DS69/AB/R, adopted 23 July 1998
<i>EC – Sardines (Panel)</i>	Panel Report, <i>European Communities – Trade Description of Sardines</i> , WT/DS231/R and Corr. 1, adopted 23 October 2002, as modified by the Appellate Body Report, WT/DS231/AB/R
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<i>US – Corrosion-Resistant Steel Sunset Review (AB)</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R, adopted 9 January 2004
<i>US – Cotton Subsidies (AB)</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/AB/R, adopted 21 March 2005
<i>US – Cotton Subsidies (Article 21.5) (Panel)</i>	Panel Report, <i>United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil</i> , WT/DS267/RW, adopted 20 June 2008, as modified by the Appellate Body Report, WT/DS267/AB/RW
<i>US – Cotton Subsidies (Article 21.5) (AB)</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil</i> , WT/DS267/AB/RW, adopted 20 June 2008

<i>US – Countervailing Measures (Article 21.5)</i>	Panel Report, <i>United States – Countervailing Measures Concerning Certain Products from the European Communities – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS212/RW, adopted 27 September 2005
<i>US – Hormones Suspension (AB)</i>	Appellate Body Report, <i>United States – Continued Suspension of Obligations in the EC – Hormones Dispute</i> , WT/DS320/AB/R, adopted 14 November 2008
<i>US – Hot-Rolled Steel (AB)</i>	Appellate Body Report, <i>United States – Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001
<i>US – Line Pipe (AB)</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea</i> , WT/DS202/AB/R, adopted 8 March 2002
<i>US – OCTG from Argentina (AB)</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R, adopted 17 December 2004
<i>US – Shrimp (AB)</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998
<i>US – Shrimp Bonding (Thailand) (Panel)</i>	Panel Report, <i>United States – Measures Relating to Shrimp from Thailand</i> , WT/DS343/R, adopted 1 August 2008, as modified by the Appellate Body Report, WT/DS343/AB/R, WT/DS345/AB/R
<i>US – Shrimp Bonding (Thailand/Ecuador) (AB)</i>	Appellate Body Report, <i>United States – Measures Relating to Shrimp from Thailand / United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties</i> , WT/DS343/AB/R, WT/DS345/AB/R, adopted 1 August 2008
<i>US – Softwood Lumber CVD Final (AB)</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , WT/DS257/AB/R, adopted 17 February 2004
<i>US – Softwood Lumber CVD Final (Article 21.5) (AB)</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 of the DSU</i> , WT/DS257/AB/RW, adopted 20 December 2005

<i>US – Steel Safeguards (AB)</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003
<i>US – Zeroing (EC) (Panel)</i>	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
<i>US – Zeroing (EC) (AB)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)</i> , WT/DS294/AB/R, adopted 9 May 2006
<i>US – Zeroing II (EC) (AB)</i>	Appellate Body Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/AB/R, adopted 19 February 2009
<i>US – Zeroing (Japan) (AB)</i>	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews</i> , WT/DS322/AB/R, adopted 23 January 2007

I. Introduction and Executive Summary

A. Introduction

1. The present dispute is one in a series of disputes addressing the issue of “zeroing” in a variety of different contexts within the antidumping duty system of the United States. In the original proceedings, the Dispute Settlement Body (“DSB”) made recommendations and rulings with respect to three sets of measures: (1) average-to-average zeroing in original investigations, “as such”; (2) average-to-average zeroing in 15 individually identified original investigations involving products of the European Communities (“EC”), “as applied”; and (3) average-to-transaction zeroing in 16 individually identified administrative or assessment reviews.

2. With respect to the first of these, the United States modified its practice to eliminate the use of zeroing in original antidumping investigations, effective February 22, 2007. There is no dispute that the United States has complied on this point. The United States also took a number of steps to bring the 31 measures – 15 original investigations and 16 administrative reviews – subject to “as applied” recommendations and rulings into compliance, effective at least with respect to current entries under the relevant antidumping orders.¹

3. The United States is well aware that the DSB has made findings about “zeroing” in other disputes that go beyond the recommendations and rulings made in the original proceedings in this dispute. The United States continues to determine how best to implement those recommendations and rulings, and to address the concerns of affected Members in the appropriate fora. However, the DSB’s recommendations and rulings in this dispute are narrower

¹ With the partial exception of one measure, as discussed by the compliance Panel. *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”), para. 8.215. The United States does not appeal from this finding of the compliance Panel.

than those made in other, later disputes. In particular, the EC sought in this dispute – but did not obtain – a finding that average-to-transaction zeroing in administrative reviews, “as such,” is inconsistent with the *General Agreement on Tariffs and Trade 1994* (“GATT 1994”) and the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (“AD Agreement”). Although such a finding has been made in other disputes, it was not made in this one. The EC’s appeal appears to proceed from an assumption that this dispute should now become a hybrid between the original DSB recommendations and rulings in this dispute and those in other proceedings. Such an approach would fail to respect the original Appellate Body findings and recommendation, the DSB’s recommendations and rulings, and the proper distinctions among disputes under the WTO dispute settlement system. In this compliance proceeding, it is useful to keep in mind that the issue is U.S. compliance with the DSB’s recommendations and rulings *in this dispute*, not the recommendations and rulings made in other disputes.

4. As the United States demonstrates in this submission, it has complied with the DSB “as applied” recommendations and rulings in this dispute by prospectively removing or amending the relevant border measures with prospective effect – that is, for current and future entries of affected goods. For the most part, the EC does not contest the application of the U.S. measures taken to comply to current entries. Rather, the core of the EC argument, both before the compliance Panel and on appeal, is that the United States had to go further in order to comply with the DSB’s recommendations and rulings, and modify its measures as they apply to *past* entries of goods for which antidumping duties were not collected with finality under U.S. domestic law at the end of the reasonable period of time.

5. In this, the EC goes far beyond the commonly accepted understanding of the consequences of adverse findings in WTO dispute settlement, which is that compliance must be achieved *prospectively* and that Members have a reasonable period of time in which to do so, as provided under Article 21.3 of the DSU. In the case of a border measure such as an antidumping duty, that means that the measure must be withdrawn or brought into conformity with the relevant WTO obligations as applied on a going-forward basis. And, with respect to the 31 measures subject to “as applied” findings in the original dispute, this is precisely what the United States has done.

6. In this compliance proceeding, and in this appeal, the United States does not assert that it has implemented the DSB’s recommendations and rulings in other disputes involving zeroing. This dispute did not go where others went. Rather, the United States focuses on the DSB’s recommendations and rulings in this dispute, which are limited in comparison with those made in some other disputes. Accordingly, the scope of these compliance proceedings are limited, in accordance with the limited DSB recommendations and rulings in the original dispute. To the extent that the EC would like more comprehensive findings on this subject, it would need to file a new dispute seeking findings on a broader set of claims – and in fact the EC has done so. The recently adopted reports in *US – Zeroing II (EC)* (WT/DS350) have a different scope than the DSB’s recommendations and rulings in this dispute, and the United States has already begun to address those reports. Similarly, the United States is working in the context of other disputes, such as those where Japan and Mexico are the other parties, on how best to address the “as such” and other findings regarding the use of zeroing in reviews. But the mere fact that the DSB recommendations and rulings in this earlier-initiated dispute are limited does not mean that they

should be expanded through compliance proceedings under Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”); nor should the EC be permitted to strain the limitations inherent in the negotiated text of Article 21.5 in order to achieve such a result.

7. The approach advocated by the EC in this appeal amounts to a retrospective remedy not provided for under the DSU. In particular, if the EC approach applies equally to retrospective and prospective antidumping duty systems – as the EC steadfastly insists that it should, even as its own practice in implementing DSB recommendations and rulings under the AD Agreement and other WTO agreements affecting border measures says otherwise – a Member would fail to comply with DSB recommendations and rulings whenever it failed to apply the withdrawal or revision of its border measure to any past entry for which a claim for refund or other challenge can be made under the Member’s municipal law. As Japan accurately observes in its third-participant submission, the issues raised by the EC in this appeal with respect to the temporal scope of compliance proceedings have “considerable systemic importance for many disputes outside the realm of the *Anti-Dumping Agreement*.”² We agree, and will show in this submission that the EC approach to compliance in this appeal is inconsistent with the DSU and its provisions in Article 21.5 permitting recourse to a panel to resolve disagreements about the existence or consistency with the covered agreements of measures taken to comply with DSB recommendations and rulings.

8. Below, the United States briefly summarizes the points made in this submission.

² Japan Third-Participant Submission, para. 153.

B. Executive Summary

9. ***Terms of Reference.*** The EC made claims with respect to 54 subsequent reviews “related to” the 31 original measures at issue in this dispute. The compliance Panel correctly found that most of these reviews fell outside the scope of this dispute. First, the compliance Panel correctly found that the subsequent reviews were not “amendments” to the original measures. Second, the compliance Panel correctly rejected the inchoate EC argument that these measures constituted “omissions” in U.S. compliance with the recommendations and rulings. Third, the compliance Panel found that 12 of the reviews had a sufficiently close “nexus” with the original measures and the recommendations and rulings to fall within the scope of the compliance proceedings. Although the compliance Panel’s application of its “nexus-based test” was generally problematic, the compliance Panel correctly found that reviews completed prior to the adoption of the DSB’s recommendations and rulings could not correctly be characterized as “measures taken to comply.”

10. ***Sunset Reviews.*** Some of the 54 subsequent reviews challenged by the EC were sunset reviews, but the compliance Panel made no findings of inconsistency with regard to any of them. As an initial matter, the EC appeal should be rejected, because none of the sunset reviews properly fell within the scope of the compliance proceeding. With respect to the three sunset reviews that the compliance Panel incorrectly found to fall within the scope of the proceedings, the compliance Panel correctly found that none of them had been completed – that is, none had resulted in the continuation of an antidumping duty order – at the time the compliance Panel was established.

11. ***Alleged “Omissions or Deficiencies.”*** Remedies in WTO dispute settlement are prospective in nature. The right to a remedy against a breach of the covered agreements (in the sense of the suspension of concessions under DSU Article 22.1) arises only after a Member fails to comply with DSB recommendations and rulings within a reasonable period of time. In disputes involving border measures, it has been consistently recognized that compliance is achieved when the measure is withdrawn or brought into compliance with respect to *entries* of goods after the reasonable period of time. This is the established practice of the DSB and individual Members, including the EC. However, in this appeal the EC argues that the United States failed to comply with the DSB’s recommendations and rulings by not modifying the application of measures to entries prior to the end of the reasonable period of time for which duty collection is not final under domestic law. Moreover, the EC argues that the United States does not comply unless it permits private parties to use domestic U.S. procedures to delay final duty collection to vindicate what the EC incorrectly claims are the “WTO rights” of these private parties.

12. The compliance Panel rightly rejected the EC claim and found that the United States did not fail to comply when it liquidated entries after the reasonable period of time, when duty liability had been assessed prior to that time. As the United States demonstrated in its Other Appellant submission, the compliance Panel incorrectly found that the United States failed to comply when it completed duty assessment after the end of the reasonable period of time, even for entries made prior to that time. The compliance Panel wrongly found that Members operating retrospective antidumping systems needed to do more with respect to prior entries in order to comply than do Members operating prospective systems. The EC also disagrees, arguing that its

approach applies evenhandedly to both types of systems. But, in that case, under the EC’s proposed approach any Member could be found to have failed to comply if it does not revisit duties collected prior to the end of the reasonable period of time, if avenues to challenge or seek refunds of those duties remain open.³

13. The EC further errs when it claims that cash deposit rates set in certain administrative reviews are an inconsistent measure taken to comply. The compliance Panel correctly found that the EC failed to establish the factual basis for its claim. However, the compliance Panel’s *dictum* on this point is in error. The DSB recommendations and rulings at issue applied only to specific assessment reviews, not cash deposit requirements, which are not duties but security and are subject to different obligations.

14. ***Alleged Past Noncompliance.*** The compliance Panel correctly rejected the EC’s request for a finding that the United States had not complied after the end of the reasonable period of time but prior to the implementation of “Section 129 determinations” in several cases. As the Section 129 determinations were undisputably implemented prior to the establishment of the compliance Panel, the EC’s request was not within the scope of the compliance proceeding, and the requested finding would have served no useful purpose.

15. ***Claims Regarding Section 129 Determinations.*** The compliance Panel correctly rejected the EC’s claim that an alleged clerical error in one of the original investigations at issue in the original proceeding should have been corrected when the United States recalculated the margin of dumping without zeroing. The EC could have raised the error in the original proceedings, but

³ As discussed below, the EC’s proposed approach would go even further and could point to a path to bring a retroactive element to compliance in most if not all WTO disputes.

did not do so. Therefore, the EC was precluded from raising the claim for the first time in the compliance proceeding. The compliance Panel also correctly rejected the EC claim that the “all others” rates in three Section 129 determinations were calculated inconsistently with Article 9.4 of the AD Agreement. That provision normally determines the “maximum” permissible “all others” rate, but it did not establish any maximum rate in the circumstances of those determinations. Accordingly, there could have been no violation of Article 9.4 in this case.

16. ***Claim Regarding Panel Composition.*** The compliance Panel correctly rejected the EC’s illogical and incorrect claim that it had been composed inconsistently with the DSU.

II. The Panel Properly Excluded Certain Measures from the Scope of the Dispute

A. Introduction

17. The original panel in this dispute found that the United States acted inconsistently with Article 2.4.2 of the AD Agreement by using what it described as “model zeroing” (that is, weighted-average-to-weighted-average zeroing) in 15 individual, specifically identified determinations in original antidumping investigations.⁴ The United States did not appeal this finding. Further, while the original panel found that the United States did not act inconsistently with Article VI:2 of the GATT 1994 and Article 9.3 of the AD Agreement by using “weighted-average-to-transaction zeroing” in 16 individual, specifically identified assessment reviews,⁵ the Appellate Body reversed the panel and found that the United States did act inconsistently with

⁴ Panel Report, para. 2.24 (a); *US – Zeroing (EC) (Panel)*, paras. 7.32, 8.1(a).

⁵ *US – Zeroing (EC) (Panel)*, paras. 7.288, 8.1(f).

those provisions.⁶ Accordingly, the DSB’s recommendations and rulings include a recommendation that the United States bring these 31 measures – 15 original investigations and 16 assessment reviews – into compliance with the GATT 1994 and the AD Agreement.⁷

18. In its request for the establishment of the compliance Panel, the EC claimed that the United States had acted inconsistently with several provisions of the GATT 1994 and the AD Agreement in “reviews related to” the 15 original investigations and 16 assessment reviews.⁸ The EC listed some 54 such reviews – including assessment reviews, sunset reviews, and changed circumstances reviews – in the Annex to its panel request. None of these 54 reviews had been identified by the United States as a measure taken to comply with the relevant DSB recommendations and rulings, which were limited to findings that the 31 individually identified measures were inconsistent, “as applied,” with covered agreements.⁹

19. However, that the 54 reviews are in some way “related to” one or more of the 31 measures covered by the original dispute, without more, is insufficient to bring the 54 reviews within the scope of this Article 21.5 review. As the Appellate Body has explained, it would be “too sweeping” to find “that *every* measure that has ‘some connection’ with and that ‘could have an impact on’ or could ‘possibly undermine’ a measure taken to comply may be scrutinized in

⁶ Panel Report, para. 2.24(c); *US – Zeroing (EC) (AB)*, paras. 135, 263.

⁷ Panel Report, para. 2.25; *US – Zeroing (EC) (AB)*, para. 264.

⁸ Panel Report, Annex A-1, para.7.

⁹ The original panel also found, and the Appellate Body affirmed, that the use of “weighted-average-to-weighted-average zeroing” in original investigations was inconsistent “as such” with the AD Agreement. It is uncontested that the United States has fully complied with this aspect of the DSB’s recommendations and rulings.

proceedings under Article 21.5 of the DSU.”¹⁰ In particular, the Appellate Body has explained that a subsequent assessment review is not necessarily subject to the jurisdiction of a compliance panel.¹¹ It cannot therefore be assumed that, simply because the 54 reviews are in some way “related to” the 31 original measures, they automatically fall within the scope of Article 21.5 review such that a panel acting under Article 21.5 of the DSU has jurisdiction to determine their consistency with the covered agreements.

20. Significantly, in the original dispute the EC sought – but did not obtain – DSB recommendations and rulings with respect to the use of “weighted-average-to-transaction zeroing” in assessment reviews “as such.”¹² The EC also sought – but did not obtain – DSB recommendations and rulings with respect to the use of “zeroing” in new shipper reviews, changed circumstances reviews, and sunset reviews.¹³ The *only* recommendations and rulings in the original dispute with respect to the use of “weighted-average-to-transaction zeroing” in assessment reviews relate to the 16 individually identified assessment reviews “as applied.” The EC is not in a position to complain that the United States has not implemented recommendations and rulings sought by the EC in the original dispute that the DSB *did not actually make*, and any such claim cannot be within the terms of reference of an Article 21.5 compliance panel. Rather, in order to come within the scope of this Article 21.5 proceeding, each of the 54 reviews had to

¹⁰ *US – Softwood Lumber CVD Final (Article 21.5) (AB)*, para. 87.

¹¹ *US – Softwood Lumber CVD Final (Article 21.5) (AB)*, para. 93.

¹² *US – Zeroing (EC) (AB)*, para. 263(c)(ii), (d); *US – Zeroing (EC) (Panel)*, para. 8.1(g).

¹³ *US – Zeroing (EC) (AB)*, para. 263(d); *US – Zeroing (EC) (Panel)*, para. 8.1(h).

be a measure taken to comply, or affect the existence of a measure taken to comply, with the specific recommendations and rulings of the DSB in the original dispute.

21. Before the Panel, the EC offered three theories to support the inclusion of the 54 reviews within the scope of this proceeding. The Panel rejected two of these theories – that the 54 reviews were all “amendments” to one or more of the 31 measures subject to the DSB recommendations and rulings,¹⁴ and that the 54 reviews represented “omissions” or “deficiencies” in the U.S. implementation of those DSB recommendations and rulings.¹⁵ The Panel accepted a third EC theory – that the reviews were “measures taken to comply” with the DSB’s recommendations and rulings – with respect to only 12 of the 54 reviews.¹⁶ The EC now appeals from the Panel’s findings.¹⁷ We address each of the EC’s arguments below.

B. The Panel Correctly Found that the 54 Reviews Were Not “Amendments” to Any of the 31 Measures Subject to DSB Recommendations and Rulings

22. First, the EC argues that the Panel erred by finding that the 54 subsequent reviews are not “amendments” to the specific determinations challenged in the original dispute.¹⁸ However, the compliance Panel correctly found that subsequent reviews do not “amend” the specific

¹⁴ Panel Report, para. 8.80.

¹⁵ Panel Report, para. 8.86.

¹⁶ Panel Report, para. 8.126. Out of these 12 reviews, the Panel made findings of inconsistency with respect to only two reviews. Panel Report, para. 9.1(b)(i). The Panel’s finding that these two reviews fell within the scope of its review, as well as its finding that the United States failed to comply with the recommendations and rulings with respect to these two reviews, are the subject of the Other Appeal filed by the United States.

¹⁷ EC Appellant Submission, paras. 56-101.

¹⁸ EC Appellant Submission, paras. 59-73.

determinations that are the subject of the DSB recommendations and rulings. The Panel was also correct when it found that the reference to “amendments” in the EC’s original panel request did not encompass these subsequent reviews.

1. Subsequent Reviews Are Not “Amendments”

23. The EC argued before the compliance Panel that, just as some panels have found that “amendments” to the measures identified in a panel request are in certain circumstances within their terms of reference, the 54 reviews are covered by the DSB’s recommendations and rulings as “amendments” to the investigations and reviews at issue in the original proceedings. The compliance Panel properly rejected the EC’s argument.¹⁹ The dispute reports cited by the EC considered that a panel’s terms of reference may extend to amendments to the measures at issue where, for example, the amendment “seeks to clarify the legislation that established the measure at issue and does not change the essence of the original measure into something different than what was in force before its issuance.”²⁰ On appeal, the EC does not renew this argument.²¹

24. The compliance Panel found that the issue before it – whether a subsequent measure is an “amendment” to a measure at issue in the original dispute for purposes of Article 21.5 – was significantly different from the question considered by panels and the Appellate Body with

¹⁹ Panel Report, paras. 8.81-8.84.

²⁰ *US – Shrimp Bonding (Thailand) (Panel)*, para. 7.48; *see also Chile – Price Band System (AB)*, para. 139 (measure at issue includes amendment to original measure identified in request for panel establishment that does not “chang[e] its essence” (emphasis deleted)).

²¹ The EC merely mentions in passing – without adducing any argumentation – one of the reports on which it (erroneously) relied during the compliance Panel proceeding. EC Appellant Submission, para. 71 n.97.

regard to amendments in original disputes.²² Further, even if the EC argument was relevant in the Article 21.5 context, the compliance Panel considered that it would not be “tenable” to describe assessment reviews or the other types of reviews at issue as “merely clarify[ing] the terms of the original investigations or (and, in certain cases) administrative reviews that were at issue in the original dispute.”²³

25. The compliance Panel was correct. In an assessment review, the U.S. Department of Commerce (“Commerce”) examines different imports, over a different time period, than it did in the original investigation or a prior assessment review. This is in no plausible sense the same measure, unchanged in its essence from the original investigation or a prior assessment review, that “merely clarifies” the original measures at issue. Similarly, sunset reviews are distinct from investigations and administrative reviews because they determine whether the expiration of an antidumping duty would be likely to lead to the continuation or recurrence of dumping and injury.²⁴ Accordingly, new subsequent determinations are not amendments to, or modifications of, original investigations and administrative reviews at issue in the original dispute, and the compliance Panel was correct in its conclusion that subsequent reviews do not amend the original measures at issue.²⁵

2. The EC’s Original Panel Request Does Not Refer to Subsequent Reviews As Amendments

²² Panel Report, para. 8.84.

²³ Panel Report, para. 8.84.

²⁴ AD Agreement, art. 11.3.

²⁵ Panel Report, paras. 8.83-84.

26. On appeal, the EC focuses on a different aspect of the compliance Panel’s findings. The EC argued to the compliance Panel that, because its panel request in the original proceeding encompassed “amendments” to the original measures at issue, the measures at issue in the original proceeding included subsequent reviews. The EC’s argument faces several insurmountable difficulties: the original panel request, when read as a whole, makes clear that the EC did not treat “amendments” as including subsequent reviews; the term “amendments” has a specific meaning in the context of this dispute (and that meaning does not include “subsequent reviews”); and, contrary to the EC’s arguments, the original panel and Appellate Body reports do not support the EC’s position. These points are further developed below.

27. First, the compliance Panel found that each time an “amendment” appears in the Annex to the EC’s original request, the term refers to an “amendment of the specific measure listed to correct for ministerial errors,” and does not refer to a subsequent review.²⁶ The compliance Panel’s analysis was correct, for the following reasons. In the first place, where the EC’s original panel request referred to a subsequent review, it treated that review as a separate measure, not as an “amendment” to the prior measure.²⁷ If the EC’s original panel request is to be read as supporting the view that subsequent reviews are amendments that “merely clarify” the

²⁶ Panel Report, para. 8.76.

²⁷ Panel Report, para. 8.75. For example, case number 21 is the assessment review for stainless steel sheet and strip in coils from Italy for the 1999-2000 period, and case number 22 is the subsequent administrative review, for the 2000-2001 period. Similarly, cases 23 and 24 are both administrative reviews for the same order (Granular Polytetrafluethylene from Italy), as are cases 25 and 26 (Stainless Steel Strip and Coils from France), and cases 27 and 28 (Stainless Steel Strip and Coils from Germany). The EC also identified both the investigation for stainless steel sheet and strip in coils from France, case 10, *and* one administrative review in connection with that order, case 25.

original investigation or a prior assessment review, each such review would not be listed as a separate measure. Thus, the compliance Panel found that the EC’s original panel request – and thus, the terms of reference for the original panel – did not encompass subsequent reviews under the rubric of “amendments” to the original measures.²⁸

28. Moreover, under U.S. law, immediately following a final determination, Commerce provides interested parties with the opportunity to identify and submit comments on alleged ministerial errors in the determination.²⁹ Commerce analyzes any allegations and comments that are received, and corrects any ministerial errors by publishing an “amended” determination.³⁰ The references in the EC’s original panel request to “amendments” to final determinations, therefore, has a precise meaning in the context of this dispute. They refer to corrections to the measures identified in the original proceeding, but do not refer to *subsequent* determinations, which involve different entries, different time periods, and perhaps even different parties. The compliance Panel found that the original EC panel request used the term “amendments” as having a specific meaning in this context that did not extend to subsequent reviews.

3. The Original Panel and Appellate Body Reports Do Not Support the EC’s Position

29. On appeal, the EC contends that because the original panel and Appellate Body reports describe the measures challenged by the EC to include “any amendments,” it was decided during the original proceedings that the measures at issue must necessarily include all subsequent

²⁸ Panel Report, para. 8.77.

²⁹ 19 C.F.R. § 351.224(d) (Exhibit US-22).

³⁰ 19 C.F.R. § 351.224(e) (Exhibit US-22).

reviews.³¹ The EC further argues that, by concluding that the EC’s original panel request did not encompass all subsequent reviews, the compliance Panel “reopened an issue which was already discussed and decided in the original dispute.”³²

30. There is no support for the EC’s argument that the original reports disposed of this issue. Although there was some discussion in the original proceeding as to whether the EC had properly described the 31 measures at issue in that proceeding using the term “any amendments,”³³ nothing in the original reports equates the use of the term “any amendments” with subsequent reviews. Rather, as explained above, subsequent reviews are identified in the original panel request, and in the original panel and Appellate Body reports, as distinct measures in their own right.³⁴ In particular, neither the panel nor the Appellate Body reports addressed the *meaning* of the term “any amendments,” as the EC used that term in its original panel requests and submissions in the original proceedings. Because the EC’s original panel request used the term “amendments” in a more restrictive way (i.e., as limited to “amended” final determinations as that term is understood in U.S. law), the recommendations and rulings of the DSB cannot have a broader scope than what is provided for in the original panel request.

31. The compliance Panel’s analysis in paragraphs 8.78 through 8.80 of its report demonstrates that it did not “disregard” findings of the original panel or the Appellate Body.

³¹ See EC Appellant Submission, paras. 62-72.

³² EC Appellant Submission, para. 70.

³³ EC Appellant Submission, paras. 64-69.

³⁴ Panel Report, para. 8.80.

Rather, the compliance Panel rejected the EC’s position in these compliance proceedings that the term “amendments” could be read so broadly as to cover subsequent reviews. The compliance Panel found that such a view “cannot be reconciled with the manner in which the [EC] itself framed the measures at issue in the original dispute.”³⁵ On appeal, the EC presents only assertion – that is, neither argument nor evidence – to indicate any error in the compliance Panel’s interpretation of the original EC panel request. Accordingly, the compliance Panel’s findings on this question should be affirmed.

C. The Panel Correctly Found that the 54 Reviews Were Not “Omissions” or “Deficiencies” in the Implementation of the DSB Recommendations and Rulings

32. The EC further appeals from the rejection by the compliance Panel of its claim that the 54 reviews were within the scope of this Article 21.5 proceeding because they represent “omissions” or “deficiencies” in the U.S. compliance with the DSB’s recommendations and rulings.³⁶ The compliance Panel found that the EC had not articulated any such claim that would not be subsumed in the EC claim, rejected by the Panel and discussed immediately above, that the 54 reviews were “amendments” to one or more of the 31 measures in the original dispute such that the DSB’s recommendations and rulings applied to the 54 reviews in exactly the same way that they applied to the original 31 measures.³⁷

³⁵ Panel Report, para. 8.80.

³⁶ EC Appellant Submission, paras. 74-82.

³⁷ Panel Report, para. 8.86.

33. As an initial matter, the compliance Panel was correct in its observation that whether the EC “intends this argument to be self-standing . . . is far from clear.”³⁸ When the compliance Panel specifically asked the EC to clarify the nature of its argument on this point, the EC replied: “The European Communities considers that the subsequent reviews listed in the Annex to the Panel Request constitute *evidence* of the *US omissions and deficiencies* in light of the DSB’s recommendations and rulings in the original dispute.”³⁹ Although the EC now asserts on appeal that it asked the compliance Panel to find “that the subsequent reviews fell within its terms of reference as *omissions* or *deficiencies*,”⁴⁰ and not that these reviews merely constituted “evidence” of alleged omissions or deficiencies, the EC in fact did not clearly make such a request to the compliance Panel. Nor does its appellant submission point to any place in the EC submissions to the compliance Panel where such a request supposedly appeared.

34. Even if the EC had made a clear request on this point, the compliance Panel’s response was correct. Article 21.5 of the DSU provides for special dispute settlement procedures “[w]here there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings” of the DSB. Having found that the 54 reviews were not “amendments” to any of the original 31 measures, and thus that none of the 54 reviews implicated the question of whether a measure taken to comply “existed” within the meaning of Article 21.5, the compliance Panel then moved on to consider whether any of the 54

³⁸ Panel Report, para. 8.86.

³⁹ EC Responses to Panel Questions, para. 33 (May 8, 2008) (emphasis in original); *see* Panel Report, para. 8.86 n.629.

⁴⁰ EC Appellant Submission, para. 74 (emphasis in original).

reviews were nonetheless “measures taken to comply” that could be evaluated for consistency with the covered agreements. Nothing about the Panel’s reasoning on this point is inconsistent with Article 21.5.

35. Further, as the compliance Panel stressed, its finding on this EC argument – even assuming the EC had made it – did not affect its ability to consider the substantive “omissions” or “deficiencies” alleged by the EC.⁴¹ According to the EC, these alleged “omissions” or “deficiencies” can fall under the scope of these Article 21.5 proceedings because, in these cases, “the necessary ‘measure taken to comply’ does not exist.”⁴² But this is precisely the analysis undertaken by the compliance Panel in examining the two “omissions” that the EC says the compliance Panel overlooked.⁴³ The EC therefore was not in any way prejudiced by the Panel’s treatment of this EC argument.

36. Nonetheless, the EC asserts on appeal that the compliance Panel erred by subsuming this particular argument by the EC into its argument that the 54 reviews were “measures taken to comply,” which according to the EC should have been examined only after the compliance Panel

⁴¹ Panel Report, paras. 8.86, 8.127.

⁴² EC Appellant Submission, para. 81.

⁴³ The first alleged deficiency, with respect to the final liquidation of entries made prior to the end of the reasonable period of time but unliquidated as of that date “in connection with any of the [31] original measures and their subsequent reviews,” EC Appellant Submission, para. 74, was directly addressed by the compliance Panel. Panel Report, paras. 8.186-8.193. The second alleged deficiency, with respect to the alleged reliance by Commerce on certain dumping margins found to be WTO-inconsistent in subsequent sunset reviews, EC Appellant Submission, para. 74, was likewise directly addressed by the compliance Panel. Panel Report, paras. 8.130-8.141. In neither case did the inclusion or exclusion of any of the 54 measures from the scope of the compliance Panel proceedings affect the reasoning of the compliance Panel.

had disposed of its “omissions or deficiencies” argument on the merits.⁴⁴ Although the EC contends that a panel is generally “bound by the sequencing order of the legal claims made by the complaining party,”⁴⁵ this assertion is incorrect. Indeed, the reports cited by the EC in support of this assertion do not in fact support it.⁴⁶ Moreover, even supposing that the EC had clearly articulated three distinct arguments for the inclusion of the 54 reviews in the scope of the panel review, the compliance Panel in fact treated the three arguments in the order proposed by the EC. In other words, the compliance Panel deemed the EC’s inchoate argument on this point to be effectively subsumed in other EC arguments dealt with elsewhere in its report. This does not imply that the compliance Panel somehow failed to respect the EC’s presentation of its claims.

37. In addition, the EC’s mere assertion that the compliance Panel “disregarded its mandate when ignoring the claims raised by the European Communities and failed to comply with its functions as required by Article 11 of the DSU,”⁴⁷ without further substantiation or argument, is insufficient to raise such a claim on appeal. As the Appellate Body explained in the original

⁴⁴ EC Appellant Submission, para. 79.

⁴⁵ EC Appellant Submission, para. 79.

⁴⁶ In *US – Shrimp*, the Appellate Body found that the examination of claims under Article XX of the GATT 1994 must proceed in a particular logical order. *US – Shrimp (AB)*, para. 120. This would appear to be true, regardless of the order in which the complaining party (or any other party) structured its arguments. The panel in *EC – Sardines* decided to follow the order of *claims* (not arguments) presented by the complaining party, but noted that the responding party had not objected to the order and that the panel itself considered the proposed order of examining claims to be reasonable. *EC – Sardines (Panel)*, paras. 7.14-7.19.

The EC made a similar argument in the *Hormones Suspension* appeal, but the Appellate Body did not directly address the EC argument. *US – Hormones Suspension (AB)*, para. 56.

⁴⁷ EC Appellant Submission, para. 82.

dispute, a claim that a panel has breached Article 11 is a “very serious allegation” that must be “clearly articulated and substantiated with specific arguments.”⁴⁸ The EC has not substantiated its claim under Article 11 with any arguments at all, let alone specific arguments.

38. The EC’s request that the Appellate Body reverse the Panel’s findings in this respect should therefore be denied.

D. The Panel Correctly Found that Reviews Completed Before Adoption of the DSB Recommendations and Rulings Were Outside the Scope of this Article 21.5 Proceeding

39. In this compliance proceeding, many of the 54 measures challenged by the EC involved reviews that were completed prior to the adoption of the DSB’s recommendations and rulings.⁴⁹ The EC appeals from the compliance Panel’s finding that these reviews were outside the scope of this Article 21.5 proceeding.⁵⁰ As the compliance Panel’s finding was proper, the EC appeal should be rejected.

40. As an initial matter, these reviews are not “measures taken to comply” with the DSB’s recommendations and rulings. For example, one of the reviews at issue is an assessment review of *Certain Pasta from Italy* that covered entries made from July 1, 2001 through June 30, 2002, with the final results published by Commerce on April 27, 2004.⁵¹ The DSB’s recommendations and rulings in this dispute were adopted on May 6, 2006, more than two years after this review

⁴⁸ *US – Zeroing (EC) (AB)*, para. 253 (quoting *US – Steel Safeguards (AB)*, para. 498).

⁴⁹ These reviews are identified in the compliance Panel Report, para. 8.119 n.676.

⁵⁰ EC Appellant Submission, paras. 83-98; *see also* Japan Third-Participant Submission, paras. 80-152.

⁵¹ Panel Report, para. 8.58 (“Case 20”).

was completed and nearly four years after the affected entries were entered. As the Appellate Body has explained, “[a]s a whole, Article 21 [of the DSU] deals with events *subsequent* to the DSB’s adoption of recommendations and rulings in a particular dispute.”⁵² Thus, it cannot be said that the United States “took” these measures in view of, or in order to comply with, DSB recommendations and rulings that did not yet exist at the time of the measures. Rather, the United States undertook and completed these reviews at the request of interested parties or as required by domestic law, in accordance with various provisions of the AD Agreement.

41. This is not to say that compliance with DSB recommendations and rulings cannot be achieved through measures or other events occurring prior to those recommendations and rulings. For example, where a measure is withdrawn prior to the DSB recommendations and rulings (whether for reasons related or unrelated to those at issue in the dispute), a Member may not need to take any further measures to comply with the recommendations and rulings after they are adopted.⁵³ However, the United States is not relying for purposes of compliance in this dispute on any of the measures identified by the EC.

42. In addition, measures other than those declared to be taken to comply may also be examined in an Article 21.5 proceeding where, as the compliance Panel explained, such

⁵² *US – Softwood Lumber CVD Final (Article 21.5) (AB)*, para. 70 (emphasis in original).

⁵³ *See, e.g.*, Minutes of the DSB Meeting on 23 May 1997, WT/DSB/M/33, Consideration of Appellate Body and Panel Reports in *US – Woven Wool Shirts and Blouses from India*, p. 11; Minutes of the DSB Meeting on 12 December 2000, WT/DSB/M/94, Implementation of the Recommendations of the DSB in *Guatemala – Definitive Antidumping Measures on Grey Portland Cement from Mexico*, paras. 42-43; *accord* Japan Third-Party Submission, para. 108 (compliance may be achieved “by a measure taken in advance of, and without regard to, the DSB’s recommendations and rulings”).

measures “potentially circumvent implementation or undermine measures officially taken to comply.”⁵⁴ However, the EC failed to demonstrate that any of the reviews completed prior to the adoption of the DSB’s recommendations and rulings, let alone all of them, had the effect of “circumvent[ing]” or “undermin[ing]” the measures that the United States took to comply. As the United States explained in its Other Appellant submission, there was no overlap between the Section 129 determinations implementing prospectively the DSB’s recommendations and rulings with respect to original investigations as to entries on or after April 23, 2007, and reviews limited to entries prior to that date.⁵⁵ *A fortiori*, reviews completed both prior to the DSB recommendations and rulings and covering entries even more remote in time cannot “circumvent” or “undermine” the compliance measures taken by the United States with respect to entries after the reasonable period of time.

43. The compliance Panel based its findings on whether these reviews fell within the scope of this proceeding principally upon its application of a “nexus-based test,” in which it examined the “nature, effect, and timing” of the various reviews in relation to the DSB recommendations and rulings.⁵⁶ As the United States has explained in its Other Appeal, the compliance Panel’s application of this test was seriously flawed.⁵⁷ The EC itself states that “the *effects* of the

⁵⁴ Panel Report, para. 8.116.

⁵⁵ U.S. Other Appellant Submission, paras. 63-64.

⁵⁶ Panel Report, para. 8.99.

⁵⁷ U.S. Other Appellant Submission, paras. 71-84. In particular, as the United States shows in that submission, the fact that the 54 measures involve the same type of merchandise from the same country as one or more of the original 31 measures does not, by itself, establish a sufficiently close connection between the 54 measures and the measures subject to the DSB

measure concerned are the relevant factor to determine whether” a measure falls within the scope of an Article 21.5 proceeding.⁵⁸ That is, the key question is whether the measures at issue have the *effect* of “circumvent[ing]” or “undermin[ing]” the compliance declared to have been achieved.⁵⁹ Although the compliance Panel’s application of its “nexus-based test,” as a general matter, tended to obscure rather than clarify the relationship between the 54 measures and their *effect* on compliance, the compliance Panel’s approach to the reviews at issue here was, in essence, appropriate. Effectively, the compliance Panel concluded that these reviews were so remote in time that they would not be expected to have had the necessary *effects* to bring them within the scope of the proceeding, and that the EC had not provided evidence sufficient to overcome that expectation.⁶⁰ The EC did not provide such evidence to the compliance Panel; and despite saying that the effects of the measure “are the relevant factor,” the EC’s submission to the Appellate Body identifies no such relevant effects.

recommendations and rulings to bring the 54 measures with the scope of this Article 21.5 proceeding. This connection will exist whenever there are assessment reviews subsequent to an original antidumping or countervailing duty investigation that is subject to DSB recommendations and rulings. However, as the Appellate Body has stated, not “every assessment review will necessarily fall within the jurisdiction of an Article 21.5 panel.” *US – Softwood Lumber CVD Final (Article 21.5) (AB)*, para. 93.

⁵⁸ EC Appellant Submission, para. 91 (emphasis in original).

⁵⁹ Japan is therefore incorrect when it argues in paragraphs 116-122 of its Third-Participant Submission that, under the compliance Panel’s approach, the intent of the complying Member when taking the measure is determinative of whether a measure falls within the scope of an Article 21.5 proceeding.

⁶⁰ *See* Panel Report, para. 8.115.

44. Finally, we note that the EC argues that it is only “contesting the positive actions taken by the United States *after* the end of the reasonable period of time ‘in view of’ the DSB’s recommendations and rulings in the original dispute.”⁶¹ It is difficult to reconcile the EC statement with its assertion that reviews completed not only prior to the end of the reasonable period of time, but also prior to the DSB’s recommendations and rulings – and thus not taken “in view of” them – are within the scope of this Article 21.5 proceeding. To the extent that the EC tries to reconcile these assertions, it would appear to be saying that certain alleged U.S. “omissions” (for example, with regard to liquidation) occurring after the end of the reasonable period of time are, or may be, connected with one or more of these reviews.⁶² If so, then it is these alleged “omissions,” and not the prior reviews themselves, that are the subject of the EC’s Article 21.5 claims. Furthermore, the EC has failed to demonstrate any specific connection between the alleged “omissions” and particular prior reviews that might show how the prior reviews themselves (as opposed to those separate alleged “omissions” after the end of the reasonable period of time) were “circumvent[ing]” or “undermin[ing]” compliance. Indeed, the EC did not even attempt to do this.

45. For all these reasons, the compliance Panel was right to consider that reviews completed prior to the DSB recommendations and rulings fall outside the scope of this proceeding. Accordingly, the EC’s appeal should be rejected.

E. Even If Additional Reviews Are Within the Scope of the Proceedings, the Appellate Body May Not Complete the Analysis on the EC Claims

⁶¹ EC Appellant Submission, para. 96.

⁶² *E.g.*, EC Appellant Submission, para. 95.

46. Finally, if the Appellate Body finds the compliance Panel wrongly excluded any measures from the scope of this proceeding, the EC asks the Appellate Body to complete the analysis and find those reviews inconsistent with a number of provisions of the DSU, the AD Agreement, and the GATT 1994.⁶³ However, the EC provides no argumentation whatsoever purporting to show that these measures are inconsistent with any of the cited provisions. Nor does the EC identify the “factual findings by the Panel [or] undisputed facts in the Panel record”⁶⁴ that would enable the Appellate Body to complete the analysis with regard to any particular measure or claim. Because the EC has not made in its appellant submission the arguments upon which the EC would expect the Appellate Body to rely in completing the analysis, the United States is unable respond here to those arguments. In these circumstances, it would not be appropriate for the Appellate Body to complete the analysis.

III. The Panel Correctly Did Not Find Any U.S. Failure to Comply with Respect to Certain Sunset Reviews

47. With respect to the sunset determinations found to be within the compliance Panel’s terms of reference,⁶⁵ the compliance Panel found that because these determinations were not concluded by the time of the compliance Panel’s establishment, the EC did not demonstrate these

⁶³ EC Appellant Submission, para. 101.

⁶⁴ *US – Softwood Lumber CVD Final (AB)*, para. 118.

⁶⁵ These included sunset determinations in cases 2, 3, 4, 5 (Stainless Steel Bar from France, Germany, Italy, and the United Kingdom), 73 Fed. Reg. 7255 (Feb. 7, 2008), and in case 19 (Pasta from Italy).

determinations caused the continuation of the underlying antidumping orders.⁶⁶ Thus, any alleged failures in compliance with the DSB’s recommendations and rulings had not materialized by the time of the compliance Panel’s establishment.⁶⁷ The compliance Panel also noted that antidumping orders at issue in “Cases” 2, 3, 4, and 5 were ultimately revoked.

48. As we demonstrate, the compliance Panel was correct in making no findings of inconsistency with respect to the challenged sunset reviews. As the compliance Panel found, none of the challenged sunset reviews had concluded before the compliance Panel was established. In addition, none of the sunset reviews included in the 54 reviews identified in the EC compliance Panel request were, in fact, within the terms of reference of the compliance Panel. We address the terms of reference issue first.

A. Sunset Reviews Are Not Within the Terms of Reference of the Original Dispute

49. The EC argues the Appellate Body should find “*all* the subsequent sunset reviews” within the compliance Panel’s terms of reference.⁶⁸ However, none of the subsequent sunset reviews – neither the three that the compliance Panel found to be within its terms of reference,⁶⁹ nor those excluded by the compliance Panel as too remote in time to fall within the scope of this proceeding – are in fact within the terms of reference of this compliance proceeding.

⁶⁶ Panel Report, para. 8.139.

⁶⁷ Panel Report, para. 8.139.

⁶⁸ EC Appellant Submission, para. 120.

⁶⁹ Panel Report, para. 8.126(b).

50. The relevant DSB recommendations and rulings are limited to the 15 original investigations and 16 administrative reviews referenced in paragraph 7 of the EC’s compliance Panel request. The EC made no claims against, and there are no DSB recommendations and rulings, regarding determinations made in sunset reviews in this dispute. Accordingly, there is no question as to the “existence” of measures taken to comply with respect to sunset reviews. Nor has the EC demonstrated that any sunset reviews undermine or otherwise affect the existence of the measures that *were* taken to comply with the DSB’s recommendations and rulings.

51. Even if the “nexus-based test” relied upon by the compliance Panel were applied, the sunset review determinations identified by the EC in its compliance Panel request have no sufficient “close connection” or “nexus” to either the measures at issue in the original dispute or to the DSB’s recommendations and rulings that would bring those determinations within the jurisdiction of the compliance Panel. Several considerations support this conclusion.

52. First, the analysis in a sunset review is different from the analysis in either an investigation or an administrative review. Sunset reviews determine whether the expiration of an antidumping duty would be likely to lead to the continuation or recurrence of dumping and injury.⁷⁰ They do not determine duty existence or liability. Thus, a determination in a sunset review is a separate determination that serves a distinct purpose, and is based on different evidentiary standards.

53. Second, the sunset review determinations were not made “in view of” the DSB’s recommendations and rulings. Sunset reviews are required by Article 11.3 of the Antidumping

⁷⁰ AD Agreement, art. 11.3.

Agreement. The United States made these sunset review determinations to fulfill this requirement, not as an exercise of discretion with a view to dispute settlement proceedings.

54. Finally, the timing of Commerce’s determinations in many of the sunset determinations at issue demonstrates that they cannot possibly be regarded as closely connected to the determinations originally challenged, or to the DSB’s recommendations and rulings. Of the 16 sunset review determinations identified by the EC as “subsequent reviews,” Commerce completed 11 of them prior to the adoption of the DSB’s recommendations and rulings.⁷¹ Thus, unlike the situation in *US – Softwood Lumber CVD Final (Article 21.5) (AB)*, the timing of these determinations demonstrates that they cannot be connected to DSB recommendations and rulings that did not even yet exist. Also, four of the five sunset reviews that post-dated the DSB’s recommendations and rulings resulted in the revocation of the antidumping duty.⁷² In the one remaining sunset review determination, the interested parties did not raise, and Commerce made no mention of, the issue of non-dumped sales.⁷³ Thus, even assuming that a “nexus-based test” approach is appropriate to determining whether these sunset reviews fall within the scope of an Article 21.5 proceeding, none of the sunset review determinations possess the nexus to fall within this Panel’s jurisdiction.

⁷¹ See Panel Report, Annex A.

⁷² Those are the antidumping duty orders on Stainless Steel Bar from France, Germany, Italy, and the United Kingdom.

⁷³ See Issues and Decision Memorandum from Notice of Final Results of Expedited Sunset Reviews of the Antidumping Duty Orders: Certain Pasta from Italy and Turkey (Feb. 5, 2007) (Exhibit US-25).

55. Both the compliance Panel’s findings and the EC’s arguments ignore the different functions of sunset reviews, the different factors examined, the different analyses involved, the different time periods concerned, and the different WTO obligations that apply. Yet these are all factors that confirm that sunset reviews are not “measures taken to comply” for purposes of this proceeding.

B. Sunset Reviews Found To Be Within the Panel’s Terms of Reference Were Not Concluded At Time of Panel Establishment

56. Even aside from the fact that none of the sunset reviews are within the terms of reference of this compliance dispute, the Appellate Body should affirm the compliance Panel’s finding that the EC failed to demonstrate that the Commerce determinations it challenged caused the continuation of the orders at the time the compliance Panel was established.⁷⁴ The EC argues that the Panel erred in its refusal to make a finding on the basis that no final determination to continue an antidumping order had been completed at the time the compliance Panel was established. Specifically, the EC contends the determinative date is the date that Commerce makes its likelihood determination, as opposed to the final decision to continue the orders.⁷⁵ The EC’s argument is without merit.

57. An Article 21.5 proceeding calls for an examination of the existence or consistency of measures taken to comply, as distinguished from measures at issue in the original proceeding. As a matter of logic, measures that have not been taken at the time of panel establishment cannot form the basis of a claim of inconsistency. In the particular context of a compliance proceeding,

⁷⁴ Panel Report, para. 8.139.

⁷⁵ EC Appellant Submission, paras. 112-115.

if a measure does not yet exist, it also cannot be a measure taken to comply that is inconsistent with the WTO agreements; likewise, if a measure does not exist, it also cannot undermine or otherwise affect the “existence” of any actual measure taken to comply. The compliance Panel was right to recognize this.

58. Sunset reviews under U.S. law have several components. First, Commerce determines whether the revocation of the antidumping duty order would likely lead to the continuation or recurrence of dumping.⁷⁶ The U.S. International Trade Commission, in turn, determines whether the revocation of the antidumping duty order would likely lead to a continuation or recurrence of material injury.⁷⁷ The conclusion of the sunset review is not based solely on Commerce’s determination. Thus, a *prima facie* showing that Commerce’s determination caused the continuation of the order is impossible without a final, conclusive determination to continue the order. Accordingly, a determination of likelihood by Commerce, without more, is insufficient, as the Panel correctly recognized in this section of its report.⁷⁸ This is illustrated by the fact that for

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

⁷⁷ 19 U.S.C. § 1675a(a) (Exhibit US-43).

⁷⁸ Panel Report, para. 8.139. We note that the United States does not share the Panel’s view, as expressed in paragraph 8.124 of its report (and by the EC at paragraph 113 of its appellant submission), that the DOC determination date is a relevant date for ascertaining whether a sunset review falls within the scope of this proceeding. For the reasons outlined in Part III.A above, the sunset reviews challenged by the EC do not fall within the scope of this proceeding.

five of the orders for which the Panel found a sunset review to fall within its terms of reference, four ultimately were revoked.⁷⁹

59. Further, the EC argument that security in the form of cash deposits is required during the pendency of a sunset determination is inapposite.⁸⁰ If the initial sunset review results in the revocation of the order, such revocation is effective on the five-year anniversary date of the order – for example, with respect to “Cases” 2 through 5, on March 7, 2007. Any security provided for entries on or after this date is refunded, with interest, if the sunset review results in revocation.

60. Finally, with respect to “Cases” 2 through 5, the United States would like to draw the Appellate Body’s attention to a point that it made to the compliance Panel and that the EC has never answered: Ever since the orders were revoked – a fact that the EC freely acknowledges – the EC has been unable to explain its interest in pursuing its claims. To the compliance Panel, the EC did assert an unspecified possibility that similar issues might arise in future disputes. The United States pointed out that these arguments were unfounded, as they related to other potential disputes, not this one.⁸¹ The compliance Panel rejected the EC assertions,⁸² and the EC has not repeated them here. Thus, the EC, by its own admission, is requesting nothing more than an advisory opinion.

⁷⁹ Those are the antidumping duty orders on Stainless Steel Bar from France, Germany, Italy, and the United Kingdom.

⁸⁰ *See* EC Appellant Submission, paras. 114-117.

⁸¹ U.S. Comments on EC Answers to Panel Questions, May 15, 2008, para. 125.

⁸² Panel Report, para. 8.250.

61. For these reasons, the Appellate Body should affirm the compliance Panel’s findings and reject the EC appeal.

IV. The Panel Correctly Rejected Most EC Claims Regarding Alleged U.S. “Actions or Omissions Based on Zeroing”

62. One of the central questions in this appeal relates to the extent of the implementation consequences that follow from the DSB’s recommendations and rulings with regard to the “as applied” claims against 31 measures (15 original investigations and 16 administrative reviews) in the original dispute. As the United States explained in its Other Appellant submission, an antidumping duty is a border measure, i.e., it is applied to counteract the dumping of imported goods at the national or customs territory border, which occurs at the time of importation.⁸³ By withdrawing the border measures, or implementing new, WTO-consistent border measures, to future *entries* subject to the 31 measures that were the subject of the DSB’s recommendations and rulings, the United States fully brought itself into compliance with those recommendations and rulings.⁸⁴

63. According to the EC, however, the DSB’s recommendations and rulings were not limited to future entries, but also encompass the *liquidation* after the end of the reasonable period of time of entries, whether the entries were made before, during, or after the reasonable period of time, if for any reason those entries remained unliquidated at the end of the reasonable period of time.⁸⁵

⁸³ U.S. Other Appellant Submission, para. 30 (*citing* the GATT 1994, Article VI:2).

⁸⁴ However, the United States acknowledged before the compliance Panel that it has not taken any action with respect to the application of one assessment review identified in the DSB’s recommendations and rulings to one exporter/producer. Panel Report, para. 8.215.

⁸⁵ *E.g.*, EC Appellant Submission, para. 155.

64. The compliance Panel accepted neither the U.S. nor the EC arguments. Instead, it found that the DSB’s recommendations and rulings encompassed the final assessment of duty liability on entries that were made at any time – before and during the reasonable period of time, as well as afterwards – if the publication of the final results of an assessment review or issuance of assessment instructions occurs after the end of the reasonable period of time.⁸⁶ Both parties have appealed different aspects of the Panel’s approach. The EC sets forth the arguments in support of its several related appeals of the Panel’s findings in this regard in Part V of its appellant submission.⁸⁷

65. In Section IV.A of this submission, the United States sets forth some general legal principles that apply to the several findings of the Panel that are covered by the EC arguments in Part V of its appellant submission, and rebuts the general arguments put forward by the EC, both in Part V.B and elsewhere in Part V. The remaining sections of Part IV of this submission respond to the individual appellate issues raised by the EC.

A. Compliance with the DSB’s “As Applied” Recommendations and Rulings Attaches to Entries Made After the End of the Reasonable Period of Time

66. As the Appellate Body has repeatedly recognized, “remedies in WTO law are generally understood to be prospective in nature.”⁸⁸ The parties and the compliance Panel do not disagree on this principle, but rather on its application to the circumstances of this dispute.

⁸⁶ Panel Report, paras. 8.201-8.213.

⁸⁷ EC Appellant Submission, paras. 121-209.

⁸⁸ *US – Cotton Subsidies (Article 21.5) (AB)*, para. 243 n.494.

1. DSB Recommendations and Rulings Neither Add to Nor Diminish a Member’s Obligations Under the Covered Agreements

67. In its appellee submission, the EC distinguishes at length between the reasonable period of time for compliance with DSB recommendations and rulings and a transitional period or other provisions governing the entry into force of new treaty obligations.⁸⁹ Thus, the EC argues that the Panel erred in considering that the prospective nature of WTO compliance obligations is analogous to the rule of non-retroactivity of treaties reflected in Article 28 of the *Vienna Convention on the Law of Treaties*.⁹⁰ As the compliance Panel recognized, the United States agrees that this rule is inapplicable to the present dispute.⁹¹ Nonetheless, the EC asserts that the United States “construe[s] the DSB rulings and recommendations as if they were legislative activity on an equal footing with treaty making by WTO Members.”⁹² The EC misstates both the U.S. argument and the basic principles governing compliance with DSB recommendations and rulings under the DSU.⁹³

68. DSB recommendations and rulings do not create *new* obligations on Members. This is clear from, for example, Article 3.2 of the DSU, which provides that “[r]ecommendations and

⁸⁹ EC Appellant Submission, paras. 125-143.

⁹⁰ Panel Report, paras. 8.168-8.169; EC Appellant Submission, para. 134; *see also* Japan Third-Participant Submission, paras. 348-370 (arguing that Article 28 does not apply in this dispute).

⁹¹ Panel Report, para. 8.168 n.762.

⁹² EC Appellant Submission, para. 147 (emphasis deleted).

⁹³ Because the principles of “inter-temporal law” discussed at length by the EC in Part V.B of its appellant submission apply “[w]hen the law is changed *by the legislature*,” EC Appellant Submission, para. 125 (emphasis in original), these principles are – on the EC’s own theory – inapplicable to proceedings under Article 21.5.

rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.”⁹⁴ Members have the obligation to act in conformity with the covered agreements whenever the agreements are in force for that Member, and this obligation is neither increased nor diminished when it is found, through dispute settlement under the DSU, that a Member has failed to act in conformity with its obligations. Thus, that Article 21.3 of the DSU may provide a Member with a “reasonable period of time” to bring itself into compliance with DSB recommendations and rulings does not imply that the Member is not subject to the underlying obligation during the reasonable period of time.⁹⁵ Rather, the reasonable period of time allows Members sufficient time to bring its measure into compliance with its obligations without being required to provide compensation or being subject to the suspension of concessions. As provided in Article 22.1 of the DSU, compensation or the right to suspend concessions “are available in the event that the recommendations and rulings are not implemented within a reasonable period of time.”

69. In other words, DSB recommendations and rulings do not create an “obligation” to comply with the covered agreements – that obligation already exists in the covered agreements themselves.⁹⁶ Rather, if a Member fails to comply with the DSB recommendations and rulings

⁹⁴ In addition, Article 19.2 of the DSU provides that “in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.”

⁹⁵ Japan’s arguments with regard to the draft Articles on Responsibility of States for Intentionally Wrongful Acts of the International Law Commission, Japan Third-Participant Submission, paras. 371-386, are therefore inapposite to this dispute.

⁹⁶ Thus, although the terms “implementation obligations” and “compliance obligations” are sometimes used as a convenient shorthand for the steps that must be taken in order to comply

within the reasonable period of time, it becomes potentially subject to a requirement to provide compensation or be subject to the suspension of concessions or other obligations.

70. Article 21.5 of the DSU provides for recourse to a compliance panel “[w]here there is a disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings” of the DSB. The scope of dispute settlement proceedings under Article 21.5 thus differs significantly from the scope of dispute settlement under the DSU generally. As the Appellate Body has explained, “[p]roceedings under Article 21.5 do not concern just *any* measure of a Member of the WTO; rather, Article 21.5 proceedings are limited to those ‘measures *taken to comply* with the recommendations and rulings’ of the DSB.”⁹⁷ This limitation on the scope of Article 21.5 proceedings flows directly from the text of Article 21.5, which provides for resolution of “disagreements” as to the existence or consistency of measures taken to comply with the DSB recommendations and rulings. Where a measure is claimed to be inconsistent with the covered agreements, but the measure is either not one taken to comply or does not affect the existence of a measure taken to comply with DSB recommendations and rulings, recourse to proceedings under Article 21.5 (rather than ordinary dispute settlement) is not permitted.

with DSB recommendations and rulings, the usage of such terms does not imply that DSB recommendations and rulings create *new* obligations that are substantively different from, or in addition to, the obligations under the covered agreements themselves that are the subject of the DSB recommendations and rulings.

⁹⁷ *Canada – Aircraft (Article 21.5) (AB)*, para. 36 (emphasis in original).

71. It is in this sense that “remedies in WTO law are generally understood to be prospective in nature.”⁹⁸ The right to a *remedy* against a breach of the covered agreements (in the sense of compensation or the other consequences described in Article 22.1 of the DSU) arises only *after* a Member fails to comply with DSB recommendations and rulings within a reasonable period of time, and not before. Until the expiration of the reasonable period of time, a Member is not “permitted” to breach the covered agreements – the Member is merely not subject to the remedies contemplated by Article 22 of the DSU for such breaches.

2. Compliance with Recommendations and Rulings with Respect to Border Measures Is Measured by Application to Entries Made After the Reasonable Period of Time

72. In disputes involving border measures, it has been consistently recognized that compliance is achieved when the measure is withdrawn or brought into compliance with the DSB’s recommendations and rulings with respect to *entries* of goods after the end of the reasonable period of time. Even if past entries were subject to a WTO-inconsistent border measure, the breach is considered to have been removed and compliance achieved when the inconsistency is removed as to future entries.

73. As already noted in the Other Appellant submission of the United States, this was the approach that the EC took to implementation of recommendations and rulings of the DSB in the *EC – Chicken Cuts* dispute. In that dispute, the Appellate Body upheld the panel’s findings that the EC had improperly classified certain chicken cuts for customs purposes, thereby imposing “customs duties on the products at issue that are in excess of the duties provided for” in the EC

⁹⁸ *US – Cotton Subsidies (Article 21.5) (AB)*, para. 243 n.494.

schedule of tariff commitments and breaching Articles II:1(a) and II:1(b) of the GATT 1994.⁹⁹

The EC informed the DSB that it “fully implemented the relevant DSB recommendations and rulings with respect to this dispute” through the entry into force of Commission Regulation (EC) No. 949/2006 of June 27, 2006.¹⁰⁰ That regulation provided 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 reasonable period of time] it cannot serve as a basis for the reimbursement of any duties paid prior to that date.¹⁰¹

The EC asserted compliance in that dispute by removing the border measure – the WTO-inconsistent duty – for *entries* (i.e. “good which have been released for free circulation”) after the end of the reasonable period of time. The EC specifically declined to refund excess duties or otherwise correct the breach of Article II:1(a) and II:1(b) that the DSB had found to exist with respect to entries prior to the expiration of the reasonable period of time. Nonetheless, the EC asserted that its measure achieved full compliance.

74. The compliance panel in *EC – Bananas III* reached a similar conclusion. In that compliance proceeding, Ecuador argued that the EC had to make certain adjustments in connection with a license regime that predated (1994-1996)¹⁰² the end of the reasonable period of

⁹⁹ *EC – Chicken Cuts (AB)*, para. 347(c).

¹⁰⁰ WT/DS269/15/Add.1, WT/DS286/17/Add.1, circulated July 4, 2006 (Exhibit US-20).

¹⁰¹ Council Regulation (EC) No. 949/2006, para. 9 (Exhibit US-20).

¹⁰² *EC – Bananas III (Article 21.5) (Ecuador)*, para. 6.91.

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 explained:

[W]e do not imply that the European Communities is under an obligation to remedy past discrimination. Article 3.7 of the DSU provides that “. . . the first objective of the dispute settlement [mechanism] is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements.” This principle requires compliance *ex nunc* as of the expiry of the reasonable period of time for compliance with the recommendations and rulings adopted by the DSB. If we were to rule that the license allocation to service suppliers of third-country origin were to be “corrected” for the years 1994 to 1996, we would create a retroactive effect of remedies *ex tunc*. However, in our view, what the EC is required to ensure is to terminate discriminatory patterns of license allocation with *prospective* effect as of the beginning of the year 1999.¹⁰³

Thus the compliance panel in *Bananas* found that, in order to comply with the DSB recommendations and rulings in that dispute, the EC had to ensure that licenses allocated *after* the end of the reasonable period of time were allocated in a WTO-consistent way. It did not have to correct its past breaches of the *General Agreement on Trade in Services* with regard to licenses that were allocated before the end of the reasonable period of time.

75. In its third-participant submission, Japan argues that, in at least two disputes, the DSB has made recommendations with respect to measures that had been withdrawn but nonetheless continued to produce “legal effects,” thus implying that compliance with DSB recommendations and rulings includes remedying any continuing “legal effects” of past actions.¹⁰⁴ However, these original panel reports do not say whether particular actions would or would not have constituted

¹⁰³ *EC – Bananas III (Article 21.5 - Ecuador)*, para. 6.105.

¹⁰⁴ Japan Third-Participant Submission, paras. 238-247.

compliance with the recommendations and rulings in those disputes. Indeed, as a general matter, measures taken after the establishment of a panel will normally be outside the panel’s terms of reference, and so an original panel is usually not in a position to scrutinize whether such measures achieve compliance such that no recommendation is warranted.¹⁰⁵ An original panel faced with the issue of whether or not to make a recommendation is therefore generally in a very different situation than a compliance panel. In any event, to the extent that the dispute reports discussed by Japan are relevant, they support the interpretation of the scope of compliance with DSB recommendations and rulings outlined above.

76. The first such report referenced by Japan is *EC – Commercial Vessels*.¹⁰⁶ In that dispute, the panel made recommendations with respect to subsidy programs under which “no new applications” for subsidies could be considered, but under which it was possible that “subsidies continue to be provided pursuant to applications made” previously.¹⁰⁷ Thus, it was unclear that the WTO-inconsistent *program* had in fact been withdrawn, because it was possible that subsidies were still being provided under that program. In this dispute, then, the DSB did *not* recommend that the EC withdraw previously granted subsidies, but only that the EC cease granting new subsidies under a WTO-inconsistent program.

¹⁰⁵ Indeed, the panel in *India – Autos* specifically declined to address India’s statements to the panel about its plans for bringing the measures into compliance, stating that such future actions were not within its terms of reference. *India – Autos*, para. 8.62.

¹⁰⁶ Japan Third-Participant Submission, para. 238.

¹⁰⁷ *EC – Commercial Vessels*, para. 8.4.

77. The other report referenced by Japan is *India – Autos*.¹⁰⁸ That report does not support Japan, however. That dispute involved certain agreements (“MOUs”), enforceable in domestic law, in which auto manufacturers in India using imported auto parts undertook obligations to export a certain quantity of finished production.¹⁰⁹ The panel found these provisions of the MOUs, as well as an Indian public notice that originally authorized the MOUs and that created an import restriction used as one of the enforcement mechanisms for the MOUs, to be inconsistent with Articles III:4 and XI:1 of the GATT 1994.¹¹⁰ During the proceedings, the public notice was repealed; the MOUs, however, remained in force. The panel, on its own initiative, undertook an examination of whether it would be appropriate to issue a recommendation under DSU Article 19.1 in that circumstance.¹¹¹ The panel concluded that the MOU signatories remained bound by the obligations that the panel had found inconsistent with the GATT 1994. Contrary to what Japan implies, the panel’s conclusions were not dependent on so-called “legal effects” independent from the actual measures at issue; rather, it was clear that the MOUs remained unchanged and thus the MOU signatories remained bound by the same legally enforceable obligations as they had before repeal of the public notice. Furthermore, Japan overlooks the importance of the violation of Article III:4, which involved the continuing

¹⁰⁸ Japan Third-Participant Submission, paras. 239-247.

¹⁰⁹ Japan Third-Participant Submission, para. 239.

¹¹⁰ *India – Autos*, paras. 7.204, 7.253.

¹¹¹ The United States notes that it disagrees with the panel’s approach to the question of whether it should make a recommendation under Article 19.1 of the DSU. Indeed, it supported India’s appeal on this issue.

treatment within the Indian market of *imported products* in comparison to like domestic products.¹¹² Thus, the withdrawal of the public notice with respect to future imports would not have achieved full compliance with the recommendations and rulings in that dispute. But this does not imply that, where the recommendations and rulings are limited to a border measure, such as an antidumping duty, full compliance cannot be achieved by bringing the border measure into conformity with the DSB recommendations and rulings with respect to future entries.

78. In sum, the practice of the DSB and individual Members is that compliance with recommendations and rulings with respect to WTO-inconsistent border measures is accomplished by withdrawing the border measure, or applying a WTO-consistent border measure, with respect to future *entries* of goods. As Japan in particular stresses, there is nothing in the AD Agreement that would suggest any different rule should apply when the border measure in question is an antidumping duty.¹¹³

79. This analysis also makes clear that actions taken to enforce or collect duty liabilities that arise from a border measure applied to imports prior to the end of the reasonable period of time do not undermine the compliance achieved by elimination of the border measure. For example, in the *EC – Chicken Cuts* dispute discussed above, the EC’s compliance measure did not “have retroactive effects nor provide interpretative guidance on a retroactive basis.”¹¹⁴ In other words, the compliance measure did not apply to the excessive and WTO-inconsistent duties that were

¹¹² See *India – Autos*, para. 7.218.

¹¹³ Japan Third-Participant Submission, para. 249.

¹¹⁴ Council Regulation (EC) No. 949/2006, para. 9 (Exhibit US-20).

levied on entries prior to the end of the reasonable period of time. If the duties on prior entries for some reason had not actually been *collected* at the end of the reasonable period of time – whether because of an unrelated dispute between the importer and the customs authorities, delays in making final payment of customs duties permitted under domestic customs law, the bankruptcy of the importer, or some other reason – the compliance measure did not reverse the WTO-inconsistent border measure that applied with respect to those entries.

80. Moreover, in many domestic systems of customs administration, even after duties have been paid and collected, there exist opportunities to challenge such duties and seek refunds. The EC compliance measure in *EC – Chicken Cuts* did not authorize or provide a basis for such refunds,¹¹⁵ which is consistent with the principle outlined above: Withdrawal of the WTO-inconsistent border measure with respect to future entries constitutes compliance with DSB recommendations and rulings against the border measure, *even if* domestic administrative procedures with respect to the final collection of the WTO-inconsistent duties with respect to entries prior to the end of the reasonable period of time are not complete. To find otherwise would open the door to a wide variety of potential retroactive remedies that would become available to any importer or other person that can request refunds under domestic law. Under the EC’s approach, for example, a Member found to apply a discriminatory internal tax in violation of Article III of the GATT 1994 would not comply by ceasing to apply the tax by the end of the reasonable period of time, if requests for tax refunds by persons who paid the discriminatory tax

¹¹⁵ Nor did the compliance measure in *EC – Bed Linens* provide a basis for providing antidumping duty refunds on prior entries. *See* U.S. Other Appellant Submission, para. 49 & n.58.

prior to the end of the reasonable period of time (and even prior to the recommendations and rulings) remained unresolved at the end of the reasonable period. Likewise, a Member found to have allocated country-specific portions of a tariff-rate quota (TRQ) inconsistently with relevant provisions of the GATT 1994 would not comply by bringing its future allocation methodology into conformity with its obligations, if after the end of the reasonable period of time it denied an importer’s request to treat past (or even new) entries as entering within an in-quota quantity that was improperly denied in a prior year, before the end of the reasonable period of time.

81. In this appeal the EC argues not merely that the United States failed to comply with the DSB’s recommendations and rulings by not modifying the application of measures subject to those recommendations and rulings to entries prior to the end of the reasonable period of time, but also that private parties should be able to make use of U.S. domestic procedures (such as judicial challenges to Commerce determinations) in order to delay liquidation and thereby obtain the retroactive application of DSB recommendations and rulings to entries made prior to the end of the reasonable period of time.¹¹⁶ The EC argues that such an approach allows private parties to vindicate their “WTO rights”¹¹⁷ – ignoring that WTO dispute settlement is aimed at protecting the rights and obligations of *Members*, not private parties. For example, Article 3.2 of the DSU

¹¹⁶ *E.g.*, EC Appellant Submission, para. 208 (“Thus, we believe that to the extent that economic operators rightly have the possibility under municipal law to obtain a stay of execution until after the end of the reasonable period of time, they must surely have the possibility to obtain what is rightfully theirs – that is, the full benefits and protection of WTO law – when the rules are eventually finally applied, and at least from the end of the reasonable period of time.”); *id.*, para. 181 (“[I]s it not a natural part of ensuring the effectiveness of WTO law that firms should have the opportunity to preserve the WTO benefits that are rightfully theirs, at least through the lawful exercise of their procedural rights under municipal law?”).

¹¹⁷ *E.g.*, EC Appellant Submission, para. 150.

provides that the dispute settlement system “serves to preserve the rights and obligations of *Members* under the covered agreements.”¹¹⁸ Likewise, Article 3.3 that “the maintenance of a proper balance between the rights and obligations of *Members*” requires the “prompt settlement of situations in which a *Member* considers that any benefits accruing to it directly or indirectly under the covered agreements.”¹¹⁹ Further, DSB recommendations and rulings cannot add to or diminish the rights or obligations of *Members*.¹²⁰ *A fortiori*, they cannot impose on *Members* an additional obligation to provide additional rights to private parties, let alone other *Members*. The EC approach would encourage *Members* to bring WTO disputes, not to preserve their rights and obligations as *Members*, but to assist private parties using domestic litigation or other administrative challenges to obtain retroactive relief.

3. The EC Seeks Compliance with an “As Such” Finding with Respect to Assessment Reviews that the DSB Did Not Make in This Dispute

82. In applying these principles to the present dispute, the EC consistently fails to recognize that the DSB’s recommendations and rulings “as applied” to the 31 individual measures – which are the only recommendations and rulings at issue in this proceeding – are limited to the measures found to be inconsistent in the original dispute. As the Appellate Body has explained, “as applied” claims refers “to the type of claims involving challenges to a *Member*’s application of a general rule to a specific set of facts.”¹²¹ By contrast:

¹¹⁸ Emphasis added.

¹¹⁹ Emphasis added.

¹²⁰ DSU, arts. 3.7, 19.1.

¹²¹ *US – OCTG from Argentina (AB)*, para. 6 n.22.

By definition, an “as such” claim challenges laws, regulations, or other instruments of a Member that have general and prospective application, asserting that a Member’s 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. The implications of such challenges are obviously more far-reaching than “as applied” claims.¹²²

In the original dispute, the EC sought, but did *not* obtain, a finding that the alleged use by the United States of an average-to-transaction zeroing “methodology” in assessment reviews was “as such” inconsistent with the covered agreements.¹²³ Rather, the only DSB recommendations and rulings in this dispute that address zeroing in assessment reviews were made, “as applied” with respect to 16 individually identified assessment reviews.¹²⁴

83. However, the EC assumes throughout its appellant submission that any use by the United States of what it calls the “unlawful zeroing methodology”¹²⁵ in assessment reviews is not only necessarily inconsistent with the AD Agreement, but also within the scope of the DSB’s recommendations and rulings in this dispute. The EC asked the Appellate Body in the original dispute to find that there is such a thing as a U.S. “zeroing methodology” in assessment reviews,

¹²² *US – OCTG from Argentina (AB)*, para. 172. This does not mean, of course, that “as applied” challenges can never result in recommendations and rulings that require future action by Members in order to come into compliance with them. *US – Cotton Subsidies (Article 21.5) (AB)*, para. 243 n.494.

¹²³ *US – Zeroing (EC) (Panel)*, para. 8.1(g); *US – Zeroing (EC) (AB)*, para. 263(c)(ii).

¹²⁴ That other recommendations and rulings may have been given by the DSB in other disputes, however, has no bearing on whether the United States has complied with the recommendations and rulings actually given by the DSB in *this* dispute.

¹²⁵ EC Appellant Submission, para. 148.

but the Appellate Body did not make such a finding, and thus was unable to complete the analysis as to whether such a “zeroing methodology” in assessment reviews was, as such, inconsistent with the covered agreements.¹²⁶ Accordingly, the EC may not simply *assume* in these compliance proceedings that the U.S. “zeroing methodology” in assessment reviews exists, or – if it does exist – that it is “unlawful.” This is not, as the EC argued to the compliance Panel, a “mechanistic” application of the distinction between “as such” and “as applied” claims.¹²⁷ Rather, it is simply a reflection of the recommendations and rulings that were, and that were not, adopted by the DSB in this dispute.

4. Conclusion

84. In sum, the United States does not – as the EC repeatedly asserts in its submission – consider its WTO obligations in this dispute to have begun on the day after the expiration of the reasonable period of time. The United States understands, and accepts, that it is to bring its measures into compliance with the DSB’s recommendations and rulings in this dispute. The issue, then, is not whether the United States is engaged in “abusive recidivism”¹²⁸ or has “effectively refused to unconditionally accept past panel and Appellate Body reports on the issue of zeroing.”¹²⁹ The issue before the compliance Panel was whether the United States *had complied* with the DSB’s recommendations and rulings *in this dispute*; the question before the

¹²⁶ *US – Zeroing (EC) (AB)*, para. 228.

¹²⁷ Panel Report, para. 8.42.

¹²⁸ EC Appellant Submission, para. 204.

¹²⁹ EC Appellant Submission, para. 53.

Appellate Body is whether the compliance Panel properly made that assessment. As the United States demonstrates in this submission, it has done so on every point subject to the EC appeal, in that the United States has withdrawn the WTO-inconsistent border measure at issue for all current and future entries.

85. In general, the United States has not revisited the application of the measures subject to DSB recommendations and rulings to entries prior to the end of the reasonable period of time. This may – as in any dispute in which a border measure of any Member is found to be inconsistent with the covered agreements and in which a reasonable period of time for compliance is afforded under Article 21.3 of the DSU – result in the application of measures found to be WTO-inconsistent to entries prior to full implementation. However – as in any such dispute – this does not amount to a failure to comply with the DSB recommendations and rulings, provided that the border measure is removed or modified appropriately, with prospective application after the reasonable period of time. Each of the EC’s individual arguments in Part V of its appellant submission effectively contends that a different rule should apply in this dispute, and perhaps beyond this dispute. This contention is erroneous, lacks legal foundation, and should be rejected. On this basis, we now turn to the EC’s specific arguments in Part V.

B. The EC’s Rewriting of the Panel’s Findings on Assessment Reviews Completed After the End of the Reasonable Period of Time Is Without Basis

86. The compliance Panel found that the United States both failed to comply with the DSB’s recommendations and rulings and acted inconsistently with the covered agreements in publishing the final results of two administrative reviews after the end of the reasonable period of time.¹³⁰

¹³⁰ Panel Report, paras. 8.208, 8.213, 9.1(b)(i).

These findings are the subject of the U.S. Other Appeal. The EC also appeals from these findings to the extent that it disagrees with some of the reasoning of the compliance Panel.¹³¹ The arguments in the U.S. Other Appeal constitute the principal basis on which the Appellate Body should reject the EC’s appeals, both generally¹³² and with respect to the two individual assessment reviews for entries in 2004 and 2005 in cases 1 and 6.¹³³ If the Appellate Body accepts the U.S. Other Appeal, the EC’s remaining arguments would not need to be addressed. Even apart from the U.S. Other Appeal, however, the EC’s arguments in this connection cannot be sustained.

87. The EC argument on appeal is not a model of clarity. However, it seems that the core of the EC’s position is that a final assessment review “must be WTO consistent *when it is carried out.*”¹³⁴ The United States does not contest this statement as written. In the first place, however, as the United States explained in its Other Appellant submission, this does not mean that assessment reviews of entries made *prior* to the end of the reasonable period of time are subject to review in an Article 21.5 proceeding where compliance with the particular DSB recommendations and rulings at issue is achieved by withdrawing the antidumping duty with respect to *future* entries.¹³⁵ As the United States explained in its Other Appeal, the compliance Panel should have concluded that these two assessment reviews were not within the scope of this

¹³¹ EC Appellant Submission, paras. 144-153, 185-188.

¹³² EC Appellant Submission, paras. 144-153.

¹³³ EC Appellant Submission, paras. 185-188.

¹³⁴ EC Appellant Submission, para. 149.

¹³⁵ U.S. Other Appellant Submission, paras. 58-70.

Article 21.5 proceeding, and we have requested that the Appellate Body reverse that error by the Panel. Because these assessment reviews are outside the scope of this proceeding, there is no basis to undertake the analysis of those reviews that the EC seeks, and the Appellate Body should simply reject the EC’s appeal on those grounds.

88. The EC also states, in a footnote, that it disagrees with the compliance Panel’s reasoning with respect to the different implications of its approach for prospective and retrospective antidumping duty assessment systems.¹³⁶ As the United States has already explained, the compliance Panel’s approach improperly expands the scope of “compliance obligations” for Members operating retrospective duty systems, in that such Members would need to bring past entries into compliance with DSB recommendations and rulings to an extent that Members operating prospective duty systems would not.¹³⁷ Before the compliance Panel, the EC argued for an approach in which *all* Members, regardless of the type of antidumping assessment system they use, would be required to bring any duty assessment or duty refund proceeding for entries prior to the end of the reasonable period of time into conformity with DSB recommendations and rulings, if those proceedings had not been concluded by the end of the reasonable period of

¹³⁶ EC Appellant Submission, para. 145 n.220 (referencing Panel Report, paras. 8.182-8.185). Japan shares the EC’s view. Japan Third-Participant Submission, para. 68.

¹³⁷ U.S. Other Appellant Submission, paras. 52-57.

time.¹³⁸ This does not appear to be actual EC practice,¹³⁹ even if the EC implicitly is maintaining this position on appeal.

89. However, the implication of the EC (and compliance Panel) view that all assessment proceedings completed after the end of the reasonable period of time – even if they involve only entries made prior to the end of the reasonable period of time – if applied evenhandedly to prospective and retrospective antidumping systems alike,¹⁴⁰ is that all Members would be required to provide antidumping duty refunds for entries prior to the end of the reasonable period of time whenever an importer or other private party has the ability to obtain a “stay of execution,” as the EC puts it,¹⁴¹ under municipal law, to prevent the collection of duties from becoming final. This is manifestly a retroactive remedy, and is not provided for by the WTO Agreement, regardless of whether it is applied in retrospective or prospective antidumping systems.

90. Indeed, if the EC argument were to be accepted, there would be no reason to limit its application to the field of antidumping duties. Under the EC approach, because municipal law

¹³⁸ Panel Report, para. 8.183.

¹³⁹ See U.S. Other Appellant Submission, para. 49 & n.58 (discussing European Court of Justice judgment in *Ikea Wholesale Ltd. v. Commissioners* (Exhibit US-34)).

¹⁴⁰ The compliance Panel’s conclusion that there is no requirement to treat retrospective and prospective dumping systems alike, such that obligations comparable to the one it found to exist for retrospective dumping systems would not necessarily apply to prospective dumping systems, Panel Report, paras. 8.182-8.185, is rejected by all parties and third parties to this dispute. U.S. Other Appellant Submission, paras. 52-57; EC Appellant Submission, para. 145 n.220; Japan Third-Participant Submission, para. 68.

¹⁴¹ EC Appellant Submission, para. 208.

must provide an opportunity for private parties to seek review and correction of administrative action related to customs matters,¹⁴² Members would appear to be required to correct past WTO inconsistencies in order to comply with DSB recommendations and rulings, as long as the private parties are able to prolong municipal law proceedings until after the end of the reasonable period of time. As we have already seen, the EC did not do this in the *Chicken Cuts* or *Bed Linen* disputes.¹⁴³ This is not the purpose of WTO dispute settlement, which aims “to secure a positive solution to a dispute,” preferably by a mutually acceptable solution among Members or “secur[ing] the withdrawal of the measures concerned if these are found to be inconsistent” with the covered agreements.¹⁴⁴

C. The Panel Correctly Found that Liquidation Instructions Do Not Measure Implementation of the U.S. Recommendations and Rulings

91. Next, the EC argues that the compliance Panel erred because it did not find that the United States had to comply with the DSB’s recommendations and rulings even with respect to entries made prior to the end of the reasonable period of time.¹⁴⁵ The EC theorizes that because the AD Agreement regulates the collection of antidumping duties, actions related to duty collection that occur after the end of the reasonable period of time are relevant to assessing

¹⁴² *E.g.*, GATT 1994, art. X:3(b).

¹⁴³ *See Ikea Wholesale Ltd. v. Commissioners*, Case. C-351/04 (European Court of Justice, Sept. 27, 2007), paras. 35, 67, 69 (Exhibit US-34) (compliance in the *EC – Bed Linens* dispute).

¹⁴⁴ DSU art. 3.7.

¹⁴⁵ EC Appellant Submission, paras. 154-184.

compliance, regardless of when liability for antidumping duties arose.¹⁴⁶ The EC’s arguments, however, wholly ignore the relevant issue in this Article 21.5 proceeding – namely, whether the actions to which it points are implicated in the context of compliance with the specific DSB recommendations and rulings in the present dispute.

92. The date on which liability for antidumping duties is “final” is not germane to the question of the scope of a Member’s compliance with DSB recommendations and rulings. In the U.S. antidumping duty system, duty liability is generally finalized through the process of “liquidation.” However, the concept of “liquidation” is not found in the AD Agreement, and is not universally applied. Nothing in the AD Agreement or the DSU suggests that the status of past entries as “liquidated” or “unliquidated” is relevant to the scope of a Member’s compliance. As explained in greater detail in the United States’ Other Appellant submission, the question of 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 because date of entry is when liability attaches to the imports in question.¹⁴⁷

93. This argument is supported by the analysis of the panel in *China – Auto Parts*, which agreed that liability for customs duties is determined on the date of entry:

[T]he obligation to pay ordinary customs duties is linked to the product *at the moment it enters the territory of another Member*. If the right to impose ordinary customs duties – and the importer’s obligation to pay it – accrues because of the

¹⁴⁶ EC Appellant Submission, paras. 171-176.

¹⁴⁷ U.S. Other Appellant Submission, paras. 40-57. The United States incorporates these arguments by reference here.

importation of the product at the very moment it enters the territory of another Member, ordinary customs duties should necessarily be related to the status of the product at that single moment. It is at this moment, *and this moment only*, that the obligation to pay such charge accrues.¹⁴⁸

Even though, in a retrospective antidumping system such as that used by the United States, the final *amount* of antidumping duties is not determined until after entry, the *obligation* to pay antidumping duties – like the obligation to pay any other duty – is triggered at the moment of entry.

94. The Appellate Body reached a similar conclusion with respect to safeguard duties in its report in *US – Line Pipe*. In that dispute, the Appellate Body interpreted a provision in Article 9.1 of the *Agreement on Safeguards* related to the circumstances in which a safeguard measure may be “applied against a product originating in a developing country Member.” The Appellate Body explained:

Article 9.1 is concerned with the application of a safeguard measure on a *product*. And we note, too, that a duty, such as the supplemental duty imposed by the line pipe measure, does not need actually to be enforced and collected to be “applied” to a product. In our view, duties are “applied against a *product*” when a Member imposes conditions under which that product can enter that Member's market . . .

¹⁴⁹

Here, too, the existence of the measure depends on the conditions that apply at the time of entry – not when the duty is “enforced and collected.” In fact, in the *Line Pipe* dispute, the Appellate

¹⁴⁸ *China – Auto Parts (Panel)*, para. 7.184.

¹⁴⁹ *US – Line Pipe (AB)*, para. 129.

Body found that the measure “applied” to entries even when no duty (or security for duty) was actually collected.¹⁵⁰

95. Further, under the EC approach that the date of liquidation is decisive for determining when a border measure applies, serious difficulties would arise in carrying out provisions of the DSU related to the suspension of concessions. Article 22 of the DSU provides for WTO Members to request DSB authorization to suspend concessions or other obligations under the covered agreements, and Article 23.2(c) states that a Member must obtain such authorization prior to suspending concessions. However, these provisions do not address which entries may be subject to the suspension of concessions. If the EC is correct in positing that border measures “apply” on the date that the final duty liability is determined (and not on the date of entry), then it would follow that a Member that has received DSB authorization to suspend concessions would be permitted to do so with respect to unliquidated entries made prior to the DSB authorization of the suspension of concessions. However, this would conflict with the reasoning of the panel in *US – Certain EC Products*, which found the retroactive application of the suspension of concessions to entries prior to DSB authorization to be “alien to the long established GATT/WTO practice where remedies have traditionally been prospective.”¹⁵¹

96. Although the compliance Panel incorrectly found that the date of any final determination published by Commerce – and not the date of entry – triggers implementation consequences in this dispute, the compliance Panel correctly focused its analysis on the relevant question: What

¹⁵⁰ *US – Line Pipe (AB)*, para. 133.

¹⁵¹ *US – Certain EC Products (Panel)*, para. 6.106.

actions should be examined to determine whether the United States has implemented the recommendations and rulings of the DSB?¹⁵² The Panel took particular consideration of the fact that the EC’s claims in the original dispute, and the findings of the panel and Appellate Body, concerned the calculation of the margins of dumping.¹⁵³ The Panel found that, if implementation consequences do not attach to final decisions about duty assessment because they are made prior to the end of the reasonable period of time, such consequences should not further depend on when the actual collection takes place.¹⁵⁴ Also, the compliance Panel correctly concluded that implementation consequences should not depend on the fact that the mere act of collecting duties by the authorities is delayed, due to actions of private parties, for reasons wholly unrelated to the dispute at hand.¹⁵⁵

¹⁵² Panel Report, para. 8.192 (“The issue that is before us concerns the temporal aspect of the US obligation to implement the DSB’s recommendations and rulings, in other words, to which actions of the United States this obligation to implement extends.”).

¹⁵³ Panel Report, para. 8.191.

¹⁵⁴ Panel Report, para. 9.192.

¹⁵⁵ Panel Report, para. 8.192; *see also*, para. 8.193 (recognizing that under the EC’s view duties that are liquidated at any point in time following the assessment of amount of the final liability – sometimes several years afterwards – would require the United States authorities to revisit the final assessment of duties previously performed in the context of the administrative review, for the sole reason that implementation of the US determination (via actual liquidation) was delayed, in some cases because of legal challenges that have nothing to do with the issue of zeroing.). *See also id.*, para. 8.191 (reasoning that the EC approach would lead to the undesirable result that the implementing Member may have to recalculate final duty liability calculations which were concluded before the end of the reasonable period of time, for the simple reason that the actual collection of duties was suspended, even where the court proceedings were unsuccessful in challenging the final duty liability determination.)

97. The EC argues because U.S. law provides for review and reimbursement of antidumping duties, there is also a WTO obligation to provide analogous retroactive relief.¹⁵⁶ The EC’s argument is an acknowledgment that it seeks impermissible, retroactive relief in the context of WTO dispute settlement. As explained in detail above, the recommendations and rulings of the DSB do not act as the basis for the reimbursement of duties. Even the EC’s municipal law recognizes this principle. Specifically, in the *Ikea* case, the European Court of Justice expressly *rejected* the notion of refunding the duties on that basis. Instead, the Court found that zeroing was inconsistent with paragraph 2(11) of the EC’s basic regulation and was “a manifest error of assessment with regard to Community law.”¹⁵⁷ On *that* basis – that zeroing was inconsistent with the EC’s own regulations, rather than the AD Agreement – the Court ordered repayment of duties.¹⁵⁸ Thus, while the EC may in some circumstances provide refunds under its municipal law; it has not done so pursuant to any WTO obligation. Numerous other instances of EC implementation demonstrate that the EC does not view itself to be subject to retroactive implementation obligations. Yet the EC argues that the United States should be subjected to a different standard of implementation.

98. Furthermore, adopting the EC’s position could disadvantage retrospective systems by imposing additional implementation obligations to the extent that similar requirements to refund

¹⁵⁶ EC Appellant Submission, paras. 180-183.

¹⁵⁷ *Ikea Wholesale Ltd. v. Commissioners*, Case. C-351/04 (European Court of Justice, Sept. 27, 2007), para. 56 (Exhibit US-34).

¹⁵⁸ *Ikea Wholesale Ltd. v. Commissioners*, Case. C-351/04 (European Court of Justice, Sept. 27, 2007), para. 69 (Exhibit US-34).

antidumping duties levied prior to implementation would not arise under prospective antidumping systems. In a retrospective system, liability attaches at the time of entry, but the amount of duty is finally determined at a later date, and collection occurs still later. By contrast, in a prospective system, the duty is collected at the time of entry in its final amount. If implementation obligations are applied to any duty collection that occurs after the expiry of the RPT, then Members with prospective systems will have no implementation obligations in respect of entries made prior to the expiry of the RPT, but Members with retrospective systems will have such obligations in the event that collection occurs *after* the expiry of the RPT. This ignores the requirement that different systems of duty assessment provided for in Article 9.3 are to be afforded analogous treatment under the AD Agreement.¹⁵⁹ Accordingly, to ensure a “level playing field” among Members with retrospective systems, prospective *ad valorem* systems, and prospective normal value systems, prospective implementation requires that duties levied on imports occurring on or *after* the date of implementation be made consistently with the DSB’s recommendations and rulings.

99. Finally, the EC’s argument that not imposing implementation obligations on prior entries liquidated after the end of the RPT violates an obligation to comply “immediately” with the DSB’s recommendations and rulings,¹⁶⁰ simply begs the question of what actions bring a responding Member into compliance.

¹⁵⁹ *US – Zeroing (Japan) (AB)*, para. 163.

¹⁶⁰ EC Appellant Submission, para. 169.

100. For all these reasons, including in particular those described in detail in the U.S. Other Appellant submission, the EC’s appeal of the compliance Panel’s findings concerning liquidation should be rejected.

D. The EC Claims Regarding Cash Deposits Related to “12 Measures” Are Without Basis

101. The EC appeals from the compliance Panel’s findings with regard to 12 of the 16 administrative reviews that were the subject of “as applied” findings in the original dispute.¹⁶¹ The compliance Panel found that, with respect to one exporter subject to one of the administrative reviews in the original dispute, the United States continued to apply the cash deposit rate from the original administrative review.¹⁶² With respect to other exporters subject to that review and the other 11 reviews in their entirety, the EC asserted before the compliance Panel that the United States was applying, after the end of the reasonable period of time, new cash deposit rates determined in later assessment reviews using zeroing, and that this amounted to a failure to comply with the DSB’s recommendations and rulings. The Panel rejected the EC claim,¹⁶³ and the EC now appeals.

1. The Panel Correctly Found that the EC Failed to Identify Any Specific U.S. Measures to Support Its Claim

¹⁶¹ EC Appellant Submission, paras. 190-197. These 12 reviews were denominated “Cases” 18-24 and “Cases” 27-31 in the original proceeding. *Id.* para. 190 n.275-76. The other four reviews at issue in the original dispute (“Cases” 16, 17, 25, and 26) relate to antidumping duty orders that had been revoked at the end of the reasonable period of time. *Id.* para. 190 n.274.

¹⁶² Panel Report, paras. 8.215-8.216.

¹⁶³ Panel Report, para. 8.217.

102. Under the U.S. retrospective antidumping duty system, liability for antidumping duties attaches at the time of entry, but the final assessment of the amount of such duties is determined at a later time. In order to ensure the collection of duties, a security in the form of a cash deposit is generally required. The cash deposit, however, is not a duty in itself; it is merely the security for the payment of the duty pending final assessment of the amount of antidumping duties owed.¹⁶⁴ As a matter of U.S. law, the amount of the cash deposit is generally determined as the margin of dumping most recently calculated by Commerce. However, this does not mean that the cash deposit rate *is* necessarily a margin of dumping; it is merely an estimate of the actual antidumping duty to be assessed later. If the assessed margin of dumping turns out to be lower than the cash deposit, the difference is refunded with interest; if the assessed margin of dumping is higher, the importer must pay the difference, again with interest.¹⁶⁵

103. The compliance Panel found that, although the EC had generally asserted that the United States was applying, after the end of the reasonable period of time, cash deposit rates based on margins of dumping calculated using zeroing, the EC “has not directed us to any specific duty assessment determinations after the end of the reasonable period of time.”¹⁶⁶ Accordingly, the compliance Panel declined to make any specific finding against “a precise US action in this respect,” because the EC had not identified any.¹⁶⁷

¹⁶⁴ See, e.g., GATT 1994, *Ad Note* to Article VI:2 and VI:3, para. 1.

¹⁶⁵ 19 C.F.R. § 351.212 (Exhibit US-6).

¹⁶⁶ Panel Report, para. 8.217.

¹⁶⁷ Panel Report, para. 8.217.

104. On appeal, the EC asserts that “the Panel had enough evidence to conclude” in the EC’s favor.¹⁶⁸ Tellingly, however, the EC fails once again on appeal to identify any such evidence or any particular U.S. measure in which a margin of dumping was calculated using “zeroing” and was being used by the United States as the basis for a cash deposit rate for any antidumping order at the time of panel establishment.¹⁶⁹ The EC merely asserts that the United States “had not stopped” using a zeroing “methodology” in assessment reviews generally, but never proves this assertion. Nor does the EC, even now, identify (1) specific cash deposit rates (2) in effect when the compliance Panel was established that (3) have been shown to have been calculated using zeroing.

105. Given the EC’s failure to meet the most minimal requirements to identify the measure at issue and to provide any evidence with regard to an identified measure to support its claim, the compliance Panel rightly declined to make findings on the EC’s claim.¹⁷⁰ Accordingly, the Appellate Body may reject the EC appeal on this basis alone.

2. The Panel’s *Obiter Dicta* on the Hypothetical Implications of the Continuing Use of Cash Deposit Rates Calculated Using Zeroing Has No Legal Effect

¹⁶⁸ EC Appellant Submission, para. 195.

¹⁶⁹ EC Appellant Submission, para. 195. The EC refers to its first written submission before the compliance Panel, *id.* para. 195 & n.283, but the only reviews mentioned in that portion of the EC submission involved orders that had been revoked prior to the establishment of the compliance Panel (for which no cash deposit rate was being applied) or reviews completed after the establishment of the compliance Panel (which could not have been used to establish the cash deposit rates being applied at the time of panel establishment).

¹⁷⁰ For example, the Appellate Body declined to complete the analysis in *US – Zeroing II (EC)*, where the EC failed to adduce any facts to demonstrate that zeroing was in fact used in particular administrative reviews. *US – Zeroing II (EC) (AB)*, para. 357 & n.767.

106. Having found that the EC had failed to put forth evidence in support of its claim, the compliance Panel should have ended its analysis there. However, the compliance Panel went on to say that, *if* the United States were applying cash deposit rates calculated in subsequent administrative reviews using zeroing, this *would* constitute a failure to comply with the DSB’s recommendations and rulings in this dispute.¹⁷¹ In its Notice of Appeal, the EC rather remarkably requested the Appellate Body on appeal to *uphold* the compliance Panel’s “findings” in this regard.¹⁷² However, the compliance Panel did not make any “finding” on this point, as its statement was purely *obiter dicta* or advisory in nature.¹⁷³ As the compliance Panel recognized, its statement was purely hypothetical – a prediction of what it *would* have found, *if* certain evidence had been presented by the EC, which the compliance Panel had already found that the EC did not present. Accordingly, the compliance Panel’s statement is without legal effect.¹⁷⁴

3. In Any Event, the DSB Recommendations and Rulings Do Not Extend to Cash Deposit Rates

107. If the Appellate Body were to reverse the compliance Panel’s finding that the EC did not make or support any claim on this point, and if the Appellate Body were to find that any such claim was supported by sufficient uncontested facts or factual findings to complete the

¹⁷¹ Panel Report, para. 8.218.

¹⁷² EC Notice of Appeal, para. (d), sixth bullet.

¹⁷³ This is confirmed by the absence of any reference to this statement by the compliance Panel in the conclusions of its report. Panel Report, para. 9.1.

¹⁷⁴ As the Appellate Body has found, a panel’s comments that are not directly relevant to its actual findings are not “legal findings and conclusions of the panel” that, under Article 17.13 of the DSU, the Appellate Body may “uphold, reverse, or modify” on appeal. *EC – Poultry (AB)*, para. 107.

analysis,¹⁷⁵ the Appellate Body would also have to undertake a legal analysis of the EC claim. However, even assuming *arguendo* that it had been demonstrated that the United States was applying a cash deposit rate, after the end of the reasonable period of time, calculated using zeroing in an assessment review subsequent to one of the 12 assessment reviews subject to the original DSB recommendations and rulings and the EC claim, it would not follow that the application of such a cash deposit rate was inconsistent with those recommendations and rulings.

108. With regard to these 12 assessment reviews, the Appellate Body found that the United States acted inconsistently with Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 by using “zeroing,” because it found that the use of zeroing in these reviews “results in amounts of assessed anti-dumping duties that exceed the foreign producers’ or exporters’ margins of dumping.”¹⁷⁶ According to the Appellate Body, this was inconsistent with the obligation in Article 9.3 of the AD Agreement with regard to the maximum “amount of the anti-dumping duty” and the obligation in Article VI:2 of the GATT 1994 with regard to the maximum anti-dumping duty that a Member may “levy.”¹⁷⁷ Both of these provisions refer to the amount of final antidumping duties that a Member may “levy” or “assess,” but neither provision addresses the amount of cash deposits or other security that may be required pending final assessment.

¹⁷⁵ As neither the compliance Panel nor the EC, to date, have identified any specific U.S. action in this regard, it is difficult to say with certainty in advance whether uncontested facts or factual findings exist with respect to an unknown measure. However, if such uncontested facts or factual findings existed with respect to some measure, the EC should have identified it by now. Therefore, the United States considers it unlikely that the Appellate Body would be able to complete the analysis, even if the EC were to eventually identify a specific measure.

¹⁷⁶ *US – Zeroing (EC) (AB)*, para. 134.

¹⁷⁷ *US – Zeroing (EC) (AB)*, para. 134.

109. Indeed, a cash deposit is not an antidumping “duty” at all. Rather, as provided in the *Ad Note* to paragraphs 2 and 3 of Article VI of the GATT 1994, it is a *security* “for the payment of anti-dumping or countervailing duty pending final determination of the facts” and final assessment of duties owed. In this respect, two provisions of the WTO agreements are relevant – the *Ad Note*, which specifies that the amount of such a security must be “reasonable,” and the refund provisions in Article 9.3.1 of the AD Agreement. As the Appellate Body has observed:

If an advance payment for an anti-dumping duty in the form of a cash deposit at the level of the margin established for an exporter in the anti-dumping duty order or the most recent assessment review exceeds the amount of anti-dumping duty liability finally assessed, no WTO-inconsistency arises provided that a refund is made in accordance with Article 9.3.1 [of the AD Agreement].¹⁷⁸

Thus, the WTO legal issues relating to cash deposits are not those that relate to the assessment and levying of antidumping duties, nor was the question of security for antidumping duties a subject of the original proceeding. Nothing in the DSB’s recommendations and rulings adopted in this dispute addresses the issue of security for potential antidumping duties; rather, the Appellate Body in the original proceeding addressed only the consistency of the *assessment* of duties with Article 9.3 of the AD Agreement and the *levying* of duties with Article VI:2 of the GATT 1994.¹⁷⁹ And, particularly in view of the refund provisions of Article 9.3.1, nothing in the adoption of the cash deposit rates pointed to by the EC could affect, let alone undermine, U.S. compliance with the recommendations and rulings that the DSB did adopt.

¹⁷⁸ *US – Shrimp Bonding (Thailand/Ecuador)(AB)*, para. 242 n.290.

¹⁷⁹ See also Japan Third-Participant Submission, paa. 250 (“[T]he *measures at issue* were *administrative reviews*, and the *claims* concerned the calculation of the margin of dumping.” (emphasis in original)).

110. Accordingly, *even if* it were demonstrated that the United States set cash deposit rates equal to a margin of dumping calculated inconsistently with Article 9.3 of the AD Agreement or Article VI:2 of the GATT 1994, it would not automatically follow that such cash deposit rates are within the scope of this Article 21.5 proceeding or are themselves inconsistent with the covered agreements. Rather, the EC would have to demonstrate both that the security requirement was within the scope of the proceeding and that the amount of security was inconsistent with relevant provisions of the covered agreements. The EC does not even purport to have made such a demonstration in this case. Thus, its claim must be rejected.

E. The Compliance Panel Properly Did Not Make Findings on the EC “Domino Theory”

111. The EC also appeals from the compliance Panel’s finding that it did not need to make findings directly on what the EC calls its “domino theory.”¹⁸⁰ In particular, the compliance Panel did not make a separate finding with respect to the EC’s general assertion that the United States has not “withdrawn” the WTO-inconsistent measure when it takes any “positive act” after the end of the reasonable period of time, including with respect to entries made prior to the end of the reasonable period of time, based on such measure.¹⁸¹ According to the compliance Panel, where the EC had made specific claims with respect to particular “positive acts” allegedly taken by the United States, the compliance Panel made the necessary findings.¹⁸² Therefore, it did not

¹⁸⁰ EC Appellant Submission, paras. 198-202.

¹⁸¹ Panel Report, paras. 8.219-8.222.

¹⁸² Panel Report, para. 8.220.

need to make any further findings with regard to the EC’s more general assertions about unidentified “positive acts” that the United States allegedly had taken or might take in the future.¹⁸³

112. The compliance Panel acted correctly in refusing the EC’s request to issue an advisory opinion as to which types of acts, in general, the United States may or may not take in order to comply with the DSB’s recommendations and rulings. A panel acting under Article 21.5 of the DSU is limited to addressing a “disagreement as to the existence or consistency with a covered agreement of measures taken to comply.” It is not called upon to opine generally about the recommendations and rulings of the DSB independently of the identification of specific instances in which measures (including omissions) are relevant to the issue of the “existence or consistency” of measures taken to comply.

113. In effect, by asking the compliance Panel (and now the Appellate Body) to rule that the taking of “positive acts” (in some undefined sense) by the United States “in relation to” antidumping orders related to the original recommendations and rulings, the EC is seeking a ruling applicable *ex ante* to the “continued application of anti-dumping duties” in a series of proceedings, similar to that at issue in *US – Zeroing II (EC)*.¹⁸⁴ In this proceeding, however, the EC seeks such a ruling in a complete evidentiary vacuum, unlike the situation in *US – Zeroing II (EC)*, where the Appellate Body made findings only with respect to particular measures on which

¹⁸³ *E.g.*, Panel Report, para. 8.220 (“Indeed, the European Communities has not provide any evidence of US actions other than that addressed in our consideration of the EC claims in these paragraphs.”).

¹⁸⁴ *E.g.*, *US – Zeroing II (AB)*, para. 395(a)(v).

the EC had adduced sufficient evidence.¹⁸⁵ Such a sweeping, generalized finding would be even more inappropriate in an Article 21.5 proceeding where the original DSB recommendations and rulings are limited to “as applied” findings with regard to particular investigations and reviews.

114. Accordingly, the Appellate Body should reject the EC’s appeal with respect to the “domino theory.”

F. The EC Has Failed to Substantiate Any of Its Subsidiary Claims

115. The EC concludes Part V of its Appellant Submission with a summary of its requests to the Appellate Body with regard to the arguments set forth in that Part.¹⁸⁶ In this summary, it includes many requests for findings never developed or supported with argumentation. For example, the EC requests that the Appellate Body find that a number of U.S. measures are inconsistent with Article 21.3 of the DSU, even though it developed no argumentation whatsoever in its appellant submission with respect to Article 21.3 and nowhere explains how any of these measures are, in its view, inconsistent with this provision. In addition, the EC requests the Appellate Body to “complete the analysis” with respect to a number of its arguments. However, the EC fails in each case to identify the “factual findings by the Panel [or] undisputed facts in the Panel record”¹⁸⁷ that would enable the Appellate Body to complete the analysis with regard to any particular measure or claim. Accordingly, these subsidiary claims

¹⁸⁵ *US – Zeroing II (AB)*, paras. 186-199.

¹⁸⁶ EC Appellant Submission, para. 209.

¹⁸⁷ *US – Softwood Lumber CVD Final (AB)*, para. 118.

that the EC makes in passing, without any supporting evidence or argumentation, should be rejected.

116. For example, the EC requests the Appellate Body to complete the analysis with respect to “assessment instructions or liquidation after the end of the reasonable period of time,”¹⁸⁸ but does not identify any particular assessment instructions that were executed, or entries that were liquidated, after the end of the reasonable period of time for which the Appellate Body could complete the analysis. Indeed, the EC goes so far as to assert that it is the United States, as the party claiming compliance, which has the obligation of presenting evidence of liquidation after the end of the reasonable period of time.¹⁸⁹ This is contrary to the approach taken by the compliance Panel, which correctly found that the EC, “as the complaining party, must therefore make a *prima facie* case of violation of the relevant provisions of the WTO agreements it invokes,” and that “it is generally for each party asserting a fact, whether complainant or respondent, to provide proof thereof.”¹⁹⁰ Because the EC has failed to identify factual findings or undisputed facts that could serve as the basis for the completion of the analysis, the EC’s requests must be rejected.

V. The Panel Properly Refused to Make a Finding Regarding the EC’s Allegations of Past U.S. Non-Compliance

117. With respect to the original DSB “as applied” recommendations and rulings regarding original antidumping investigations, the United States made new determinations (“Section 129”

¹⁸⁸ EC Appellant Submission, para. 352(d)(i).

¹⁸⁹ EC Appellant Submission, para. 161.

¹⁹⁰ Panel Report, para. 8.7.

determinations) in the 12 cases in which the antidumping order had not already been revoked, recalculating the margin of dumping without “zeroing,” and revoking orders in whole or in part, as appropriate, based on the new margins of dumping so calculated. Eleven of the 12 Section 129 determinations were implemented on April 23, 2007,¹⁹¹ and one Section 129 determination was implemented on August 31, 2007.¹⁹² In this dispute, the reasonable period of time ended on April 9, 2007, and the EC requested the establishment of the compliance Panel on September 13, 2007. Before the compliance Panel, the EC claimed that the U.S. implementation of the Section 129 determinations after April 9, 2007 was inconsistent with Article 21.3 and 21.3(b) of the DSU.¹⁹³

118. The compliance Panel declined to make findings on the EC claim.¹⁹⁴ As an initial matter, the compliance Panel expressed its doubt that Article 21.3 or Article 21.3(b) of the DSU provided a legal basis for the EC claim.¹⁹⁵ However, the compliance Panel found that there was

¹⁹¹ 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).

¹⁹² Implementation of the Findings of the WTO Panel in *US – Zeroing (EC): Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Duty Order on Stainless Steel Sheet and Strip in Coils from Italy*, 72 Fed. Reg. 54,640 (Sept. 26, 2007) (Exhibit EC-6). The delay in issuing this Section 129 determination was the result of the allowance for an additional period for comment by interested parties with relation to alleged “arithmetical errors,” including the alleged error addressed in Part VI of this submission. *Id.* at 54,641.

¹⁹³ Panel Report, Annex A, para. 1.

¹⁹⁴ Panel Report, paras. 8.223-8.227.

¹⁹⁵ Panel Report, para. 8.226.

no disagreement that the factual situation complained about by the EC – the lack of Section 129 determinations – had ceased to exist by the time the Panel was established.¹⁹⁶ Accordingly, the compliance Panel concluded that it was neither necessary or appropriate to make findings on the EC claim.¹⁹⁷ Although the compliance Panel imprecisely refers to its approach as an exercise in “judicial economy,”¹⁹⁸ it correctly frames its analysis in terms of the requirement to assess the “existence or consistency . . . of measures taken to comply” – and, by extension, the existence of the “disagreement” over such existence or consistency – as of the date of panel establishment rather than in some prior period.¹⁹⁹ Finally, the compliance Panel rejected the EC argument that the *possibility* that a WTO ruling might have an effect in the municipal law of a responding Member – regardless of whether such an effect actually existed in this particular dispute – required it to make the ruling requested by the EC.²⁰⁰

119. The compliance Panel was correct not to make findings on the EC claim. An Article 21.5 proceeding addresses only cases of “disagreement” as to the existence or consistency of measures taken to comply. There is no “disagreement” between the parties that the United States did not implement the Section 129 determinations before April 23, 2007 or August 31, 2007, as the case may be. Nor was there any “disagreement” between the parties, at the moment the EC requested the establishment of the compliance Panel in this dispute, that the United States had implemented

¹⁹⁶ Panel Report, para. 8.227.

¹⁹⁷ Panel Report, para. 8.226.

¹⁹⁸ Panel Report, para. 8.226.

¹⁹⁹ Panel Report, para. 8.226.

²⁰⁰ Panel Report, para. 8.22.7.

all of the Section 129 determinations. In the absence of any “disagreement as to the existence or consistency with a covered agreement of” the Section 129 determinations, there was nothing for the compliance Panel to decide.²⁰¹

120. The United States finds compelling the reasoning of the panel in *US – Cotton Subsidies (Article 21.5)*, when it explained that a finding of a breach of Article 21.3 would “be of little relevance to the effective resolution of disputes.”²⁰² The panel went on to explain that:

Where a panel makes a finding under Article 21.5 of the DSU that a Member has not complied with the DSB recommendations and rulings in the original dispute, the consequence of that finding is that the Member remains subject to obligations that flow from the recommendation issued in the original proceeding and is thus required to take steps to bring itself into compliance with that recommendation. A finding by the panel that the Member also failed to comply with the DSB recommendations and rulings in the original proceeding at an earlier point in time would have no additional operative value in terms of the nature of the obligations of the Member in question. On the other hand, if a panel under Article 21.5 finds that the Member has brought itself into compliance with the DSB recommendations and rulings as of the time of the establishment of the panel, such a finding logically would supersede and render irrelevant any finding that the Member was not in compliance with those recommendations and rulings at an earlier point in time. Thus, in both cases a finding of a violation at the end of the

²⁰¹ The EC discusses at length the Appellate Body finding in *US – Cotton Subsidies* that, in certain circumstances, a measure may be challenged in an *original* proceeding even when its legislative basis has expired. EC Appellant Submission, paras. 222-224. However, given the limited scope of an Article 21.5 proceeding, the Appellate Body’s reasoning in *US – Cotton Subsidies* does not apply to situations in which the “disagreement as to the existence” of certain measures is resolved prior to the request for panel establishment. Indeed, as the EC recognizes, the Appellate Body stated in *US – Cotton Subsidies* that an expired measure may not be subject to a *recommendation* – that is, the Appellate Body recognized that an expired measure may not have implications for compliance. EC Appellant Submission, para. 225; *see also* Panel Report, para. 8.249 (finding that the compliance Panel may examine measures in existence at the time of panel establishment that were subsequently revoked, although “any finding of inconsistency with respect to a measure that is no longer in effect will not affect any remaining US obligations to implement”).

²⁰² *US – Cotton Subsidies (Article 21.5) (Panel)*, para. 9.67.

reasonable period of time would be of a declaratory nature and without practical implications as to the obligations of the Member in question, unless one interprets the DSU to mean that a proceeding under Article 21.5 can create obligations for a Member to take steps that must be effective as of the end of the reasonable period of time. We see no textual support for such a retroactive interpretation of the DSU.²⁰³

The same reasoning applies to the EC requests in this dispute.

121. The EC asserts that, the conclusions of the *US – Cotton Subsidies (Article 21.5)* panel notwithstanding, there may be “practical implications” of the finding it requests, but that the EC is “entitled” to such a finding whether or not it can demonstrate such practical implications.²⁰⁴

The EC asserted before the compliance Panel, as it does now before the Appellate Body, that potential effects in municipal law of such a finding are a sufficient basis for the requested finding.²⁰⁵ However, the EC does not identify any such effects in this case, and indeed appears to agree with the conclusion of the compliance Panel that the identification of such effects is not relevant to the issue of whether the requested finding may appropriately be made.²⁰⁶ However, potential alleged effects in municipal law cannot bring a measure or claim within the scope of Article 21.5 proceedings. These proceedings do not concern “just *any* measure” of a Member,²⁰⁷ but only those measures described in the text of Article 21.5.

²⁰³ *US – Cotton Subsidies (Article 21.5) (Panel)*, para. 9.67 (citation omitted).

²⁰⁴ EC Appellant Submission, paras. 227-228.

²⁰⁵ EC Appellant Submission, para. 227.

²⁰⁶ Panel Report, para. 8.227 & n.836; EC Appellant Submission, para. 228.

²⁰⁷ *Canada – Aircraft (Article 21.5) (AB)*, para. 36 (emphasis in original).

122. Finally, the EC asks the Appellate Body to “complete the analysis” and find that the United States acted inconsistently with Article 19.1, Article 21.3, and Article 21.3(b) of the DSU.²⁰⁸ As the EC articulated no claim under Article 19.1 of the DSU in its request for the establishment of the compliance Panel,²⁰⁹ such a claim was not part of the “matter” that was before the compliance Panel, and the EC may not now assert a new claim on appeal. With respect to Article 21.3, this provision merely sets forth the possibility of a “reasonable period of time” for compliance where it is “impracticable to comply immediately with the recommendations and rulings.” Thus, Article 21.3 does not impose an obligation on the Member concerned, but rather provides that Member with a right to a reasonable period of time should immediate compliance be impracticable. Article 21.3(b) simply identifies the reasonable period of time.²¹⁰ Thus, the compliance Panel was correct not to find that the United States breached Article 21.3.

123. In any event, there being no “disagreement” as to the existence of the Section 129 determinations at issue as of the date of panel establishment, there is no basis for the Appellate Body to disturb the compliance Panel’s treatment of this issue.

VI. The Panel Correctly Found that the EC’s Claim Regarding the Alleged Clerical Error with Respect to the Section 129 Determination in Case 11 Was Not Properly Before It

²⁰⁸ EC Appellant Submission, paras. 230-234.

²⁰⁹ See Panel Report, Annex A, para. 1.

²¹⁰ As the compliance Panel observed, although the panel in *Australia – Salmon (Article 21.5)* did make findings with respect to the period prior to the entry into force of the measures taken to comply in that dispute, it did not make any finding of a violation of Article 21.3. Panel Report, para. 8.226 & n.834.

124. Before the compliance Panel, the EC argued that an alleged calculation error that arose in the original investigation of stainless steel sheet and strip in coils from Italy (“Italy SSSS”) was not corrected in the Section 129 determination in which the United States recalculated the margin of dumping without the use of zeroing. The compliance Panel concluded that the EC’s claim was not properly before it on the basis that “the alleged error constitutes a new claim with respect to an unchanged aspect of the original measure which the [EC] could have made, but did not make, in the original dispute.”²¹¹ The Panel further concluded that the EC’s claim could be “‘separated’ from the remainder of the Section 129 determination for the purpose of this proceeding.”²¹²

125. As an initial matter, the EC’s submission is riddled with factual inaccuracies about the existence of the alleged arithmetic error. In particular, the EC stated that, “[t]he United States acknowledges that such an error . . . had been made . . . in the original investigation.”²¹³ The United States has not made, and does not make, any such acknowledgment. The EC further declares that “[i]n the Section 129 Determination concerned, the USDOC realised that there was an arithmetical error and decided to *extend* the duration of the Section 129 proceeding.”²¹⁴ During the Section 129 proceeding, Commerce neither came to this realization, nor agreed that the alleged error was in fact an error. Commerce extended the proceeding to consider whether

²¹¹ Panel Report, para. 8.239.

²¹² Panel Report, para. 8.243.

²¹³ EC Appellant Submission, para. 237.

²¹⁴ EC Appellant Submission, para. 238 (emphasis in original).

review of the allegation – as well as other allegations of ministerial errors by other interested parties, including the petitioners – was proper in the context of the Section 129 proceeding.²¹⁵

Ultimately, however, Commerce decided not to consider the merits of any of these allegations.²¹⁶

126. The EC further opines that “even the United States now acknowledges that, if, in addition to eliminating zeroing, the United States had corrected this obvious calculation error in the Section 129 proceeding, the dumping margin would have been negative.”²¹⁷ The United States made no such acknowledgment, and the source cited by the EC (i.e., its own first submission) provides no support for its assertion.

127. The EC now argues that the compliance Panel committed legal error in reaching its decision. Specifically, the EC charges that the compliance Panel erred by: (1) not considering whether the Section 129 determination as a whole was the measure taken to comply; (2) finding that the EC was precluded from raising new claims against unchanged aspects of the original measure; and (3) declining to address whether the EC’s claims were closely related to the measure taken to comply.²¹⁸ We will address these arguments in turn.

128. The EC maintains that Commerce’s consideration of the claim in its Section 129

²¹⁵ Implementation of the Findings of the WTO Panel in *US – Zeroing (EC): Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Duty Order on Stainless Steel Sheet and Strip in Coils from Italy*, 72 Fed. Reg. 54,640 (Sept. 26, 2007) (Exhibit EC-6).

²¹⁶ Issues and Decision Memorandum for Section 129 Determination in *Stainless Steel Sheet and Strip in Coils from Italy* (Exhibit EC-8).

²¹⁷ EC Appellant Submission, para. 237.

²¹⁸ EC Appellant Submission, paras. 235-296.

Determination and its use of the data set from the original investigation rendered the alleged error an “integral” part of measure taken to comply.²¹⁹ Accordingly, the EC avers that the Panel “made an error when defining the ‘measure taken to comply’ for the purpose of this compliance proceeding.”²²⁰ The EC misses the mark in at least two respects.

129. First, the EC improperly assumes that an element appearing in a redetermination necessarily is part of the measure taken to comply. As the compliance Panel properly concluded,²²¹ and as observed by the Appellate Body in *EC – Bed Linen (Article 21.5)*,²²² the fact that a particular element appears in a redetermination does not make it an inseparable element of a measure taken to comply.

130. Thus, the relevant inquiry is whether the element appearing in a redetermination is separable from the measure taken to comply. Here, regardless of whether the alleged error concerned an arithmetical error in the normal value as the EC challenges, the alleged error is “separable” from the measure taken to comply. In the original dispute, the DSB found that the United States breached its obligations in the Italy SSSS investigation because of its failure to provide offsets (commonly called “zeroing”). Commerce subsequently recalculated the margin

²¹⁹ EC Appellant Submission, paras. 247-256.

²²⁰ EC Appellant Submission, para. 245.

²²¹ Panel Report, para. 8.243 (noting that the alleged error “can be ‘separated’ from the remainder of the Section 129 determination for the purpose of this proceeding.”)

²²² *EC - Bed Linen (Article 21.5) (AB)*, para. 86 (“[W]e do not see why that part of the redetermination that merely incorporates elements of the original determination . . . would constitute an inseparable element of a measure taken to comply with the DSB rulings in the original dispute. Indeed, the investigating authorities of the European Communities were able to treat this element separately.”).

of dumping in accordance with the DSB’s recommendations and rulings in the Section 129 determination. To accomplish this, Commerce changed only the language that caused the computer program to disregard non-dumped comparisons. Commerce then re-ran the program and calculated the revised margin of dumping. Commerce made no other changes to the computer program.²²³ Having recalculated the margin of dumping without zeroing, Commerce complied with the DSB’s recommendations and rulings.

131. The alleged error had no effect on Commerce’s ability to recalculate the margin in accordance with the DSB’s recommendations and rulings. Moreover, as the compliance Panel properly found, the alleged “error is not a consequence of the use of zeroing in the original dispute, and the recalculation of the margin of dumping without zeroing did not lead to or affect the alleged error.”²²⁴ Therefore, regardless of Commerce’s actions during the Section 129 determination, the alleged error was not part of the measure taken to comply.

132. Secondly, the EC ignores the fact that even, assuming for the sake of argument that the alleged error was part of the measure taken to comply, it still was not properly before the compliance Panel. The compliance Panel determined – and the EC does not deny – that the claim was a “new claim with respect to an unchanged aspect of the original measure . . . which the [EC] could have made, but did not make, in the original dispute.”²²⁵

²²³ Panel Report, para. 5.148.

²²⁴ Panel Report, para. 8.243.

²²⁵ Panel Report, para. 8.239.

133. Summarizing *US – Countervailing Measures (Article 21.5)*, the compliance Panel

explained that:

The [*US – Countervailing Measures (Article 21.5)*] panel added that ***even if it were to consider that the aspect of the measure in question were an aspect of the measures taken to comply, it would nevertheless still have concluded that the EC claim was not within its mandate.*** The panel noted that the EC claim concerned aspects of the original measure that were unchanged and were not challenged in the original proceedings. It reasoned that the purpose of an Article 21.5 proceeding is to provide an expeditious procedure to establish whether a Member has properly implemented DSB recommendations and rulings and that admitting such a new claim would mean providing the European Communities with a second chance to raise a claim that it had failed to raise in the original proceeding.²²⁶

The EC in this case failed to challenge the alleged error in the original proceeding. Thus, it was never ruled upon or included within the DSB’s recommendations and rulings. The United States accordingly made no changes in its Section 129 determination concerning the alleged error, nor did the DSB’s recommendations and rulings require it to do so. The alleged error, therefore, is an aspect of the original measure that is unchanged. Thus, even “if the arithmetical error . . . became an integral part of the ‘measure taken to comply’” as the EC contends,²²⁷ the compliance Panel properly found that the claim was not within the scope of the proceeding.

134. The EC disagrees with the compliance Panel’s interpretation of the panel report in *US – Countervailing Measures (Article 21.5)*.²²⁸ In the EC’s view, the panel in that dispute only meant to address the situation in which the complaining party included a claim in its original panel

²²⁶ Panel Report, para. 8.240 (emphasis added).

²²⁷ EC Appellant Submission, para. 252.

²²⁸ EC Appellant Submission, para. 276.

request but never pursued it, not the situation here in which the complaining party could have included a claim in the original panel request, but did not.²²⁹ As the compliance Panel found, the EC’s argument is untenable because it unfairly would allow complaining Members a “second chance” to pursue claims they could have pursued in the original proceeding, and thus presents fundamental due process concerns.²³⁰

135. With respect to the first point, the EC contends that the compliance Panel misunderstood the meaning of the phrase “second chance,” as used by the panel in *US – Countervailing Measures (Article 21.5)*. The EC submits that it would not be given a “second chance” to pursue its claim because it literally raised the claim for the “first” time in the context of the compliance proceeding.²³¹

136. It is difficult to tell whether the EC really means for the Appellate Body and the parties to take its misreading of the phrase “second chance” seriously. A Member is provided a “second chance” – that is, a second *opportunity* – if it is permitted to raise a claim in a compliance proceeding that, as a legal and practical matter, it *could have raised* before the original panel, but did not. Here, the EC made a decision not to raise its alleged error claim from the outset of this dispute. The EC now seeks to pursue its claim in these compliance proceedings, rather than in a fresh dispute. If permitted to do this, the EC would be given yet another (i.e. second) opportunity

²²⁹ EC Appellant Submission, para. 276.

²³⁰ Panel Report, paras. 8.240-8.241.

²³¹ EC Appellant Submission, para. 276.

to raise a claim it should and could have raised from the start. Thus, the EC’s situation falls squarely within the concerns outlined in *US – Countervailing Measures (Article 21.5)*.

137. Further, the EC’s position also is at odds with the nature of Article 21.5 proceedings, including the abbreviated time periods set out in Article 21.5. Where a claim could have been raised in the initial proceeding, but was not, there are no recommendations and rulings with respect to that claim and therefore no “disagreement as to the existence or consistency . . . of measures taken to comply” with them. Further, Article 21.5 places certain procedural limitations on compliance proceedings, including abbreviated time frames.²³² This further confirms that compliance proceedings exist for a limited purpose, and not to examine new claims that could have been, but were not, raised in the initial dispute.²³³

138. The EC also contends that principles of due process are respected if “the complaining Member provides in its compliance panel request the claims raised against the measure taken to comply.”²³⁴ The EC’s argument simply misses the point. First, as mentioned in the previous paragraph, proceedings under DSU Article 21.5 are expedited, and the addition of claims beyond

²³² DSU, art. 21.5.

²³³ See *US – Softwood Lumber CVD Final (Article 21.5) (AB)*, para. 72, emphasizing that:

[T]he applicable time-limits . . . [in Article 21.5 proceedings] are shorter than those in original proceedings, and there are limitations on the types of claims that may be raised in Article 21.5 proceedings. This confirms that the scope of Article 21.5 proceedings logically must be narrower than the scope of original dispute settlement proceedings. This balance should be borne in mind in interpreting Article 21.5 and, in particular, in determining the measures that may be evaluated in proceedings pursuant to that provision.

²³⁴ EC Appellant Submission, para. 277.

the scope of the recommendations and rulings thus can raise unwarranted litigation difficulties for the responding Member.

139. Moreover, compliance proceedings serve a particular function within the DSU; in particular, no second reasonable period of time is available if the Member concerned is found not to have complied with the DSB’s recommendations and rulings. The compliance Panel correctly highlighted the statement of the *US – Countervailing Measures (Article 21.5)* panel indicating that “it would be unfair to expose the United States to the possibility of a finding of violation on an aspect of the original measure that the United States was entitled to assume was consistent with its obligations . . . given the absence of a finding of violation in the original report.”²³⁵ The EC’s argument simply ignores all of these legitimate concerns.

140. The EC’s last argument – that the compliance Panel erred by declining to address whether the claims were closely related to the measure taken to comply²³⁶ – is also flawed. As described in detail elsewhere in this submission and in the U.S. Other Appellant submission, the scope of Article 21.5 proceedings is limited by the text of DSU Article 21.5 to assessing the existence or consistency of measures taken to comply.

²³⁵ Panel Report, para. 8.240 (citing *US – Countervailing Measures on Certain EC Products (Article 21.5 - EC)*, paras. 7.75-7.76).

²³⁶ See Panel Report, fn. 864 (emphasis added) (“As a consequence of our analysis that the alleged error concerns an unchanged aspect of the original measure, we do not consider that we need to examine further the parties’ argument as to whether the calculation error is part of the measure taken to comply; *we also need not decide whether the alleged calculation error should be found to be part of that measure on the basis of the close nexus argument put forward by the European Communities.*”).

141. The compliance Panel properly declined to examine the EC’s claim in this case. In paragraph 8.243, the compliance Panel concluded that (1) the alleged error was distinct from any of the other claims that the EC pursued in the original dispute, (2) the recalculation of the margin of dumping did not cause or affect the alleged error, and (3) the alleged error could be separated from the remainder of the Section 129 Determination.²³⁷ These factors led the compliance Panel to determine that “the claims of the European Communities relate to a part of the Section 129 determination that has remained unchanged from the original measure.”²³⁸ Thus, the alleged error was neither a failure to implement DSB recommendations and rulings nor a measure taken to comply, nor did it call into question or otherwise affect the existence of a measure taken to comply. Accordingly, the compliance Panel properly declined to examine the EC’s claim.

142. Finally, the supposed “obviousness” of the alleged arithmetic error in question is not a justification for allowing the EC to raise a claim in an Article 21.5 proceeding that does not fall within the scope of such proceedings and that it could have made, but chose not to make, in the original proceeding.²³⁹ Wholly apart from the legal analysis above, considerations of orderly administration support the compliance Panel’s findings here. The United States has established procedures, including deadlines, under which Commerce considers alleged ministerial errors and corrects them through amendments to final determinations. Commerce’s determinations with

²³⁷ Panel Report, para. 8.243.

²³⁸ Panel Report, para. 8.243.

²³⁹ One might wonder why, if the alleged error were so “obvious,” the EC chose not to bring it to the attention of the United States in its consultations request or of the original panel in this dispute.

respect to such errors are, like other Commerce determinations, subject to judicial review. In this instance, the responding parties sought judicial review of precisely this alleged ministerial error, and failed to overturn Commerce’s determination.²⁴⁰ It is well established that Commerce, as an investigating authority, may set appropriate procedures and deadlines “in the interest of orderly administration.”²⁴¹ Such orderly administration is in the interest of all parties to an antidumping proceeding. If the Section 129 determination becomes an opportunity for one interested party to raise new claims of error that would otherwise have been untimely, on what basis could Commerce refuse to consider other claims of error by other interested parties, which could have led to a net increase in the recalculated margin of dumping rather than, as the EC assumes, a decrease? These considerations also support Commerce’s decision not to reopen the Section 129 proceeding to consider new issues not relevant to the DSB’s recommendations and rulings. For all the reasons given above, that decision was in no way inconsistent with those recommendations and rulings, and the Appellate Body should reject the EC’s appeal.

VII. The Panel Correctly Found that the “All Others” Rates Were Not Inconsistent with the AD Agreement

143. The EC argues that the United States acted inconsistently with Articles 9.4, 6.8 and Annex II of the Antidumping Agreement in its recalculation of the “all others” rate in the Section

²⁴⁰ U.S. Comments on EC Answers to Panel Questions, para. 115 (May 15, 2008) (referring to Acciai Speciali Terni S.p.A. v. United States, 142 F.Supp.2d 969, 991, 994 (Ct. Int’l Trade 2001)).

²⁴¹ *US – Hot-Rolled Steel (AB)*, para. 73; *see also US – OCTG from Argentina (AB)*, para. 241.

129 determinations on Stainless Steel Bar from France, Italy and the United Kingdom.²⁴² The compliance Panel, however, correctly found that Commerce’s calculation of the “all others” rate was not WTO inconsistent.

144. By way of background, this EC appeal concerns the Section 129 determinations on Stainless Steel Bar from France, Italy and the United Kingdom, which the EC denominates as “Cases” 2, 4, and 5. As explained in Part III.B above, a sunset review of these orders resulted in their full revocation effective as of March 7, 2007. The effect of this revocation is the refund of any cash deposits on imports of stainless steel bar from these countries made on or after March 7, 2007; further, those imports have not been and will not be subject to any final assessment of antidumping duties. This revocation also applies to all entries made on or after the effective date of the Section 129 determination (April 23, 2007) that were subject to the “all others” rate complained about by the EC. Thus, for the reasons set forth in Part III.B, and incorporated here by reference, the EC has no articulable interest in pursuing its claims with respect to “Cases” 2 through 5. Once again, the EC seeks nothing more than an advisory opinion about a moot case.

145. In any event, the Appellate Body should find that the EC has failed to demonstrate that the calculation of the all others rates in the Section 129 determinations was inconsistent with the AD Agreement.

146. Consistent with Article 6.10, in the original investigations, Commerce limited its examination to the largest percentage of the volume of the exports from the country in question which could reasonably be investigated. Commerce then calculated an “all others rate” to apply

²⁴² EC Appellant Submission, paras. 297-350.

to imports from those exporters or producers who did not have their own margin of dumping, consistent with Article 9.4.²⁴³ Article 9.4 provides that when an authority limits its examination, pursuant to the second sentence of Article 6.10, that antidumping duty applied to imports, “shall not exceed” the weighted average of dumping established with respect to the selected exporters or producers. Article 9.4 further contains a restriction on the use of zero, *de minimis* or margins based on facts available, when calculating the ceiling for the weighted average margin.

147. In the Section 129 determinations related to these investigations, Commerce recalculated the margins of dumping for the selected respondents as well as the “all others” rate. For the three stainless steel bar determinations challenged by the EC, *all* of the margins of dumping Commerce recalculated, however, were either zero or *de minimis*, or based on facts otherwise available.²⁴⁴ This is a situation not addressed in Article 9.4. Commerce established the “all others” rate for each Section 129 determination based on the simple average of the margins of dumping calculated in that Section 129 determination.²⁴⁵

148. The compliance Panel correctly found Commerce’s recalculation was not inconsistent with Article 9.4.²⁴⁶ Although the EC argues that the prohibition on the use of *de minimis* margins or margins based on facts available *always* applies, the restriction in Article 9.4 speaks only to

²⁴³ Panel Report, para. 5.166.

²⁴⁴ Issues and Decision Memorandum for Section 129 Determinations, Apr. 9, 2007, at 17-18 (Exhibit EC-7).

²⁴⁵ Issues and Decision Memorandum for Section 129 Determinations, Apr. 9, 2007, at 18 (Exhibit EC-7).

²⁴⁶ Panel Report, paras. 8.281-8.284.

the permissible “ceiling,” or that amount that an “all others” rate “shall not exceed.”²⁴⁷ It does not speak to the calculation of the “all others” rate itself. When the *only* margins from investigated companies are zero or *de minimis* or based on an application of Article 6.8, this simply means that a ceiling cannot be determined pursuant to Article 9.4. A Member may still apply an antidumping duty to the noninvestigated companies, and under the general principles of Article 9.4, that amount may be based on the results of other companies. However, since Article 9.4 established no ceiling in this instance, there is no applicable prohibition.

149. Article 9.4 is therefore silent as to the situation that arises in this dispute. As the Appellate Body has explained, the principles of treaty interpretation referenced in Article 3.2 of the DSU “neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended.”²⁴⁸ When confronted with a similar situation in *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body similarly declined to read into the silence of the treaty text obligations that were not there.²⁴⁹ As Articles 3.2 and 19.1 of the DSU provide, DSB recommendations and rulings do not “add to or diminish

²⁴⁷ See *US – Hot-Rolled Steel (AB)*, para. 128 (“Article 9.4 of the *Anti-Dumping Agreement* requires the *exclusion* of all such margins from the calculation of the maximum ‘all others’ rate.” (emphasis in original)); see also *id.*, paras. 116 (“maximum limit, or ceiling”), para. 125 (“ceiling”); para. 129 (“maximum allowable rate”).

²⁴⁸ *India – Patent Protection (US) (AB)*, para. 45.

²⁴⁹ *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 123 (rejecting Japan’s argument that the United States was obligated to calculate margins of dumping in sunset reviews, because Article 11.3 of the AD Agreement does not prescribe any methodology to be followed in making a likelihood determination in a sunset review, and that “[t]his silence in the text of Article 11.3 suggests that no obligation is imposed on investigating authorities to calculate or rely on dumping margins in a sunset review.”).

the rights and obligations of Members.” Thus, the Appellate Body should not find an obligation where the Members did not establish one in the covered agreements.

150. Given the absence of any specific obligation in Article 9.4, the United States developed a reasonable “all others” rate in this instance. Article 9.4 of the AD Agreement provides that when a Member has limited its investigation in accordance with Article 6.10, the Member may establish an “all others” rate to apply to those exporters or producers who were not individually investigated. Thus, in a retrospective system such as that of the United States, the “all others” rate calculated in an investigation serves as the basis for calculating security for the payment of antidumping duties for those companies that have not been individually investigated. Article 9.4 further establishes that the “all others” rate cannot be arbitrary, but rather must be based upon the results of the exporters and producers who have been investigated. Thus, the “all others” rate chosen by the United States is not only not inconsistent with any obligation contained in Article 9.4, but is also reasonable in the circumstances.²⁵⁰

151. The EC disagrees with the U.S. and the compliance Panel’s interpretation, but offers no plausible alternatives. Though the EC does not deny that Article 9.4 does not speak to the situation where all investigated margins are either zero, *de minimis* or based on facts available, the EC merely avers that the Appellate Body should find an inconsistency without resolving the

²⁵⁰ The “all others” rate established in the Section 129 determination was only applied by the United States as a cash deposit rate, due to the subsequent revocation of the order retroactive to a date prior to the effective date of the Section 129 determination, and never as an assessment rate. As explained above, the cash deposits were then refunded in full, with interest. In this case, therefore, the security required by the United States was “reasonable.” GATT 1994, *Ad Note* to Article VI:2 and VI:3, para. 1.

question as to how an “all others” rate should be calculated.²⁵¹ If the Appellate Body were to accept the EC’s argument, then when a Member limits its investigation pursuant to Article 6.10, and all of the margins calculated for the investigated companies are either zero or *de minimis*, or calculated pursuant to Article 6.8, that Member would have no method for calculating a margin of dumping to be applied to the non-investigated companies.

152. The fact remains that the AD Agreement does not provide any specific obligations for the calculation of a margin of dumping to be applied to non-investigated companies, when the only margins calculated during the investigation are either zero or *de minimis*, or calculated pursuant to Article 6.8. In such a situation, the “ceiling” to be applied to the non-investigated companies cannot be determined by the specific methodology set forth in Article 9.4. Thus, the obligation the EC seeks to attribute to Article 9.4 simply does not exist.

VIII. The Panel Properly Rejected the EC’s Claims that It Was Improperly Composed

153. The EC also appeals from the compliance Panel’s rejection of its request for findings that the composition of the compliance Panel was inconsistent with Articles 8.3 and 21.5 of the DSU.²⁵² The compliance Panel correctly rejected the EC’s illogical and incorrect claim, and the Appellate Body should do likewise.

154. As an initial matter, the EC appeal does not fundamentally pertain to the substantive dispute between the EC and the United States. Rather, the EC appeal appears to be grounded in a concern about the functioning of the WTO as an institution. After all, it is the *EC* in this dispute,

²⁵¹ EC Appellant Submission, para. 350.

²⁵² EC Appellant Submission, paras. 10-55.

not the United States, that “requested the Director-General to determine the composition of the Panel.”²⁵³ The EC argues on appeal that it must be able to seek redress from the DSB for alleged violations of EC rights or “meta-rights” (whatever those might be) under the DSU, regardless of when such alleged violations arise or who is alleged to commit them.²⁵⁴ Nevertheless, such concerns do not necessarily bring a matter within the scope of review by a particular panel or the Appellate Body. Under Article 11 of the DSU, “[t]he function of panels is to assist the *DSB* in discharging its responsibilities under this Understanding and the covered agreements.”²⁵⁵ However, the EC turned to the Director-General, not the DSB. If the EC has recourse with respect to alleged failings in this regard, it is not to the panel or the Appellate Body.

155. Second, the “matter” that is the subject of the EC appeal was not before the compliance Panel. Indeed, given that panel composition invariably follows panel establishment, it is difficult to see how such a claim could ever be within the scope of a panel’s terms of reference.²⁵⁶ This is particularly the case in a proceeding under Article 21.5, in which a compliance panel’s terms of reference are further limited to resolving a “disagreement as to the existence or consistency with the covered agreements of measures taken to comply with the recommendations and rulings.” It is difficult to see how the composition of the compliance Panel could fall within the scope of such a review.

²⁵³ WT/DS294/26, para. 4.

²⁵⁴ EC Appellant Submission, para. 30.

²⁵⁵ Emphasis added.

²⁵⁶ See, e.g., DSU arts. 6.2, 7.1.

156. Third, the EC never explains how a panel that was not properly composed, and therefore not legally in existence, could make any “findings” that had any legal significance. Indeed, an improperly composed panel would not have the authority to make “findings” on the merits of the EC’s claims in this compliance proceeding or even on the question of its own composition. And if a compliance panel was not properly composed, it would have no authority to issue a report and there would be no basis for an appeal. In other words, the logical result of the EC’s position here is that the Appellate Body should dismiss the EC’s appeal in its entirety of the compliance Panel’s report as not being properly before it – there is no authorized panel, therefore no authorized report of a panel for purposes of Article 17.6 of the DSU and therefore no authorized issues of law or legal interpretations.

157. Further, even if this “matter” were somehow properly before the compliance Panel or the Appellate Body, the EC fails to demonstrate any breach of the DSU. For example, the EC argues that Article 21.5 provides for recourse to dispute settlement, “including wherever possible resort to the original panel.”²⁵⁷ However, the EC agrees that two of the three original panelists were not available. Thus, it was not possible to resort to the original *panel* in this compliance proceeding. Article 21.5 does not provide for how to compose a compliance panel in that circumstance. In the absence of being able to resort to the original panel, the EC requested the Director-General to appoint the panelists, and the United States agreed to have the Director-General do so.

²⁵⁷ EC Appellant Submission, para. 41.

158. The EC’s waiver of its alleged rights (or “meta-rights”) and conditional withdrawal of its appeal in the event of its success²⁵⁸ are also puzzling, to say the least. Suffice it to say that the EC is not the only party in this dispute with due process concerns and procedural rights. The United States has due process rights in the composition of the panel, and the EC is not in any position to waive the rights of another WTO Member.

159. Finally, the EC statement that the compliance Panel report contains “[t]he uncontested facts” at issue²⁵⁹ is false. The compliance Panel report merely relates the allegations made by the EC. As the United States informed the compliance Panel, “the EC did not have the permission of the United States to disclose” what the United States may or may not have said in confidential communications about this issue, and that “the EC’s disclosures are not only unauthorized, but they are also wrong.”²⁶⁰ The compliance Panel took note of the U.S. objection and accordingly deleted all references to alleged statements by the United States from its report.²⁶¹ The United States is frankly surprised and regrets that the EC repeats those allegations in its appellant submission. Repeating these unauthorized purported disclosures does not render them “uncontested.” Indeed, the only truly uncontested fact is that the parties turned to the Director-General to appoint the panelists.

²⁵⁸ EC Appellant Submission, paras. 50, 55.

²⁵⁹ EC Appellant Submission, para. 10 (citing Panel Report, para. 8.10).

²⁶⁰ U.S. Second Written Submission to the Compliance Panel, para. 7 & n.5.

²⁶¹ Panel Report, para. 8.12 n.552.

160. The United States remains deeply concerned about the EC’s unilateral actions in this regard. All WTO Members participating in dispute settlement have been well served by the panelist selection process run by the Secretariat, including by its confidentiality. We call upon the European Communities to re-consider its position in this matter. In the meantime, the United States requests that the Appellate Body follow the practice of the compliance Panel and omit any reference to EC assertions with regard to alleged statements made by the United States during the panel composition process from its report.²⁶²

IX. The EC Request for a Suggestion

161. Finally, the EC requests the Appellate Body exercise its discretion under Article 19.1 of the DSU to suggest that the United States

forthwith take all necessary steps of a general or particular character to ensure the conformity of all the measures at issue and all the measures taken to comply with the *Anti-Dumping Agreement*, the *GATT 1994*, the *DSU*, and the rulings and recommendations of the DSB in the original proceeding, with full effect not later than the end of the reasonable period of time, such that any and all actions, including administrative reviews, assessment instructions and final liquidations after that date are not based on zeroing, and are revised as necessary to achieve that result.²⁶³

The requested suggestion would appear to either (1) merely restate the findings or rulings that the EC is seeking in this appeal, and thus would provide no “useful guidance and assistance”²⁶⁴ in

²⁶² In addition, the EC comments in the final sentence of paragraph 54 of its appellant submission are not only completely unfounded, they are utterly inappropriate in WTO dispute settlement. The United States wishes to convey its deep dissatisfaction with the EC’s litigation tactics in this connection.

²⁶³ EC Appellant Submission, para. 351.

²⁶⁴ *EC – Bananas III (Article 21.5) (Ecuador II/US) (AB)*, para. 325.

implementing such rulings, or (2) to extend such rulings to an indeterminate set of future measures, none of which are within the compliance Panel’s terms of reference and therefore may not be the subject of recommendations and rulings, let alone suggestions about how to implement such recommendations and rulings. The Appellate Body recently rejected an EC request for a similar suggestion in another dispute,²⁶⁵ and should do so again here.

X. Conclusion

162. For the reasons stated above, the United States respectfully requests the Appellate Body to reject the EC appeal in its entirety.

²⁶⁵ *US – Zeroing II (EC) (AB)*, para. 394.