UNITED STATES – LAWS, REGULATIONS AND METHODOLOGY FOR CALCULATING DUMPING MARGINS ("ZEROING")

RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE EUROPEAN COMMUNITIES

WT/DS294

REBUTTAL SUBMISSION OF THE UNITED STATES OF AMERICA

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I. Introduction

1. In the original proceeding, the EC prevailed with respect to its "as applied" claims involving 15 investigations and 16 administrative reviews. The EC did not prevail with respect to its "as such" claims. It seems clear, then, that the questions before this compliance panel pertain to U.S. compliance with the findings concerning those specific investigations and reviews.

2. Nevertheless, the EC has adopted a multi-pronged effort to expand the recommendations and rulings in the original proceeding and to transform the "as applied" findings into something much broader. The EC would like this Panel to conclude that reviews involving totally separate inquiries – sunset reviews – are at issue in this proceeding, and that *different* administrative reviews, covering different time periods and entries, are also at issue in this proceeding. To do so, the EC is advancing inconsistent arguments, contending that the same determination is both an act and an omission, a measure taken to comply and a failure to take a measure to comply, and contending that determinations that did not even exist at the time of the recommendations and rulings were in fact within the scope of those recommendations and rulings.

3. The United States has removed the border measures in question. The United States has therefore complied with the recommendations and rulings of the DSB.

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

4. At the outset, the United States wishes to address the EC's claims, advanced for the first time in its rebuttal submission, concerning Articles 8.3 and 21.5. Specifically, the EC has asked the Panel to rule on its own composition, and, in particular, to find that it was not composed in a manner consistent with Articles 21.5 and 8.3 of the DSU.[1] It would be tempting for a responding party to agree with such a claim, as it would mean the panel in question had no authority to make findings on either these claims, or the claims in the panel request. However, taking that position would do an injustice to the dispute settlement system, and thus the United States simply points out that it is struck by the irony in the EC's self-defeating, illogical, and unsupportable claim.

5. The EC has advanced such an argument with at least one other panel.[2] That panel dismissed the EC's arguments as "unpersuasive"[3] and stated that it failed to see how the requested finding or ruling "would contribute to a positive solution to [the] dispute within the meaning of Article 3.7 of the DSU."[4] The United States agrees.

6. These claims are not within the terms of reference of this panel because they are not part of the "matter" referred to the DSB by the EC in its panel request. These claims are not about a

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[1] EC Second Written Submission, para. 21.
[2] *US – Cotton Subsidies (Article 21.5) (Panel)*, n. 83.
[3] *US – Cotton Subsidies (Article 21.5) (Panel)*, n. 83.
[4] *US – Cotton Subsidies (Article 21.5) (Panel)*, para. 8.28.

measure identified in that panel request. In fact it is unclear, in light of DSU 6.2 and 7.1, how such a claim could ever be within the scope of a panel's terms of reference.

7. At the same time, the United States would like to note that the EC did not have the permission of the United States to disclose anything that the United States may or may not have said during the panel composition process.[5] The United States is deeply concerned by the EC's unilateral actions in this regard. The United States therefore requests the Panel to strike from the record any discussion of the panel selection process (other than the EC's own selective allegations concerning its own positions) and request that third parties to destroy or return this information.

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

8. The EC's response to the U.S. request for a preliminary ruling only reinforces the deficiencies in the panel request. The EC states that "all the issues raised by the United States in its request were already addressed by the EC's First Written Submission."[6] The EC references a section in its first submission entitled "Preliminary Issue: Jurisdiction of the Panel."[7] The EC took the extraordinary step – in its first submission – of stating that it considered that

> all matters referred to in this submission fall within the scope of this proceeding. In particular, the measures mentioned in the Annex to the Panel Request, in addition to the Section 129 Determinations explicitly mentioned by the United States . . . fall within the scope of this proceeding.[8]

9. It is telling that the EC felt the need to include an entire section defending its view on the scope of a proceeding that *it* initiated – before the United States had even filed its first submission. Typically a complaining Party *understands*, and does not doubt, that its submission is consistent with the terms of reference in its panel request and therefore feels no need to make anticipatory assertions in that regard. As the United States will detail below, these anticipatory assertions end up reflecting the U.S. concerns and thus confirm the fact that the EC's submissions go beyond the terms of reference as delineated by the panel request.

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

10. The EC contends that the "subsequent determinations" identified in the Annex to its panel request in this proceeding were part of the terms of reference of the original proceeding, that they

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[5] Indeed, the EC's disclosures are not only unauthorized, but they are also wrong.
[6] EC Second Written Submission, para. 23.
[7] EC First Written Submission, para. 47 *et seq*.
[8] EC First Written Submission, para. 47.

are measures taken to comply, and that they are "omissions". For instance, not only is the EC arguing that these determinations are measures from the original proceeding as well as measures taken to comply, but the EC also argues that measures taken to comply both exist[9] and do not exist,[10] at the same time. These propositions are, of course, mutually contradictory.[11]

11. While the United States understands why the EC has great difficulty in finding a legal theory to justify why this Panel should consider those determinations to fall within its terms of reference, and why the EC would therefore write a series of contradictory arguments in the hopes that one of them might find favor, the United States regrets that – by the rebuttal submission – the complaining party in this matter has been unable to simplify matters for the Panel.

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

12. The United States also regrets that the EC would resort to characterizing the U.S. arguments in connection with the preliminary ruling request as "so patently absurd as to barely require further comment."[12] Having articulated that view, the EC nevertheless goes on to present two pages of commentary that does not address the basic question.

13. The crux of the matter is simple: why would the EC elect to refer in its panel request to the determinations in the 15 investigations and 16 administrative reviews as "measures" – a term with a particular meaning in the context of Article 6.2 of the DSU – but to all other determinations referenced in that request as "reviews"? The EC's own jurisdictional plea in its first submission exposes the EC's awareness that the panel request would be read just that way, and thus the EC took great pains to argue, or overargue, that the panel request should be read more broadly.

14. The United States is not ignoring or deliberately misconstruing the express terms of paragraph 7 of the panel request. The EC acknowledges that the panel request refers to "reviews *related to* the measures in question."[13] The EC appears to assume that the words "related to" transform the "reviews" into "measures" included within the terms of reference for purposes of its panel request. However, nowhere does the panel request state that those reviews are in fact the measures in question. The panel request by its very express application of the dispute

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[9] EC Second Written Submission, para. 44.

[10] EC Second Written Submission, paras. 35-36.

[11] As the Appellate Body noted, "[i]n principle, a measure which has been 'taken to comply. . . .' will *not* be the same measure as the measure which was the subject of the original dispute . . . ." *Canada – Aircraft (Article 21.5)(AB)*, para. 36. The Appellate Body reiterated this view in *US – Shrimp (Article 21.5)*, stating that "panel proceedings under Article 21.5 of the DSU involve, in principle, not the original measure, but a new and different measure that was not before the original panel." *US – Shrimp (Article 21.5)(AB)*, para. 23.

[12] EC Second Written Submission, para. 26.

[13] EC Second Written Submission, para. 26.

settlement term of art "measure" to 15 investigations and 16 administrative reviews *disclaims* that the reviews are measures within the scope of the panel request for purposes of the terms of reference. The EC asserts that paragraph 7's reference to the Annex bolsters its argument, but nothing in the Annex supports the argument that these reviews are measures for purposes of this proceeding.

15. The EC also contends that the U.S. "ability" to reference the reviews in the Annex is somehow evidence that those reviews are measures.[14] To be clear, the question is not whether the EC listed the reviews. The question is whether the EC identified those reviews *as measures* for purposes of this proceeding.

16. The EC continues to contend that its reference to "omissions" brings the reviews in the Annex within the terms of reference.[15] However, an omission is a failure to act, not an action; the reviews are "actions"; and the reviews are therefore not omissions. Thus, a fair reading of the panel request does not allow subsequent reviews to be read into the word "omission."

17. Finally, the United States would note that the EC has used a variety of terms to characterize its views on the measures at issue. The EC uses "subsequent reviews," "assessment instructions," and "amendments." The EC appears to use them somewhat interchangeably, which adds to the confusion.

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

18. In the view of the EC, the subsequent reviews listed in the Annex to its panel request were actually measures from the *original* dispute.[16] It appears that the EC relies upon the use of the phrase "amendments" from the original proceeding as support for this proposition.[17] The EC has failed to establish that these subsequent reviews are "amendments." The EC has failed to establish that the subsequent reviews were part of the original proceeding.

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

[14] EC Second Written Submission, para. 30.
[15] EC Second Written Submission, para. 29.
[16] EC Second Written Submission, para. 43.
[17] EC Second Written Submission, para. 40.

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

20. The EC, in its original panel request, directly referenced amended determinations in the context of U.S. antidumping law. U.S. law provides a procedure to correct or remove any faults or errors in a Commerce antidumping determination. For example, Commerce's regulations provide for a procedure to address and correct any "ministerial errors" that may be present in a published final determination.[18] In this procedure, interested parties may submit comments on the alleged ministerial errors.[19] Commerce will analyze these comments, and correct any ministerial errors by publishing an amended determination.[20]

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

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

23. Similarly, sunset reviews are not amendments "to the original measures" either, despite the EC's assertion to the contrary.[21] As noted above, administrative reviews are distinct proceedings because they involve different time periods and transactions. Sunset reviews are distinct from investigations and administrative reviews because they determine whether the

[18] *See* 19 C.F.R. § 351.224(c). (Exhibit US-22)
[19] 19 C.F.R. § 351.224(d). (Exhibit US-22)
[20] 19 C.F.R. § 351.224(e). (Exhibit US-22)
[21] EC Second Written Submission, para. 48.

expiration of an antidumping duty would be likely to lead to the continuation or recurrence of dumping and injury.[22] They do not determine antidumping duty liability.

24. Thus, a determination in a sunset review is not a mere correction or removal of the faults or errors from an investigation, but rather a separate determination for a separate purpose based on different evidentiary standards. Like many of the other determinations listed in the EC's annex to its Article 21.5 panel request, these sunset review determinations did not exist at the time of the establishment of the original panel.[23]

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

25. A further flaw with the EC's attempt to expand the terms of reference to include the subsequent determinations listed in the Annex is that many of these determinations did not yet exist at the time of the establishment of the original panel. A matter may only be referred to a panel if "final action has been taken by the administering authority."[24] Measures that are not yet in existence at the time of panel establishment are not within a panel's terms of reference under the DSU.[25]

26. The EC's original "as applied" claims could not be a broad as the EC now contends because that would mean that the EC's claim encompassed Commerce determinations and actions that were not in existence at the time of the establishment of the original panel. The original panel was established at the March 19, 2004 DSB meeting.[26] Yet most of the subsequent determinations identified by the EC in its annex to its Article 21.5 panel request were made *after* March 19, 2004. Thus, because they did not exist when the original panel was established, these determinations could not have been part of the original panel's terms of reference. Accordingly, none of the determinations made after March 19, 2004 could have been the subject of the DSB's

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[22] AD Agreement, Art. 11.3.

[23] The United States pointed out that the EC's original panel request did not include either the sunset review or the claim, in contrast to Japan's panel request in *US – Zeroing (Japan).* The EC responded by pointing out that its argument is "substantive." EC Second Written Submission, para. 49. That may well be; but in order for the Panel to address such a "substantive" argument, it must first conclude that the underlying claim is within the terms of reference of the proceeding. It is not.

[24] AD Agreement, Art. 17.4.

[25] *See, e.g, EC – Chicken Cuts (AB)*, para. 156; *US – Cotton Subsidies (Panel)*, para. 7.158 (finding that a measure that had not yet been adopted could not form a part of the Panel's terms of reference); *Indonesia – Autos (Panel)*, para. 14.3 (agreeing with the responding party that a measure adopted after the establishment of the panel was not within the panels terms of reference). In addition, such measures could not have been consulted upon, and thus the prerequisites of Article 4 of the DSU are not fulfilled with respect to such measures.

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

recommendations and rulings. Likewise, the DSB's recommendations and rulings could not have covered any liquidation instructions that were not issued as of March 19, 2004.[27]

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

4. The Subsequent Determinations Are Not Measures Taken to Comply

28. The EC further maintains that the subsequent determinations listed in its annex to its Article 21.5 panel request are measures taken to comply, and are thus within the scope of this proceeding.[28]

29. The EC has asserted that these determinations are "closely connected" to the original investigations and administrative reviews identified in the original proceeding.[29] Whether a determination has *a* connection to the DSB recommendations and rulings is not sufficient to bring that determination within the scope of an Article 21.5 proceeding. As the Appellate Body noted in *US – Softwood Lumber CVD Final (Article 21.5)* , "not . . . every assessment review will necessarily fall within the jurisdiction of an Article 21.5 panel."[30] Indeed, the Appellate Body stated that not every measure that has "some connection with," "could have an impact on," or could "possibly undermine" a measure taken to comply may be scrutinized in an Article 21.5 proceeding.[31] "Indeed, such an approach would be too sweeping."[32]

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

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[27] In this regard, the Panel should likewise reject the EC's suggestion that this Panel has the authority to review the sunset review determinations regarding Stainless Steel Bar from France, Germany, Italy and the United Kingdom. *See* EC Rebuttal Submission, para. 125. The determination to revoke these antidumping duty orders occurred well after the establishment of the original panel, indeed after the establishment of this Panel. Therefore, this Panel cannot examine the conformity of that determination in these Article 21.5 proceedings.

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

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

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

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

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

DSB."[33] This was evident by the fact that the Section 129 determination and the determination in the first administrative review both closely corresponded to the expiration of the reasonable period of time,[34] which provided Commerce with the ability to take account of the DSB's recommendations and rulings in the first administrative review.[35]

31. The situation in this dispute does not resemble the situation in *Softwood Lumber.* As the United States demonstrated in its First Written Submission, many of the subsequent determinations were made prior to the adoption of the DSB's recommendations and rulings.[36] Indeed, the EC seeks to include reviews dating as far back as *1998*.[37] Thus, these subsequent determinations could not have taken into consideration the recommendations and rulings of the DSB. Indeed, the EC has failed to provide any evidence that these subsequent determinations were adopted "in view of" such recommendations and rulings. Accordingly, there is no sufficient nexus for this Panel to consider these subsequent determinations to be measures taken to comply.

32. Thus, it is clear that not only is the EC seeking to have the Panel transform the as applied findings of the original proceeding to *future* events, but it is also trying to go back in time to have the Panel extend these findings to *past* events. However, the Panel's terms of reference are clear. They are limited to the determinations in the 15 investigations and 16 administrative reviews, and not to reviews occurring prior to the adoption of the recommendations and rulings in this dispute.

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

33. The EC maintains that it is not only challenging these subsequent determinations as measures taken to comply. Rather, the EC argues that its is challenging the "*omissions or deficiencies*" of the United States as reflected in these subsequent determinations.[38] This only further demonstrates, however, that the EC is attempting to gain the benefits of an "as such" finding, when the Appellate Body declined to make one.[39]

34. That is, the "as applied" findings made by the original panel and the Appellate Body covered the determinations made in the 15 investigations and 16 administrative reviews

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

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

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

[36] US First Written Submission, para. 47, n. 62.

[37] Panel Request Annex, Stainless Steel Wire Rod, Case No. 7, p. 3.

[38] EC Rebuttal Submission, para. 38 (emphasis in original).

[39] U.S. First Written Submission, paras 48-50.

identified by the EC in its original panel request. As demonstrated above, the "as applied" findings did not cover the subsequent determinations identified by the EC in its annex to the its Article 21.5 panel request.

35. An "as applied" challenge concerns the "application of a general rule to a specific set of facts."[40] By contrast:

> an "as such" claim challenges laws, regulations, or other instruments of a Member that have general and prospective application, asserting that a Member's 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.[41]

As demonstrated in the U.S. First Written Submission, the United States has removed the cash deposit rate established by the challenged determinations, and thus complied with the DSB's recommendations and rulings concerning the "as applied" claims.[42]

36. The EC, however, complains of the "continued" use of the allegedly "same methodology" that was the subject to the DSB recommendations and rulings "when carrying out dumping determinations in the subsequent review proceedings."[43] That is, the EC complains of the general and prospective application of the so-called "zeroing" methodology. Thus, despite the EC's contentions to the contrary, by seeking the application of the DSB's recommendations and rulings to "subsequent review proceedings,"[44] the EC is attempting to gain the benefit of an "as such" finding, when the Appellate Body declined to make one.

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

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

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[40] *US – OCTG from Argentina (AB)*, para 6, n. 22.
[41] *US – OCTG from Argentina (AB)*, para. 172.
[42] US First Written Submission, paras. 91-102.
[43] EC Rebuttal Submission, para. 43.
[44] EC Rebuttal Submission, para. 58.

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

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

> In order to offset or prevent dumping, a contracting party may *levy* on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product.[45]

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

> As in many other cases in customs administration, a contracting party may require reasonable security (bond or cash deposit) for the payment of anti-dumping or countervailing duty pending final determination of the facts in any case of suspected dumping or subsidization.[46]

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

41. Several provisions of the AD Agreement further demonstrate that determining whether relief is "prospective" or "retroactive" can only be determined by reference to date of entry. For example, Article 10.1 of the AD Agreement states that provisional measures and antidumping duties shall only be applied to "products which *enter for consumption* after the time" when the provisional or final determination enters into force, subject to certain exceptions.[47] This limitation applies even though the dumping activity that forms the basis for the dumping and injury findings necessarily occurs *prior* to the time that the determination enters into force. As Article 10.1 demonstrates, the critical factor for determining whether particular entries are liable

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[45] (Emphasis added).
[46] GATT, Ad Article VI, Paragraphs 2 and 3.
[47] (Emphasis added).

for the assessment of antidumping or countervailing duties is the legal regime in existence on the date of entry.

42. Similarly, Article 8.6 of the AD Agreement states that if an exporter violates an undertaking, duties may be assessed on products "*entered for consumption* not more than 90 days before the application of . . . provisional measures, except that any such retroactive assessment shall not apply to imports *entered* before the violation of the undertaking."[48] Once again, the critical factor for determining the applicability of the provision is the date of entry.

43. In addition, Article 10.6 of the AD Agreement states that when certain criteria are met, "[a] definitive anti-dumping duty may be levied on products which were *entered for consumption* not more than 90 days prior to the date of application of provisional measures . . . ."[49] However, under Article 10.8, "[n]o duties shall be levied retroactively pursuant to paragraph 6 on products *entered for consumption* prior to the date of initiation of the investigation."[50] As with Articles 8.6 and 10.1, whenever the AD Agreement specifies an applicable date for an action, the scope of applicability is based on entries occurring on or after that date.

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

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

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

46. The EC argues that prospective implementation of the DSB's recommendations and rulings with respect to U.S. administrative reviews would make the U.S. system of duty

[48] (Emphasis added).
[49] (Emphasis added).
[50] (Emphasis added).

collection "*untouchable*" and a "moving target."[51] In this regard, the U.S. system is no different from a prospective antidumping system – the EC's system. An "as applied" challenge to the allegedly improper collection of antidumping duties in a prospective system would necessarily come after the duties have been collected. By that time, the complaining Member could not recover the duties collected. Morever, if the allegedly inconsistent collection continues during the pendency of the dispute, the complaining Member will be required to initiate further disputes in order to address the situation pursuant to the WTO dispute settlement system. This is the system to which the Members agreed, and it applies to all Members equally. This Panel should reject the attempts of the EC to gain a greater degree of relief from this system than that the Members provided for.

47. Finally, the United States notes that there is a fundamental problem with the EC's arguments in this dispute. In paragraph 72 of its Rebuttal Submission the EC argues, "Therefore, even if the products at the time of importation are potentially liable for anti-dumping duties, the US system of duty assessment implies that such a responsibility only materializes when the amount of the duties due for a particular period is determined pursuant to administrative review proceedings." If it were true that liability for antidumping duties only arose after the completion of an administrative review, this would mean that there would be no "final action" as required by Article 17.4 of the AD Agreement for the EC to challenge whenever Commerce issued a determination in an antidumping investigation. Rather, the EC could only challenge a Commerce antidumping duty determination after such a determination was made in an administrative review.

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

48. Despite the revocation of the antidumping duty orders covering Stainless Steel Bar from France, Italy and the United Kingdom, the EC persists with its claim against the "all others" rate resulting from Commerce's Section 129 determinations.[52] The EC's claim continues to be unfounded.

49. The EC contends that under Article 9.4 of the AD Agreement, the United States could not use zero or *de minimis* margins or margins based on facts available in calculating the new all others rate.[53] This is despite the fact that these were the only margins remaining after Commerce recalculated the margins of dumping to implement the DSB's recommendations and rulings.

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[51] EC Rebuttal Submission, para. 90 (emphasis in original).
[52] EC Rebuttal Submission, paras. 128-31.
[53] EC Rebuttal Submission, para. 128.

50. The EC contends that its alternative methods would be consistent with WTO obligations.[54] Namely, the EC argues that Commerce could have continued to use the original all others rates.[55]

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

52. Indeed, had Commerce used the original all others rates, as advocated by the EC in this dispute, and had an average of zero or *de minimis* margins and margins based on facts available resulted in lower all other rates, the United States anticipates that the EC would have claimed that the use of the original all others rates was inappropriate as the underlying margins were tainted with "zeroing." The EC's arguments in this dispute are thus clearly results-oriented, and not based on the obligations found in the AD Agreement.[56]

VI. Stainless Steel Sheet and Strip in Coils from Italy

53. In its rebuttal submission, the EC continues to maintain that the alleged error in question is within the terms of reference of this Article 21.5 panel. Specifically, the EC contends that the alleged error is part of the measure taken to comply because it "was actually committed" in the context of the Section 129 proceeding.[57] Additionally, the EC avers that it has established a *prima facie* case with respect to its claims, and that the United States could not disregard an "obvious mistake" in the Section 129 proceeding.[58]

54. The EC's arguments are without merit. As we discuss below, the alleged error is an unchanged aspect of the original measure and, therefore, is not a part of the measure taken to comply. Moreover, the EC still has not made a *prima facie* case with respect to the claims asserted, nor has it put forth any authority to support its contention that the United States could not disregard an "obvious mistake" in the instant proceeding.

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[54] EC Rebuttal Submission, para. 129.

[55] EC First Written Submission, para. 139.

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

[57] EC Second Written Sub., para. 106.

[58] EC Second Written Sub., paras. 112-114, 120.

A. EC's Claim is Not Part of the Terms of Reference

55. As a preliminary matter, the EC advances factual inaccuracies in support of its argument that the alleged error "was actually committed" in the Section 129 proceeding.[59] To comply with the DSB's recommendations and rulings, Commerce recalculated the dumping margin for ThyssenKrupp Acciai Speciali Terni S.p.A. and ThyssenKrupp AST USA (collectively, "TKAST") by providing an offset to its dumping margin based on its non-dumped comparisons. In order to do this, Commerce made minimal revisions to the computer program from the original investigation that was used to calculate TKAST's margin. The only change that Commerce made within that program applied to the part of the program that caused the program to disregard non-dumped comparisons. Once that part of the program was changed in a manner consistent with the DSB's recommendations and rulings, Commerce re-ran the program to calculate a revised margin for TKAST.

56. Commerce made no other changes to the program and made no changes to the sets of data used by the program to calculate the dumping margin. In other words, apart from the limited zeroing change, Commerce simply re-ran the original computer program using the original data. Moreover, to the extent that Commerce had found, in the original investigation, that TKAST had failed to provide information with respect to 84 transactions, the original program included certain information in order to address those transactions, using "the facts available."[60] In the course of the Section 129 proceeding, Commerce made no changes to the program related to these 84 unreported transactions. Thus, to the extent that the EC contends that an error was made with respect to the treatment of these 84 unreported transactions, it is clear that the alleged error was not "actually committed" in the Section 129 proceeding as the EC asserts.

57. This fact is of critical importance because an unchanged aspect of the original measure is not a part of the measure taken to comply. The Appellate Body's decision in *EC – Bed Linen (21.5) (AB)* confirms this point. In that dispute, India sought to challenge, in the Article 21.5 proceeding, an aspect of the EC's original measure that did not change, and which the EC did not have to change to bring its measure into compliance with the DSB's recommendations and rulings.[61] In response, the EC argued that the measure taken to comply did not include unchanged findings from the original determination.[62] The Appellate Body agreed with the EC, explaining that, "[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

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[59] EC Second Written Sub., para. 106.

[60] *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils from Italy*, 64 Fed. Reg. 30750, 30755 (June 8, 1999) (Exhibit US-23), amended by *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order; Stainless Steel Sheet and Strip in Coils from Italy*, 64 Fed. Reg. 40,567 (July 27, 1999). (Exhibit US-24)

[61] *EC – Bed Linen (Article 21.5) (AB)*, para. 13.

[62] *EC – Bed Linen (Article 21.5) (AB)*, para. 38.

taken to comply with the DSB rulings in the original dispute."[63] Consistent with the reasoning in *EC – Bed Linen 21.5 (AB)*, the EC cannot assert its challenge before this Article 21.5 panel because the treatment of the 84 unreported transactions is an unchanged aspect of the original measure.

58. The EC's alternative argument – that the alleged error is within the scope of this proceeding because it bears a close nexus to the measure taken to comply – is inapposite. In *Softwood Lumber*, there was an original investigation, which was found inconsistent with the covered agreements. The United States revised the determination relating to the original investigation. Canada argued that a separate measure, an administrative review. For the reasons described above, the Appellate Body concluded that, under those particular facts, the administrative review was within the scope of that Article 21.5 proceeding.

59. Here, however, there is no third measure. There is the original investigation and the measure taken to comply. Thus, this situation is analogous to *Bed Linen*, not *Softwood Lumber.* The EC failed to advance a claim (assuming *arguendo* that there is a basis in the Antidumping Agreement for such a claim) in the original proceeding, and is using the Article 21.5 proceeding to challenge an aspect of the original measure that was unchanged, and that the United States did not have to change, to bring its measure into compliance. Here, the EC is seeking precisely what it opposed (and the Appellate Body did not permit) in *EC – Bed Linen*: affording complaining parties a second bite at the apple.

B. The EC Continues to Fail to Present a Prima Facie Case

60. In its first submission, the EC asserted that the United States' failure to address the alleged errors is inconsistent with various Articles of the *Antidumping Agreement*. Even if, *arguendo*, this Panel could reach this claim (though for the reasons given in the previous subsection it should not), the EC's claims fail. The United States rebutted the EC's arguments by noting that the EC failed to make a *prima facie* case with respect to the claims asserted. The EC has not responded to that argument, other than to assert that "the mere text of those provisions reflects the obligations that the United States, by failing to correct the error, has infringed."[64]

61. As the United States noted in its first written submission, the Appellate Body has stated that "a *prima facie* case must be based on 'evidence *and* legal argument' put forward by the complaining party in relation to *each* of the elements of the claim."[65] The EC, as the complaining party, bears the burden of coming forward with evidence and legal argument to establish a *prima facie* case of a violation. A bald assertion that a clerical error breaches a series

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[63] *EC – Bed Linen (Article 21.5) (AB)*, para. 86.
[64] EC Second Written Sub., para. 114.
[65] *US – Gambling (AB)*, para. 140, quoting *US – Wool Shirts (AB),* at 335.

of provisions is insufficient. Having failed at that task yet again, the United States respectfully requests that this Panel reject the EC's claims.

C. The Scope of an Article 21.5 Proceeding is Limited

62. The EC argues that "obvious mistakes" should have been addressed in the Section 129 proceeding.[66] According to the EC, the United States should have addressed all claims of error and, in fact, had ample time to do so.[67] The EC is offering a test that is not found in the AD Agreement or the DSU – indeed, the EC offers no textual support for its assertion. Moreover, the EC's test would tend to create more problems than it solves. What is an "obvious" mistake? To whom? Why would "obvious" mistakes be exempt from the limitations on compliance proceedings, but "non-obvious" mistakes would not? And if the mistake were "obvious," why did the EC fail to raise it in the original proceedings?

63. To support its view that obvious mistakes should be corrected, the EC attempts to demonstrate that the United States *has* corrected mistakes in the past. Whether the United States has used section 129 proceedings to correct mistakes is not germane to the question at hand, which is whether the United States – or any other responding party – is *obligated* to do so.

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

64. In its first submission, the United States reserved the right, in the event that the EC pursued claims against revoked measures, to request a preliminary ruling regarding the EC's claims concerning Articles 3.1, 3.2, 3.5, and 5.8. of the AD Agreement in the cases involving Stainless Steel Bar from France, Germany, Italy and the United Kingdom.[68] As the United States noted, the orders have been revoked, but the EC states in its rebuttal submission that it continues to pursue these claims.[69]

65. As the United States also noted in its first submission,[70] the EC advanced these same claims, unsuccessfully, in the original proceeding. The EC does not dispute this fact; instead, the EC asks the United States to identify where in the original proceeding the EC made these claims.[71] The United States notes that these claims appear in the corrected version of the EC's original Panel request under Section 3.2, "as applied claims."[72]

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[66] EC Second Written Sub., para. 120.
[67] EC Second Written Sub., para. 116.
[68] U.S. First Written Submission, para. 65.
[69] EC Second Written Submission, para. 132.
[70] U.S. First Written Submission, para. 65.
[71] EC Second Written Submission, para.133.
[72] *See also US – Zeroing (EC) (Panel)*, paras. 4.114-4.116.

66. The EC is precluded from pursuing these claims here. First, the original Panel did not find that the United States had breached its obligations with respect to Articles 3.1, 3.2, 3.5, and 5.8. Thus, the recommendations and rulings of the DSB did not pertain to any findings on these claims, and the United States was under no obligation to take a measure to comply with respect to such claims.

67. Second, not only were the claims not part of the DSB's recommendations and rulings, but the original Panel specifically found those claims unavailing, stating it "perceive[d] no need to pronounce on the dependent claims raised by the European Communities" under, *inter alia*, Articles 3.1, 3.2, 3.5, and 5.8 of the AD Agreement.[73] The reasons given by the original Panel for dismissing the claims similarly apply to compel rejection of the EC's reiterated argument here. Now, as in the original proceeding, it is not necessary for the Panel to address dependent claims where the United States has implemented the DSB's recommendations with respect to the violations found. As the original Panel stated:

> [d]eciding such dependent claims would provide *no additional guidance* as to the steps to be undertaken by the United States *in order to implement our recommendation regarding the violation on which it is dependent.*[74]

68. The Appellate Body noted and did not disturb the original Panel's treatment of the injury claims.[75] The EC now argues, however, that the United States was in fact obliged to take steps with respect to the injury claims. Yet that argument contradicts the express finding of the original Panel that no such steps would need to be taken.

69. The EC includes a brief statement that its claim "refers to new measures (*i.e.*, measures taken to comply) and, thus, new claims can be made against them."[76] The EC, however, is not making "new claims." The EC is trying to resuscitate failed claims from the original dispute. The Appellate Body has clarified that "adopted panel and Appellate Body reports must be accepted by the parties to a dispute" and compliance bodies will decline to revisit original Panel and Appellate Body reports that have been adopted and accepted by the parties.[77] Because the original Panel rejected the EC's injury claims in the original dispute on the basis that addressing them would provide no further guidance to the United States for purposes of implementation, the EC is precluded from renewing those claims here.

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[73] *US – Zeroing (EC) (Panel)*, para. 7.109.
[74] *US – Zeroing (EC) (Panel)*, para 7.109 (emphasis added).
[75] *US – Zeroing (EC) (AB)*, n.12.
[76] EC Second Written Submission, para. 134.
[77] *Chile – Price Band System (AB) (21.5)*, para. 236.

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

70. In its first submission, the United States explained that there is no textual basis for the EC's claim of a breach of Article 21.3.[78] The EC has continued to fail to explain the textual basis for its claim. The EC asserts that Article 21.3 "requires WTO Members to comply *immediately* with the recommendations of adopted DSB reports."[79] Article 21.3 does no such thing. Indeed, Article 21.3 *acknowledges* that immediate compliance may be impracticable and thus confers a right on the *responding* Member to a reasonable period of time.

71. The EC's reliance on *Australia – Salmon (21.5)* is of no help in this regard. The panel in that dispute did not find a breach of Article 21.3, which is what the EC is requesting here. In that context, the EC's attempt to distinguish *US – Cotton Subsidies (Article 21.5) (Panel)* is unavailing. The panel in that dispute squarely rejected the claim the EC is advancing here: a breach of Article 21.3.[80]

IX. Conclusion

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

[78] U.S. First Written Submission, para. 104.
[79] EC Second Written Submission, para. 94.
[80] *See* U.S. First Written Submission, para. 106.

Exhibit List

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