EUROPEAN UNION – COST ADJUSTMENT METHODOLOGIES AND CERTAIN ANTI-DUMPING MEASURES ON IMPORTS FROM RUSSIA (SECOND COMPLAINT)

(DS494)

RESPONSES OF THE UNITED STATES OF AMERICA TO THE PANEL'S QUESTIONS TO THIRD PARTIES

September 27, 2019

TABLE OF REPORTS

Short Title	Full Case Title and Citation
Argentina – Import Measures (AB)	Appellate Body Reports, *Argentina – Measures Affecting the Importation of Goods*, WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, adopted 26 January 2015
Canada – Aircraft (AB)	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999
China – Broiler Products	Panel Report, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R and Add.1, adopted 25 September 2013
EU – Biodiesel (AB)	Appellate Body Report, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/AB/R, adopted 26 October 2016
India – Patents (AB)	Appellate Body Report, *India – Patent Protection for Phar5maceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998
Ukraine – Ammonium Nitrate (Russia) (AB)	Appellate Body Report, Ukraine – Anti-Dumping Measures on Ammonium Nitrate (Russian Federation), WT/DS493/AB/R, not yet adopted
US – Corrosion-Resistant Steel Sunset Review (AB)	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004
US – DRAMS	Panel Report, *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea*, WT/DS99/R, adopted 19 March 1999
US – Gasoline (AB)	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996
US – Hot-Rolled Steel (AB)	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel*

	Products from Japan, WT/DS184/AB/R, adopted 23 August 2001
US – OCTG (Korea)	Panel Report, *United States – Anti-Dumping Measures on Certain Oil Country Tubular Goods from Korea*, WT/DS488/R and Add.1, adopted 12 January 2018
US – Oil Country Tubular Goods Sunset Reviews (AB)	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004
US – Stainless Steel (Mexico) (AB)	Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008
US – Zeroing (EC) (AB)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006
US – Zeroing (Japan) (AB)	Appellate Body Report**,** *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322, adopted 23 January 2007
US – Clove Cigarettes (AB)	Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012

WRITTEN QUESTIONS FROM THE PANEL TO ALL THIRD PARTIES AFTER THE THIRD PARTY SESSION

Question 1. The Panel understands that, for the European Union, the calculation of a dumping margin is not necessary to establish a likelihood of recurrence of dumping. Do you agree with this interpretation?

1. The United States agrees that, to evaluate the likelihood of recurrence of dumping, nothing in the text of Article 11.3 of the Anti-Dumping Agreement requires an investigating authority to calculate or rely upon a dumping margin.

2. Instead, Article 11.3, simply provides that "any definitive antidumping duty shall be terminated on a date not later than five years from its imposition . . . unless the authorities determine . . . that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.

3. Consistent with the text, the Appellate Body has observed that:

> Article 11.3 neither explicitly requires authorities in a sunset review to calculate fresh dumping margins, nor explicitly prohibits them from relying on dumping margins calculated in the past. This 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.[1]

4. Similarly, the Appellate Body in *US – Zeroing (Japan*) noted that an investigating authority may in making a likelihood determination decide whether to rely upon dumping margins.[2] The Appellate Body has explained that under Article 11.3, to impose an anti-dumping duty for longer than five years, an investigating authority must determine, among other things, that "the expiry of the duty would be likely to lead to a continuation or recurrence of *dumping*."[3] That likelihood of recurrence determination does not require the calculation of a dumping margin.

If yes, what methodology should be used for this purpose?

5. As to the correct methodology to evaluate the likelihood of recurrence of dumping under Article 11.3, there may be multiple ways in which an investigating authority could make such a determination. The appropriate approach might well depend upon the facts of a given proceeding. As an example, investigating authorities could "choose to rely upon dumping margins in making their likelihood determination."[4] But as explained above, Article 11.3 does not require that they do so.

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[1] *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 123 (internal citation omitted).
[2] *US – Zeroing (Japan) (AB)*, paras. 182-183 ("{S}hould investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation of these margins must conform to the disciplines of Article 2.4.").
[3] *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 104 (emphasis in original).
[4] *See US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 127.

Question 2. The panel in *US-DRAMS* stated that:

> **[T]he scope of application of the AD Agreement is determined by the scope of the post WTO review, so that pursuant to Article 18.3, the AD Agreement only applies to those parts of a pre-WTO measure that are included in the scope of a post-WTO review. Any aspects of a pre-WTO measure that are not covered by the scope of the post-WTO review do not become subject to the AD Agreement by virtue of Article 18.3 of the AD Agreement. By way of example, a pre-WTO injury determination does not become subject to the AD Agreement merely because a post-WTO review is conducted relating to the pre-WTO determination of the margin of dumping. (Panel Report, *US-DRAMS*, para. 6.14)**

a. Do you agree with the panel's statement?

6. The *US – DRAMS* panel's statement is consistent with our understanding of how, under Article 18.3, the Anti-Dumping Agreement applies to pre-WTO or pre-accession determinations.

7. Specifically, under Article 18.3, the Anti-Dumping Agreement applies to investigations and reviews of "existing measures" that were "initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement."[5] The Anti-Dumping Agreement does not apply to investigations or reviews made before "the date of entry into force for a Member of the WTO Agreement."[6] Accordingly, as illustrated by the example in the excerpt above, a pre-WTO determination does not become subject to the Anti-Dumping Agreement simply because a post-WTO review relates to the pre-WTO determination of the margin of dumping.

b. Does Article 18.3 prevent Russia from challenging dumping or injury determinations made before Russia's accession to the WTO?

8. As elaborated above, to the extent Russia's claims require that the Panel consider a pre-Russian accession measure as covered by the Anti-Dumping Agreement, under Article 18.3 those claims must fail. In this regard, the United States notes that the country-wide rate under the EU's analogue country methodology, relied upon in interim and expiry reviews of the EU's anti-dumping measure on ammonium nitrate from Russia, was calculated before Russia's 2012 accession to the WTO.[7]

9. We understand Russia to challenge that "from 2002 the European Union continues applying the country-wide anti-dumping duty" – namely, with respect to the EU's 2008 and 2014 expiry and 2018 interim review of ammonium nitrate.[8] Before considering the merits of Russia's arguments concerning these reviews, the Panel should consider the import of Article 18.3 of the Anti-Dumping Agreement. As explained above, the panel's reasoning in *US –DRAMS* may aid in this task.

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[5] Anti-Dumping Agreement, Art. 18.3.
[6] Anti-Dumping Agreement, Art. 18.3.
[7] *See* EU First Written Submission, paras. 422-423.
[8] Russia First Written Submission, paras. 900-903.

10. Moreover, with respect to the 2018 review, the United States notes the EU's observation that it "set the duty based on the injury margin determined in the 2018 review" rather than the margin calculated in the 2002 expiry review.[9] The United States also notes that the EU submits that in the "2014 expiry review, the Commission did not calculate dumping margins." Thus, for Russia's claims regarding the 2014 and 2018 reviews, it may not in the first place be necessary for the Panel to reach the Article 18.3 issue.

Question 3. Do you consider that Article 18.3 allows a Member to maintain a measure that is inconsistent with the Anti-Dumping Agreement if it was adopted prior to the entry into force of this Agreement?

11. Under Article 18.3, where a measure precedes a party's accession to the WTO, the Anti-Dumping Agreement does not govern pre-accession determinations between the acceding Member and any other WTO Member. The panel in *US – DRAMS* explained, in connection with Article 18.3 of the Anti-Dumping Agreement, that "pre-WTO measures do not become subject to the AD Agreement simply because they continue to be applied on or after the date of entry into force of the WTO Agreement for the Member concerned," and that "we do not believe that the terms of Article 18.3 provide for the application of the AD Agreement to all aspects of a pre-WTO measure simply because parts of that measure are under post-WTO review. Instead, we believe that the wording of Article 18.3 only applies the AD Agreement to post-WTO review."[10]

12. Accordingly, under Article 18.3, a determination made prior to a party's accession to the WTO would not be inconsistent with the Anti-Dumping Agreement. The Member would have owed no WTO treaty obligation – under the Anti-Dumping Agreement or otherwise – to the non-Member at the time the determination was made.

Question 4. In its first written submission, Russia argues that:

> **Nothing in the text of Article 2.2 of the Anti-Dumping Agreement suggests the application of [the "representative"] condition for the other alternative method of the normal value determination, i.e. construction of normal value. *Moreover, there is no requirement to use only those prices that are unaffected by so called 'distortions' or 'market impediments' due to government regulation.* The text of Article 2.2 explicitly requires to construct the normal value on the basis of 'the cost of production [of the product] in the country of origin'. (Russia's first written submission, para. 100)**
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> **Could the third parties comment on this argument?**

13. As an initial matter, the United States notes the EU's observation that Russia's claim is "grounded in basic error."[11] Specifically, the argument that Article 2.2 of the Anti-Dumping Agreement contains no "representative" condition with respect to the construction of normal value appears to misread Article 2(3) of the EU's Basic Regulation. The term "representative" in

[9] EU First Written Submission, para. 433.
[10] *US – DRAMs (Panel)* (DS99), para. 6.14.
[11] EU First Written Submission, para. 52.

Article 2(3) of the Basic Regulation applies only to export prices, and has nothing to do with the costs used by the investigating authority to construct normal value.

14. Leaving aside that the excerpted argument is built upon this misunderstanding, it also misreads Article 2.2 of the Anti-Dumping Agreement. The text does not "explicitly require[]" that normal value be constructed using the cost of production in the country of origin. Rather, as explained in the United States Third Party Submission,[12] the "proper comparison" text of Article 2.2 of the Anti-Dumping Agreement reflects that establishing normal value requires a "comparable price, in the ordinary course of trade," and cannot be interpreted as preventing an investigating authority from evaluating evidence that government interference affects the "proper comparison" of prices or costs. Several examples demonstrate that domestic price, third-country export price, and cost of production may be considered *not* "a comparable price, in the ordinary course of trade," when the evidence of record indicates they do not reflect normal commercial principles:

- a price for a sale may not reflect the criteria of the marketplace[13];
- a price for a sale might not reflect normal commercial practices, such as in relation to other terms and conditions of sale[14];
- a price for a sale might be one established between related parties, rather than a transaction between economically independent entities at market prices, and thus not reflect normal commercial principles[15]; or
- a price for the sale of an input used in the production of the product under consideration may not be consistent with an arm's-length transaction price or reflect normal commercial principles.[16]

15. The above examples indicate that where normal commercial conditions do not prevail in the marketplace, prices may not be "comparable". To the extent the representative condition in the EU Basic Regulation actually requires the investigating authority to review whether the use

[12] United States Third Party Submission, paras. 5-24.
[13] *US – Hot-Rolled Steel (AB)*, para. 142 ("We note that determining whether a sales price is higher or lower than the 'ordinary course' price is not simply a question of comparing prices. Price is merely one of the terms and conditions of a transaction. To determine whether the price is high or low, the price must be assessed in light of the other terms and conditions of the transaction. Thus, the volume of the sales transaction will affect whether a price is high or low. Or, the seller may undertake additional liability or responsibilities in some transactions, for instance for transport or insurance. These, and a number of other factors, may be expected to affect an assessment of the price.").
[14] *US – Hot-Rolled Steel (AB)*, paras. 141, 143 n. 106 (noting a liquidation sale is one example of a sale between independent parties that might be considered not in the ordinary course of trade, because it "may not reflect 'normal' commercial principles.").
[15] *US – Hot-Rolled Steel (AB)*, para. 141, 143 (noting that "[i]t suffices to recognize that, *as between affiliates*, a sales transaction *might* not be 'in the ordinary course of trade', either because the sales price is higher than the 'ordinary course' price, or because it is lower than that price" (italics original)).
[16] *EU – Biodiesel (AB)*, para. 6.41 (finding that in applying the second condition of Article 2.2.1.1, "an investigating authority is 'certainly free to examine the reliability and accuracy of the costs recorded in the records of the producers/exporters' to determine … whether non-arms-length transactions or other practices affect the reliability of the reported costs"); *US – Oil Country Tubular Goods (Korea) (Panel)*, paras. 7.192-7.198.

of costs in the exporting country to construct normal value would result in "comparable prices", the regulation would not run afoul of Article 2.2 of the Anti-Dumping Agreement.

16. Indeed, the Appellate Body in *EU – Biodiesel (Argentina)* observed that the reference to "in the country of origin" in Article 2.2 "indicates that, whatever information or evidence is used to determine the 'cost of production', it must be apt to or capable of yielding a cost of production in the country of origin."[17] According to the Appellate Body, "[t]his, in turn, suggests that information or evidence from outside the country of origin may need to be adapted in order to ensure that it is suitable to determine a 'cost of production' 'in the country of origin'."[18] An investigating authority thus is not required under Article 2.2 of the Anti-Dumping to adapt an out-of-country source for an input price so as to match the rejected cost for that input.

Question 5. To what extent does the text of Article 2.2 of the Anti-Dumping Agreement, read in context, suggest that the term "particular market situation" could encompass a scenario where domestic prices or costs of production are not market-determined, because of "distortions" due to "government regulation"?

17. As an initial matter, the above question does not define what is meant by "distortions" that are caused by "government regulation". For purposes of determining normal value under Article 2.2 of the Anti-Dumping Agreement, the relevance of the government regulation will depend upon the particular facts before the investigating authority.

18. But as a general proposition, government regulation could be a factor taken into account under the particular market situation provision of Article 2.2 if such regulation results in domestic prices not being suitable for a proper comparison. In other words, the United States interprets Article 2.2 of the Anti-Dumping Agreement to permit an investigating authority to examine the effect of government regulation in the domestic market to the extent that it may be relevant in determining the existence of a particular market situation. For its part, the "particular market situation" language of Article 2.2 of the Anti-Dumping Agreement contains no language to prohibit an examination of whether the distortion caused by government regulation may preclude a proper comparison.

19. If the government regulation in question causes domestic market conditions to differ materially from market-based conditions (such as those reflecting normal commercial principles), this could result in "distortions" to sales prices of the like product or costs, rendering them unfit for a proper comparison.

Question 6. To what extent does Article 2.2 allow the rejection of *costs* considered to be affected by "market distortions" from the construction of the normal value, taking into account that, according to that provision, the only consequence of determining that a particular market situation exists is that the normal value will be determined based on an alternative method: namely, the cost of production in the country of origin or third-country export prices?

[17] *EU – Biodiesel (Argentina) (AB)*, para. 6.70.
[18] *EU – Biodiesel (Argentina) (AB)*, para. 6.70; *Ukraine – Ammonium Nitrate (AB)*, para. 6.121.

20. The United States does not understand Russia to be challenging whether, in constructing normal value, the "particular market situation" provision of Article 2.2 of the Anti-Dumping Agreement permits an investigating authority to reject the costs affected by "market distortions". Rather, Russia is challenging the second subparagraph of Article 2(3) of the EU's Basic Regulation to the extent that it provides that "a particular market situation for the product concerned" exists "when prices are artificially low."[19]

21. Russia further alleges that the text of Article 2(3) of the Basic Regulation is "as such" inconsistent with Article 2.2 because the condition that "a particular market situation for the product concerned" exists "when prices are artificially low"[20] introduces "an additional circumstance for determining normal value via alternative methods."[21] Again, this facet of Russia's claim pertains to prices, not costs. Thus, to resolve Russia's claims in this dispute, the Panel need not address the issue presented in this question.

Question 7. Do you agree with Russia that the concept of "particular market situation" describes only one specific situation in relation to a country's market as a whole, as provided in the Second Interpretative Note *Ad* Article VI:1 of the GATT 1994 (Second *Ad* Note) (Russia's first written submission, paras. 141-152)? Does the language in Article 2.2 support the view that "the particular market situation" also covers the situation of an industry or a specific product?

22. The United States disagrees with Russia's interpretation: "particular market situation" in Article 2.2 of the Anti-Dumping Agreement is not limited to one specific situation in relation to a country's market as a whole.

23. As an initial matter, to the extent the above question suggests that the Second *Ad* Note provides for or supports such an understanding, that framing is incorrect. The Second *Ad* Note identifies one situation – an exemplar – in which "special difficulties may exist in determining price comparability."[22]

24. Indeed, nothing in the text indicates that it is the exclusive situation in which "special difficulties may exist". The text does not read, for example, that "it is recognized that only in the case of imports" from a state-trading country. There is no language that circumscribes the importing Member's investigation "in determining price comparability for the purposes of paragraph 1". That is, the text does not limit to this one situation the determination that there is no "comparable price, in the ordinary course of trade". The recognition by Members of a "case" creating special difficulties ("It is recognized that, in the case …") does not logically imply that there could be no other "case". Moreover, the text does not provide legal authority to do something that an importing Member may not already do or is prohibited from doing. That is, the Second *Ad* Note is not written as an exception to GATT 1994 Article VI.

[19] *See* Russia First Written Submission, para. 21 (emphasis added).
[20] EU Basic Regulation Art. 2(3) (emphasis added).
[21] *See* Russia First Written Submission, paras. 21, 133.
[22] The example identified in the Second *Ad* Note is "in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State."

25. Turning to the text of Article 2.2 of the Anti-Dumping Agreement, it provides for "[t]he particular market situation" that prevents sales in the domestic market of the exporting country from "permit[ting] a proper comparison . . . ." The article "the" refers to the particular market situation at issue that prevents a proper comparison.[23] The term does not imply that the exporting country may contain just one such situation or otherwise circumscribe the meaning of "particular market situation". Similarly, the use of the singular "situation" does not mean that the exporting country may contain just one, country-wide particular market situation.

26. Had the drafters intended to limit in scope the term "particular market situation", they could have drafted the text to reflect that intent (e.g., with an adjective such as "country-wide").[24] Because the text of Article 2.2 does not limit "particular market situation" in this way, a particular market situation could affect all market participants, or its impact could be limited to some market participants, a particular industry, or specific products.

27. Thus, an investigating authority may find that a "particular market situation" exists when the evidence of record demonstrates that a specific condition or set of circumstances renders the comparable price, in the ordinary course of trade, for the like product, unfit as a proper comparison.[25]

Question 8. Article 2.7 of the Anti-Dumping Agreement states that "[Article 2 of the Anti-Dumping Agreement] is without prejudice to the [Second *Ad* Note]" Do you consider that the language used in Article 2.7 suggests that Article 2.2 and the Second *Ad* Note concern different matters, such that Article 2 should be applied in a way that is unaffected by the provisions of the Second *Ad* Note?

28. The United States does not consider that the Second *Ad* Note limits the ability of an investigating authority under Article 2.2 of the Anti-Dumping Agreement to examine a "particular market situation". Specifically, the text of the Second *Ad* Note contains no language to suggest that it is an exception or derogation from Article VI of the GATT 1994. Rather, the text of the Second *Ad* Note is expressed as a recognition by Members that, in the situation described therein, "special difficulties may exist in determining price comparability." As explained in the United States Third Party Submission, that situation is written as an example, not the exclusive situation where "special difficulties may exist".[26]

29. The Second *Ad* Note suggests that the importing Member exercise judgment as to whether use of domestic prices is "appropriate". Specifically: "in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate."[27] In other words, the text of the Second *Ad* Note describes a situation in which difficulties exist "in determining price comparability for the purposes of paragraph 1" of Article VI, which confirms

[23] Other particular market situations in the exporting country – those that do not affect a proper comparison – are not relevant, of course, to the analysis under Article 2.2 of the Anti-Dumping Agreement.
[24] *See*, e.g., *India – Patents (AB)*, para. 45 (observing that the principles of interpretation in Article 31 of the Vienna Convention "neither require nor condone the imputation into a treaty of words that are not there or . . . concepts that were not intended.").
[25] *See* United States Third Party Submission, paras. 16-20.
[26] *See* United States Third Party Submission, paras. 21-24.
[27] Emphasis added.

that the authority to "determin[e] price comparability" exists in Article VI:1 of the GATT 1994. There is also nothing in the text to preclude an overlap between the matters discussed in Article 2.2, Article 2.7, and the Second *Ad* Note, depending on the facts and circumstances of the particular case.

30. Finally, as explained in response to Question 7 and in the United States Third Party Submission,[28] neither Article 2.7 nor the Second *Ad* Note control or further define the meaning of the phrase "particular market situation" under Article 2.2. Article 2.2 contains nothing to suggest that the meaning of the phrase "particular market situation" is limited by the second *Ad* Note.

Question 9. The European Union argues that the findings of the Panel and Appellate Body in *EU – Biodiesel (Argentina)* concern the same issues and the same WTO provisions as those raised by Russia's claim regarding the second subparagraph of Article 2(5) (European Union's first written submission, paras. 76-82). Do you agree? If not, please explain the differences between the present dispute and *EU - Biodiesel (Argentina)*.

31. The United States agrees that Russia's claims regarding the second subparagraph of EU Basic Regulation Article 2(5) overlap with certain issues in *EU – Biodiesel (Argentina)*. As reflected in the passages excerpted by the EU, *EU – Biodiesel* also pertained to the application of the second subparagraph of Article 2(5).[29] Moreover, the United States understands Russia's position to be that the Appellate Body in *EU – Biodiesel (Argentina)* incorrectly decided this issue "based on mere assumptions", not that the issues here are materially different.[30]

32. However, the United States rejects the implication the EU draws from the fact that *EU – Biodiesel (Argentina)* pertained to similar issues.[31] Specifically, the EU's request that the Panel "follow the prior guidance of the Appellate Body" is misplaced.[32] As explained in response to Question 10, the panel and Appellate Body interpretations in *EU – Biodiesel (Argentina)* are not "precedent" and do not control this dispute. If those prior interpretations concern similar issues and the Panel finds the reasoning to be persuasive, the Panel may refer to that reasoning in conducting its own objective assessment.

Question 10. To what extent are the panel's and Appellate Body's findings in *EU – Biodiesel (Argentina)* relevant to the Panel's analysis of the meaning of the second subparagraph of Article 2(5) and its alleged inconsistency with Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement?

33. The findings of the Appellate Body and panel in *EU – Biodiesel (Argentina)* are relevant to the extent that the Panel in this dispute finds the reasoning to be persuasive. However, there is no provision in the DSU or the covered agreements that establishes a system of "case-law" or

[28] *See* United States Third Party Submission, paras. 22-23.
[29] EU First Written Submission, para. 78 (quoting *EU – Biodiesel (Argentina) (AB)*, paras. 6.211-213, 6.242, 6.283-287).
[30] Russia First Written Submission, para. 270.
[31] *See* EU First Written Submission, para. 82.
[32] *See* EU First Written Submission, para. 82.

"precedent," or that otherwise requires a panel to apply the provisions of the covered agreements consistently with the adopted findings of previous panels or the Appellate Body.

34. In requesting that the Panel simply "follow the prior guidance of the Appellate Body", the EU cites the Appellate Body's report in *US – Stainless Steel (Mexico)*, which stated that "absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case."[33] No provision of the DSU – or any covered agreement – refers to "cogent reasons" or suggests that a panel must justify legal findings that are not consistent with the reasoning set out in prior reports. Indeed, were a panel to decide to apply the reasoning in prior Appellate Body reports alone, and decline to fulfill its function under Articles 7.1, 11, and 3.2 of the DSU – to make findings on the applicability of and conformity with existing provisions of the covered agreements, as understood objectively through the application of customary rules of interpretation – the panel would risk creating additional obligations for Members that are beyond what has been provided for in the covered agreements – an act strictly prohibited under Articles 3.2 and 19.2 of the DSU.

35. To say that an Appellate Body interpretation in one dispute is controlling for later disputes would effectively convert that interpretation into an authoritative interpretation of the covered agreement. Such an approach would directly contradict the agreed text of the WTO Agreement, which provides in Article IX:2 that: "The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements." Thus, WTO Members reserved the authority to adopt interpretations to themselves, acting in the Ministerial Conference (or General Council), not the DSB. WTO Members further set out a different process for adopting such an interpretation. The Members decided that they would act on the basis of a recommendation from the relevant Council, ensuring discussion and deliberation by Members. Finally, WTO Members set out a special decision-making rule for adopting an authoritative interpretation, not the negative consensus adoption that applies to reports under the DSU.

36. That Article IX:2 reserves to WTO Members in the Ministerial Conference the critical authority to adopt authoritative interpretations has been emphasized by Members. In the debate over the promulgation of "amicus procedures" by the Appellate Body, numerous WTO Members spoke in the General Council on this point. They correctly noted that it was not for panels or the Appellate Body to fill gaps in the DSU (or other covered agreements). It was rather for Members to amend the agreements or exercise their exclusive authority to adopt an authoritative interpretation under Article IX:2 to permit amicus submissions, if the Members considered this appropriate. Members making statements included Uruguay, Egypt (on behalf of the Informal Group of Developing Countries), Hong Kong, India, Brazil, Mexico, Singapore (on behalf of

[33] EU First Written Submission, para. 81 (citing *US – Stainless Steel (Mexico) (AB)*, para. 160). As a threshold matter, *US – Stainless Steel (Mexico)* fails to support the EU's request because the relevant passage is *obiter dicta*. Specifically, the Appellate Body noted "[s]ince we have corrected the Panel's erroneous legal interpretation and have reversed all of the Panel's findings and conclusions that have been appealed, we do not, in this case, make an additional finding that the Panel also failed to discharge its duties under Article 11 of the DSU." *US – Stainless Steel (Mexico) (AB)*, para. 162 (emphasis added).

ASEAN), Colombia (on behalf of ANDEAN Members), Zimbabwe, Pakistan, Norway, Korea, Australia, Tanzania, and others.[34]

37. If this were not enough, the DSU also expressly confirms that panel and Appellate Body reports do not set out authoritative interpretations. Article 3.9 of the DSU provides that "[t]he provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement." Thus, WTO Members again expressed that the adoption by negative consensus of an interpretation contained in a panel or Appellate Body report does not make that interpretation authoritative, as such an authoritative interpretation could only be adopted by the Ministerial Conference (or General Council) acting according to different decision-making rules. Put differently, if the DSB does not have the authority under the DSU to adopt an authoritative interpretation, then a panel or the Appellate Body assisting the DSB cannot do so either.

38. This does not mean that the United States considers a prior panel or Appellate Body interpretation to be without any value. To the extent that a panel finds prior Appellate Body or panel reasoning to be persuasive, a panel may refer to that reasoning in conducting its own objective assessment of the matter. Such a use of prior reasoning likely would add to the persuasiveness of the panel's own analysis, whether or not the panel agrees with the prior reasoning. But considering an interpretation in a prior Appellate Body report is very different from a statement that the interpretation is controlling or "precedent" in a later dispute.

Question 11. In relation to the existence of unwritten measures, in *Argentina – Import Restrictions* the Appellate Body stated that "the constituent elements that must be substantiated with evidence and arguments in order to prove the existence of a measure challenged will be informed by how such measure is described or characterized by the complainant" (Appellate Body Report, *Argentina – Import Restrictions*, para. 5.108). The Appellate Body also stated that "the specific measure challenged and how it is described or characterized by a complainant will determine the kind of evidence a complainant is required to submit and the elements that it must prove in order to establish the existence of the measure challenged" (Appellate Body Report, *Argentina – Import Restrictions*, para. 5.110). How do you understand these Appellate Body's statements?

39. The United States responds to questions 11, 12, 13 and 14 together. Under Article 3 of the Dispute Settlement Understanding, dispute settlement is directed at a "measure". Accordingly, requests for consultation and the establishment of panels must identify the specific measure at issue.[35] Although the Dispute Settlement Understanding does not further define the term "measure", Article 3 makes clear that a "measure" is undertaken by a Member. As a result, it may be possible to identify the measure taken by form (e.g., a legal instrument) or substance (e.g., in the case of an unwritten measure, describing the actions taken by the Member). Where identifying the substance of a measure, a fuller description may be necessary to establish the

[34] *See* Minutes of Meeting of the General Council on 22 November 2000, WT/GC/M/60 (Uruguay, paras. 4-9), (Egypt, para. 11), (Hong Kong, para. 28), (India, paras. 37-40), (Brazil, paras. 46-47), (Mexico, paras. 50-52), (Colombia, paras. 54-55), (Zimbabwe, para. 58), (Singapore, para. 61), Pakistan (para. 66), Norway (paras. 68-69), Korea (para. 85), Australia (para. 104), Tanzania (para. 107).
[35] *See* Dispute Settlement Understanding, Arts. 4.4 and 6.2.

existence of the measure. The evidence required to establish the existence and precise content of the measure will depend on the description of the measure as set out in the complainants' panel request. If the complainant has alleged the existence of an unwritten measure that it claims to be a rule or norm of general and prospective application, then the complainant must set out sufficient evidence to substantiate the existence of that rule or norm. However, generally speaking, for both types of measures, the complaining Member must identify the Member taking the measure in question and the specific action that is the subject of the complaint.

Question 12. In its first written submission, the European Union argues that the first and the second subparagraphs of Article 2(5) of the Basic AD Regulation are highly fact-dependent in their application. For this reason, the alleged "cost adjustment methodology" cannot be challenged as a measure of general and prospective application, because "it is simply not possible to discern, at an abstract level, what the precise content of such 'methodology' is supposed to be, or how these provisions might apply to future fact patterns". (European Union's first written submission, paras. 97 to 101)

a. Do you agree with the European Union when it states that when an unwritten measure is based on the operation of highly fact-dependent provisions, it cannot be challenged as a measure of general and prospective application?

Question 13. What kind of evidence would Russia be required to submit to the Panel to prove the *precise content* of this "cost adjustment methodology"?

Question 14. Do you consider that the evidence submitted by Russia in its first written submission demonstrates the *precise content* and existence of this alleged cost adjustment methodology?

Question 15. Japan and the United States argue that the term "normally" in the first sentence of Article 2.2.1.1 encompasses a group of additional circumstances under which an investigating authority may decline to use the costs or input prices that are kept in the records of the investigated producer or exporter (Japan's third-party submission, paras. 30-36; United States' third-party submission, fn 50)? Do you agree with Japan and the United States?

40. The United States elaborates upon its position that the adverb "normally" in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement indicates that there may be situations in which costs should not be calculated based on an investigated firm's records (even when the two conditions of the first sentence are satisfied).[36]

41. The adverb "normally" appears immediately after the verb "shall" in the phrase "costs shall normally be calculated." In the context of a treaty provision, the verb "shall" is understood to indicate a mandatory obligation or commitment. The adverb "normally" is understood to mean "under normal or ordinary conditions; as a rule'."[37] As such, the adverb "normally"

[36] *See* United States Third Party Submission, para. 36 n.50 (citation omitted).
[37] *Ukraine – Ammonium Nitrate (Russia) (AB)*, para. 6.87 (not yet adopted by the DSB) (citing *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), vol. 2, p. 1945); *US – Clove Cigarettes (AB)*, para. 273.

moderates the obligation established in the first sentence of Article 2.2.1.1, because while "normally" confirms that "under normal or ordinary conditions" costs should be calculated on the basis of the records kept by the exporter or producer under investigation," it also directs that where conditions are demonstrated to be not normal or not ordinary, costs need not be calculated on the basis of these records.[38]

42. To interpret "normally" to refer only to the two conditions in the first sentence of Article 2.2.1.1 would incorrectly render the adverb inutile and redundant. Together, the verb "shall" and the conjunction "provided that" sufficiently reference the two conditions in the first sentence of Article 2.2.1.1. Consistent with the principle of effectiveness,[39] it would be redundant for the adverb "normally" to do so as well. It is clear that the presence of the adverb "normally" instills a degree of flexibility to the first sentence of Article 2.2.1.1 and expressly contemplates that there will be instances when the evidence demonstrates that an investigating authority should not calculate costs on the basis of the records kept by the exporter or producer, even when these records satisfy the two conditions that follow the conjunction "provided that."

43. Consistent with this interpretation, the Appellate Body has observed that, "[g]iven the reference to 'normally' in the first sentence of Article 2.2.1.1, we do not exclude that there might be circumstances other than those in the two conditions set out in that sentence, in which the obligation to base the calculation of costs on the records kept by the exporter or producer under investigation does not apply."[40] The Appellate Body elaborated that "[s]imply because parties to input transactions are considered to be unrelated does not mean that cost calculations should necessarily be based on records kept by the exporter or producer under the first sentence of Article 2.2.1.1."[41] In making this assertion, the Appellate Body highlighted the "reference to 'normally' in the first sentence of Article 2.2.1.1."[42]

44. One could speculate on what situations might lead an investigating authority to reject recorded costs even where the recorded costs otherwise satisfy the two explicit conditions in the first sentence of Article 2.2.1.1. But the nature of any such inquiry depends on the facts of a particular case and the evidence before the investigating authority. If an investigating authority pursuant to Article 2.2.1.1 decided not to use a respondent's books and records, it would need to "explain why it departed from the norm" and "justify its decision on the record of the investigation and/or in the published determinations."[43]

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[38] *US – Clove Cigarettes (AB)*, para. 273 (finding that the use of the term 'normally" … indicates that the rule … admits of derogation under certain circumstances"); United States Oral Statement at the Panel Third Party Session, para. 20.
[39] *See US – Gasoline (AB)*, p. 23.
[40] *Ukraine – Ammonium Nitrate (Russia) (AB)*, paras. 6.87, 6.105 (not yet adopted by the DSB).
[41] *Ukraine – Ammonium Nitrate (Russia) (AB)*, para. 6.105 (not yet adopted by the DSB).
[42] *Ukraine – Ammonium Nitrate (Russia) (AB)*, para. 6.105 (not yet adopted by the DSB) ("In particular, as explained above, given the reference to 'normally' in the first sentence of Article 2.2.1.1, we do not exclude that there might be circumstances, other than those in the two conditions set out in that sentence, in which the obligation to base the calculation of costs on the records of the exporter or producer under investigation does not apply").
[43] *China – Broiler Products*, paras. 7.161, 7.164, 7.175; *see also* United States Third Party Submission, para. 35 n.65.