**WORLD TRADE ORGANIZATION**

**WT/DS322/RW**
24 April 2009

(09-1876)

Original: English

# UNITED STATES – MEASURES RELATING TO ZEROING AND SUNSET REVIEWS

Recourse to Article 21.5 of the DSU by Japan

***Final Report of the Panel***

## TABLE OF CONTENTS

Page

**I. INTRODUCTION .......... 1**

**II. BACKGROUND .......... 1**

**III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS .......... 2**

**IV. ARGUMENTS OF THE PARTIES .......... 4**

**V. ARGUMENTS OF THE THIRD PARTIES .......... 4**

**VI. INTERIM REVIEW .......... 5**

A. JAPAN'S COMMENTS ON THE INTERIM REPORT .......... 5

B. THE UNITED STATES' COMMENTS ON THE INTERIM REPORT .......... 5

**VII. FINDINGS .......... 8**

A. STANDARD OF REVIEW / BURDEN OF PROOF / TREATY INTERPRETATION .......... 8

**1. Standard of Review .......... 8**

**2. Burden of Proof .......... 9**

**3. Treaty Interpretation .......... 10**

B. PRELIMINARY ISSUES .......... 11

**1. Are Reviews 4, 5 and 6 "measures taken to comply" within the meaning of Article 21.5 of the DSU? .......... 12**

(a) Main arguments of the parties: Japan .......... 12

*(i) Reviews 4, 5 and 6 as declared "measures taken to comply" .......... 12*

*(ii) The nexus-based test .......... 13*

(b) Main arguments of the parties: United States .......... 16

*(i) Reviews 4, 5 and 6 as declared "measures taken to comply" .......... 17*

*(ii) The nexus-based test .......... 17*

(c) Main arguments of the third parties .......... 19

(d) Evaluation by the Panel .......... 20

**2. The inclusion of Review 9 in these proceedings .......... 31**

(a) Main arguments of the parties .......... 31

(b) Main arguments of the third parties .......... 33

(c) Evaluation by the Panel .......... 33

*(i) Did Japan's Request for Establishment meet the specificity requirements of Article 6.2 of the DSU? .......... 34*

*(ii) Should Review 9 be included in the scope of the proceeding? .......... 35*

*(iii) Future measures .......... 36*

C. COMPLIANCE IN RESPECT OF REVIEWS 1, 2, 3, 7 AND 8 .......... 38

**1. Main arguments of the parties .......... 38**

**2. Main arguments of the third parties ..... 41**
**3. Evaluation by the Panel ..... 42**
D. COMPLIANCE IN RESPECT OF REVIEWS 4, 5, 6 AND 9 ..... 47
(a) Main arguments of the parties ..... 47
(b) Evaluation by the Panel ..... 47
E. THE ZEROING PROCEDURES AS SUCH ..... 50
(a) Main arguments of the parties ..... 50
(b) Main arguments of the third parties ..... 52
(c) Evaluation by the Panel ..... 52
F. ARTICLE II OF THE GATT 1994 ..... 55
(a) Introduction ..... 55
(b) Main arguments of the parties ..... 56
(c) Evaluation by the Panel ..... 56
*(i) Are Japan's claims properly within the scope of this Article 21.5 proceeding? ..... 57*
*(ii) The United States' arguments that there is no need to address Japan's Article II claims ..... 57*
*(iii) The substance of Japan's Article II claims ..... 58*
G. SUNSET REVIEW DETERMINATION OF 4 NOVEMBER 1999 ..... 59
(a) Main arguments of the parties ..... 59
(b) Main arguments of the third parties ..... 61
(c) Evaluation by the Panel ..... 62
**VIII. CONCLUSIONS AND RECOMMENDATIONS ..... 64**

# LIST OF ANNEXES

## ANNEX A

EXECUTIVE SUMMARIES OF THE FIRST WRITTEN SUBMISSIONS OF THE PARTIES


| Contents | | Page |
|---|---|---|
| Annex A-1 | Executive Summary of the First Written Submission of Japan | A-2 |
| Annex A-2 | Executive Summary of the First Written Submission of the United States | A-10 |


## ANNEX B

THIRD PARTIES' WRITTEN SUBMISSIONS OR EXECUTIVE SUMMARIES THEREOF


| Contents | | Page |
|---|---|---|
| Annex B-1 | Executive Summary of the Third Party Written Submission of the European Communities | B-2 |
| Annex B-2 | Third Party Written Submission of Hong Kong, China | B-7 |
| Annex B-3 | Executive Summary of the Third Party Written Submission of Korea | B-11 |
| Annex B-4 | Executive Summary of the Third Party Written Submission of Norway | B-14 |


## ANNEX C

EXECUTIVE SUMMARIES OF THE SECOND WRITTEN SUBMISSIONS OF THE PARTIES


| Contents | | Page |
|---|---|---|
| Annex C-1 | Executive Summary of the Second Written Submission of Japan | C-2 |
| Annex C-2 | Executive Summary of the Second Written Submission of the United States | C-10 |

## ANNEX D

SUPPLEMENTAL SUBMISSIONS OF THE PARTIES
OR EXECUTIVE SUMMARIES THEREOF


| Contents | | Page |
|---|---|---|
| Annex D-1 | Executive Summary of the Supplemental Submission of Japan | D-2 |
| Annex D-2 | Response of the United States to the Supplemental Submission of Japan | D-7 |
| Annex D-3 | Response of Japan to the United States' Response to the Supplemental Submission of Japan | D-14 |


## ANNEX E

ORAL STATEMENTS OF THE PARTIES AND THIRD PARTIES
OR EXECUTIVE SUMMARIES THEREOF AT THE
SUBSTANTIVE MEETING OF THE PANEL


| Contents | | Page |
|---|---|---|
| Annex E-1 | Executive Summary of the Opening Statement of Japan | E-2 |
| Annex E-2 | Executive Summary of the Opening Statement of the United States | E-14 |
| Annex E-3 | Closing Statement of the United States | E-20 |
| Annex E-4 | Third Party Oral Statement of China | E-23 |
| Annex E-5 | Executive Summary of the Third Party Oral Statement of the European Communities | E-25 |
| Annex E-6 | Third Party Oral Statement of Hong Kong, China | E-30 |
| Annex E-7 | Third Party Oral Statement of the Republic of Korea | E-32 |
| Annex E-8 | Third Party Oral Statement of Mexico | E-35 |
| Annex E-9 | Third Party Oral Statement of Norway | E-39 |
| Annex E-10 | Third Party Oral Statement of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu | E-41 |
| Annex E-11 | Third Party Oral Statement of Thailand | E-44 |


## ANNEX F


| Contents | | Page |
|---|---|---|
| Annex F-1 | Request for the Establishment of a Panel by Japan | F-2 |

## TABLE OF CASES

| Short Title | Full Cases Title and Citation |
|---|---|
| *Australia – Leather (21.5 – US)* | Panel Report, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather*, Recourse by the United States to Article 21.5 of the DSU, WT/DS126/RW, and Corr. 1, adopted 11 February 2000, DSR 2000:III, 1189. |
| *Australia – Salmon (21.5 – Canada)* | Panel Report, *Australia – Measures Affecting the Importation of Salmon*, Recourse by Canada to Article 21.5 of the DSU, WT/DS18/RW, adopted 20 March 2000, DSR 2000:IV, 2031. |
| *Brazil – Desiccated Coconut* | Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted 20 March, 1997, DSR 1997:I, 167. |
| *Canada – Aircraft (21.5 – Brazil)* | Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, Recourse by Brazil to Article 21.5 of the DSU, WT/DS70/AB/RW, adopted 4 August 2000, DSR 2000:IX, 4299. |
| *Canada – Dairy (21.5 – New Zealand) (II)* | Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, Second Recourse to Article 21.5 of the DSU by New Zealand and the United States, WT/DS103/AB/RW/2, WT/DS113/AB/RW/2, adopted 17 January 2003, DSR 2003:I, 213. |
| *Canada – Wheat Exports* | Appellate Body Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, adopted 27 September 2004, DSR 2004:VI, 2807. |
| *Chile – Price Brand System (21.5 - Argentina)* | Appellate Body Report, *Chile – Price Brand System and Safeguard Measures Relating to Certain Agricultural Products*, Recourse to Article 21.5 of the DSU by Argentina, WT/DS207/AB/RW, adopted 22 May 2007. |
| *EC – Bananas* | Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R/USA, adopted 25 September 1997, as modified by the Appellate Body Report, WT/DS27/AB/R, DSR 1997:II, 589. |
| *EC – Bananas III (21.5 – US)* | Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Recourse to Article 21.5 of the DSU by the United States, WT/DS27/AB/RW/USA and Corr.1, adopted 22 December 2008. |
| *EC – Bed Linen (21.5 – India)* | Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, Recourse to Article 21.5 of the DSU by India, WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, 965. |
| *EC – Chicken Cuts* | Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005. |
| *EC – Commercial Vessels* | Panel Report, *European Communities – Measures Affecting Trade in Commercial Vessels*, WT/DS301/R, adopted 20 June 2005. |
| *EC – Hormones* | Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 13. |
| *EC – Sugar Subsidies* | Panel Report, *European Communities – Export Subsidies on Sugar*, WT/DS265/R, WT/DS266/R, WT/DS283/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R. |

| Short Title | Full Cases Title and Citation |
|---|---|
| *EC – Tariff Preferences* | Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, adopted 20 April 2004, DSR 2004:III, 951. |
| *Japan – Apples* | Appellate Body Report, *Japan – Measures Affecting the Importation of Apples*, WT/DS245/AB/R, adopted 10 December 2003, DSR 2003:IX, 4391. |
| *US – Corrosion-Resistant Steel Sunset Review* | Appellate Body, *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 – FSC (21.5 - EC) (II)* | Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, Second Recourse to Article 21.5 of the DSU by the European Communities, WT/DS108/RW2, adopted 14 March 2006, as upheld by the Appellate Body Report WT/DS108/AB/RW2, DSR 2006:XI, 4761. |
| *US – Gambling Services (21.5 – Antigua and Barbuda)* | Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Recourse to Article 21.5 of the DSU by Antigua and Barbuda, WT/DS285/RW, adopted 22 May 2007. |
| *US – OCTG from Argentina (21.5 - Argentina)* | Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, Recourse to Article 21.5 of the DSU by Argentina, WT/DS268/AB/RW, adopted 11 May 2007. |
| *US – Softwood Lumber IV (21.5 - Canada)* | Panel Report, *United States – Final Countervailing Duty Determination with respect to Certain Softwood Lumber from Canada*, Recourse by Canada to Article 21.5, WT/DS257/RW, adopted 20 December 2004, as upheld by the Appellate Body Report, WT/DS257/AB/RW. |
| *US – Softwood Lumber IV (21.5 - Canada)* | Appellate Body Report, *United States – Final Countervailing Duty Determination with respect to Certain Softwood Lumber from Canada*, Recourse by Canada to Article 21.5 of the DSU, WT/DS257/AB/RW, adopted 20 December 2005, DSR 2005:XXIII, 11355. |
| *US – Upland Cotton* | Panel Report, United States – *Subsidies on Upland Cotton*, WT/DS267/R, adopted 21 March 2005, as modified by the Appellate Body Report, WT/DS267/AB/R, DSR 2005:II- III- IV- V- VI, 297. |
| *US – Upland Cotton (21.5 - Brazil)* | Appellate Body Report, *United States – Subsidies on Upland Cotton*, Recourse to Article 21.5 of the DSU by Brazil, WT/DS267/AB/RW, adopted 20 June 2008. |
| *US – Wool Shirts and Blouses* | Appellate Body Report, *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R and Corr.1, adopted 23 May 2007, DSR 1997:I, 323. |
| *US – Zeroing (EC)* | Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)*, WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, 417. |
| *US – Zeroing II (EC)* | Panel Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/R, adopted 19 February 2009, as modified by the Appellate Body Report WT/DS350/AB/R. |
| *US – Zeroing II (EC)* | Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009. |
| *US – Zeroing (Japan)* | Panel Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/R, adopted 23 January 2007, as modified by the Appellate Body Report WT/DS322/AB/R. |

| Short Title | Full Cases Title and Citation |
|---|---|
| *US – Zeroing (Japan)* | Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted 23 January 2007. |
| *US – 1916 Act* | Appellate Body Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, 4793. |

**TABLE OF ABBREVIATIONS**

| Abbreviation | Description |
|---|---|
| *AD Agreement* | *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* |
| DSB | Dispute Settlement Body |
| DSU | *Understanding on Rules and Procedures Governing the Settlement of Disputes* |
| GATT 1994 | *General Agreement on Tariffs and Trade 1994* |
| RPT | Reasonable period of time |
| *SCM Agreement* | *Agreement on Subsidies and Countervailing Measures* |
| T-to-T | Transaction-to-transaction (comparison of export price and normal value) |
| USCBP | United States Customs and Border Protection |
| USDOC | United States Department of Commerce |
| WTO | World Trade Organization |
| *WTO Agreement* | *Marrakesh Agreement Establishing the World Trade Organization* |
| W-to-W | Weighted average normal value-to-weighted average export price (comparison) |
| 1989 Anti-Dumping Order | "Anti-Dumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings, and Parts Thereof from Japan", 54 FR 20904, 15 May 1989. |

# I. INTRODUCTION

1.1 On 7 April 2008, Japan requested the establishment of a panel[1] pursuant to Article 21.5 of the DSU concerning the United States' alleged failure to comply with the recommendations and rulings of the DSB in the dispute *US – Zeroing (Japan)*. At the 18 April 2008 DSB meeting, the DSB referred this dispute to the original panel, if possible, in accordance with Article 21.5 of the DSU, to examine the matter referred to the DSB by Japan in document WT/DS322/27.[2]

1.2 The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by Japan in document WT/DS322/27, the matter referred to the DSB by Japan in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.

1.3 Due to the unavailability of the Chairman of the original panel, the parties, on 23 May 2008, agreed on a replacement panelist, and as a result the composition of the Panel is as follows:

1.4 Chairman: Mr. José Antonio Buencamino

Members: Mr. Simon Farbenbloom
Mr. Raúl León-Thorne

1.5 China; the European Communities; Hong Kong, China; Korea; Mexico; Norway; Chinese Taipei and Thailand reserved their rights to participate in the Panel proceedings as third parties.

1.6 The Panel met with the parties on 4-5 November 2008. The meeting with the parties was opened to public viewing. The Panel met with the third parties on 5 November 2008. A portion of the Panel's meeting with the third parties was also opened to public viewing.

# II. BACKGROUND

2.1 On 23 January 2007, the DSB adopted the reports of the Appellate Body[3] and the original panel.[4] Those reports contained the following findings:

- that by maintaining model zeroing procedures in the context of original investigations, the United States acted inconsistently with Article 2.4.2 of the *AD Agreement*;[5]

- that the United States acted inconsistently with Articles 2.4 and 2.4.2 of the *AD Agreement* by maintaining zeroing procedures when calculating margins of dumping on the basis of transaction-to-transaction comparisons in original investigations;[6]

- that the United States acted inconsistently with Articles 2.4 and 9.3 of the *AD Agreement* and Article VI:2 of the GATT 1994 by maintaining zeroing procedures in periodic reviews;[7]

---

[1] WT/DS322/27.
[2] WT/DS322/28.
[3] Appellate Body Report, *US – Zeroing (Japan)*.
[4] Panel Report, *US – Zeroing (Japan)*.
[5] Panel Report, *US – Zeroing (Japan)*, para. 7.258(a).
[6] Appellate Body Report, *US – Zeroing (Japan)*, para. 190(b).

- that the United States acted inconsistently with Articles 2.4 and 9.5 of the *AD Agreement* by maintaining zeroing procedures in new shipper reviews;[8]

- that by applying zeroing procedures in the anti-dumping investigation regarding imports of cut-to-length carbon quality steel products from Japan, the United States acted inconsistently with Article 2.4.2 of the *AD Agreement*;[9]

- that the United States acted inconsistently with Articles 2.4 and 9.3 of the *AD Agreement* and Article VI:2 of the GATT 1994 by applying zeroing procedures in 11 periodic reviews; and[10]

- that the United States acted inconsistently with Article 11.3 of the *AD Agreement* when in two sunset review determinations it relied on margins of dumping calculated in previous periodic review proceedings through the use of zeroing.[11]

2.2 The DSB recommended that the United States bring its measures found to be inconsistent with the *AD Agreement* and the GATT 1994 into conformity with the United States' obligations under those agreements. On 4 May 2007, Japan and the United States agreed, pursuant to Article 21.3(b) of the DSU, that the United States should have a reasonable period of time of 11 months from the date of the adoption of the reports in which to comply with the recommendations and rulings of the DSB. That RPT expired on 24 December 2007.[12]

## III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1 Japan claims that the United States has failed to comply with certain of the recommendations and rulings of the DSB. In particular, Japan requests the Panel to find that:

(a) with respect to the DSB's recommendations and rulings regarding the United States' maintenance of the zeroing procedures challenged "as such" in the original proceedings:

- the United States has failed to implement the DSB's recommendations and rulings in the context of T-to-T comparisons in original investigations, and under any comparison methodology in periodic and new shipper reviews, which is inconsistent with the United States' obligations under Articles 17.14, 21.1, and 21.3 of the DSU in the sense that these provisions aim at achieving a satisfactory and prompt settlement of the matter; and,

- the United States' failure to do so is in continued violation of its obligations under Article 2.4 of the *AD Agreement* and Article VI:2 of the GATT 1994; as well as Article 2.4.2 of the *AD Agreement* with respect to T-to-T comparisons in original investigations; Article 9.3 with respect to periodic reviews; and Article 9.5 with respect to new shipper reviews;

(b) with respect to the DSB's recommendations and rulings regarding the United States' periodic reviews, that:

---

[7] Appellate Body Report, *US – Zeroing (Japan)*, para. 190(c).
[8] Appellate Body Report, *US – Zeroing (Japan)*, para. 190(d).
[9] Panel Report, *US – Zeroing (Japan)*, para. 7.258(b).
[10] Appellate Body Report, *US – Zeroing (Japan)*, para. 190(e).
[11] Appellate Body Report, *US – Zeroing (Japan)*, para. 190(f).
[12] WT/DS322/20.

(i) in the case of five periodic reviews (Reviews 1, 2, 3, 7, and 8)[13] that were found to be WTO-inconsistent in the original proceedings:

- the United States has failed to implement the DSB's recommendations and ruling regarding the importer-specific assessment rates determined in those Reviews, which is inconsistent with its obligations under Articles 17.14, 21.1, and 21.3 of the DSU in the sense that these provisions aim at achieving a satisfactory and prompt settlement of the matter; and

- the United States' failure to do so is in continued violation of its obligations under Articles 2.4 and 9.3 of the *AD Agreement*, and Article VI:2 of the GATT 1994;

(ii) in the case of four subsequent periodic reviews (Reviews 4, 5, 6 and 9),[14] [15] which are measures taken to comply, the United States has acted inconsistently with its obligations under Articles 2.4 and 9.3 of the *AD Agreement*, and Article VI:2[16] of the GATT 1994; and

(c) with respect to the DSB's recommendations and rulings regarding the United States' sunset review determination of 4 November 1999:

- the United States has failed to bring its WTO-inconsistent measure into conformity with its WTO obligations, which is inconsistent with its obligations under Articles 17.14, 21.1, and 21.3 of the DSU in the sense that these provisions aim at achieving a satisfactory and prompt settlement of the matter; and,

- the United States' failure to do so is in continued violation of its obligations under Article 11.3 of the *AD Agreement*; and

---

[13] Review 1 concerned Ball Bearings and Parts Thereof From Japan (1 May 1999 through 30 April 2000) (66 Fed. Reg. 36551, 12 July 2001) (As amended: 72 Fed. Reg. 67892, 3 December 2007) (JTEKT and NTN). Review 2 concerned Ball Bearings and Parts Thereof From Japan (1 May 2000 through 30 April 2001) (67 Fed. Reg.55780, 30 August 2002) (As amended: 73 Fed. Reg. 15481, 24 March 2008) (NTN). Review 3 concerned Ball Bearings and Parts Thereof From Japan (1 May 2002 through 30 April 2003) (69 Fed. Reg. 55574, 15 September 2004) (JTEKT, NSK, and NTN). Review 7 concerned Cylindrical Roller Bearings and Parts Thereof From Japan (1 May 1999 through 31 December 1999) (66 Fed. Reg. 36551, 12 July 2001) (JTEKT and NTN) and Review 8 concerned Spherical Plain Bearings and Parts Thereof From Japan (1 May 1999 through 31 December 1999) (66 Fed. Reg. 36551, 12 July 2001) (NTN).

[14] Review 4 concerned Ball Bearings and Parts Thereof From Japan (1 May 2003 through 30 April 2004) (70 Fed. Reg. 54711, 16 September 2005)(As amended: 70 Fed. Reg. 61252, 21 October 2005 (NSK))(As amended: 70 Fed. Reg. 69316, 15 November 2005 (Nippon Pillow Block("NPB"))(JTEKT, NSK, NPB, and NTN). Review 5 concerned Ball Bearings and Parts Thereof From Japan (1 May 2004 through 30 April 2005) (71 Fed.Reg. 40064, 14 July 2006) (JTEKT, NSK, NPB, and NTN) and Review 6 concerned Ball Bearings and Parts Thereof From Japan (1 May 2005 through 30 April 2006) (72 Fed. Reg. 58053, 12 October 2007) (Asahi Seiko, JTEKT, NSK, NPB, and NTN). Review 9 concerned Ball Bearings and Parts Thereof from Japan (Final Results for the Period 1 May 2006 – 30 April 2007) 73 Fed. Reg. 52823, 11 September 2008 (JTEKT, NPB, and NTN).

[15] Review 9 was adopted by the United States during the course of this proceeding. The inclusion of Review 9 in this proceeding is discussed infra at Section VI.B.2.

[16] At para. 159(b)(ii) of its First Written Submission, Japan also included a claim under Article VI:1 of the GATT 1994. Japan failed to develop that claim in any of its subsequent submissions or statements to the Panel. Accordingly, we consider that Japan abandoned its claim under Article VI:1 of the GATT 1994.

(d) with respect to certain liquidation actions taken after the expiry of the RPT, the United States acts in violation of Articles II:1(a) and II:1(b) of the GATT 1994.

3.2 The United States asks the Panel to find that the United States has complied with the recommendations and rulings of the DSB and to reject Japan's claims to the contrary. The United States asserts that the zeroing procedures challenged "as such" by Japan in the original proceeding no longer exist, as on 27 December 2006 USDOC published a final notice announcing that it would no longer apply the zeroing procedures in W-to-W comparisons in original investigations.[17]

3.3 The United States submits that it complied with the DSB's recommendations and rulings regarding Reviews 1, 2 and 3 by withdrawing the WTO-inconsistent cash deposit rates with prospective effect, replacing them with new cash deposit rates determined in subsequent administrative reviews. The United States denies that it was required to take any compliance action in respect of the importer-specific assessment rates determined in Reviews 1, 2, 3, 7 and 8. Furthermore, the United States asks for a preliminary ruling that Reviews 4, 5, 6 and 9 are not "measures taken to comply" within the meaning of Article 21.5 of the DSU, and therefore fall outside the scope of this proceeding. The United States also requests a preliminary ruling that "subsequent closely connected measures", including Review 9, are not within the Panel's terms of reference.

3.4 The United States asserts that it was not required to take any action to comply with the DSB's recommendations and rulings regarding the 4 November 1999 sunset review, because the relevant likelihood of dumping determination continues to be based on a number of dumping rates not called into question by the findings of the Appellate Body.

3.5 The United States asks the Panel to exercise judicial economy in respect of Japan's Article II claims. Furthermore, the United States asserts that the anti-dumping liability giving rise to the liquidation actions challenged by Japan was incurred prior to the expiry of the RPT.

## IV. ARGUMENTS OF THE PARTIES

4.1 The arguments of the parties are set out in their written submissions and oral statements to the Panel and their answers to the Panel's questions. The parties' submissions and oral statements, or their executive summaries thereof, are attached to this report as annexes (see List of Annexes, pages iii and iv).

## V. ARGUMENTS OF THE THIRD PARTIES

5.1 China; the European Communities; Hong Kong, China; Korea; Mexico; Norway; Chinese Taipei and Thailand reserved their rights to participate in the Panel proceedings as third parties. China; Mexico; Chinese Taipei and Thailand did not present written submissions. The arguments of Korea are set out in its written submission and oral statement. The arguments of the European Communities; Hong Kong, China and Norway are set out in their written submissions, oral statements and in their answers to the Panel's questions. The arguments of China; Chinese Taipei and Thailand are set out in their oral statements, while the arguments of Mexico are set out in its oral statement and in its answers to the Panel's questions. The third parties' written submissions and oral statements, or their executive summaries thereof, are attached to this report as annexes (see List of Annexes, pages iii and iv).

---

[17] Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 Fed. Reg. 77722, 77723 (USDOC, 27 December 2006).

## VI. INTERIM REVIEW

6.1 The Panel submitted its interim report to the parties on 6 February 2009. On 27 February 2009, both parties requested that the Panel revise precise aspects of the interim report. Neither party requested an interim review meeting. On 13 March 2009, both parties submitted comments on the other party's request for interim review. The Panel has carefully considered the arguments made by the parties in their requests for interim review and addresses them below, in accordance with Article 15.3 of the DSU.

### A. JAPAN'S COMMENTS ON THE INTERIM REPORT

6.2 Regarding para. 6.66 of the interim report, Japan asks the Panel to include references to two other administrative reviews covered by the original proceeding that form part of the chain of assessment for the 1989 Order. One of the administrative reviews occurred before Review 1. The other occurred between Reviews 2 and 3.

6.3 The United States objects to the changes proposed by Japan, on the basis that such changes do not reflect arguments made by Japan during the course of the proceeding.

6.4 We have included the references proposed by Japan. Since the amendments reflect the factual record, there is no merit in the United States' comment that Japan failed to make any equivalent arguments in its previous submissions to the Panel. Accordingly, we have amended paras. 7.65, 7.66 and para. 7.74 of our report. We have also deleted footnote 100 of the interim report.

6.5 Regarding para. 6.160 of the interim report, Japan asks the Panel to update the Exhibits the Panel relies on as proof of zeroing in respect of Reviews 4, 5, 6 and 9. Japan suggests that the Panel should use the documents it provided in the Exhibit JPN-91 series, attached to its 26 November 2008 replies to questions from the Panel.

6.6 The United States objects to the use of the Exhibit JPN-91 series. The United States asserts that the revised programs included in the Exhibit JPN-91 series were created by Japan for this compliance proceeding, and Commerce has never employed these programs. The United States contends that it would therefore be inappropriate to rely on the Exhibit JPN-91 series to demonstrate Commerce's actions in the challenged anti-dumping administrative reviews.

6.7 We have included references to the Exhibit JPN-91 series in para. 7.160 of our report. Since the Exhibit JPN-91 series contains excerpts from the USDOC computer programme log, the United States is incorrect to argue that these exhibits were created by Japan for this proceeding. To the extent that we rely on other exhibits created by Japan for this proceeding, we explain the basis for doing so at paras. 7.162 – 7.165 of our report.

6.8 In addition, Japan proposed a number of stylistic and/or typographical changes to the interim report. The United States did not comment on any of these proposed changes. We have incorporated the changes proposed by Japan into our final report.

### B. THE UNITED STATES' COMMENTS ON THE INTERIM REPORT

6.9 Regarding the last sentence of para. 6.8 of the interim report, the United States asks the Panel to clarify an alleged ambiguity in its text.

6.10 Japan does not object in principle to the change proposed by the United States. However, Japan considers that the proposed text is overly narrow, since it might exclude the interpretation of sources of law other than the covered agreements.

6.11 We have amended para. 7.8 of our report along the lines requested by the United States. We do not consider that the reference to the covered agreements is overly narrow since, in accordance with Article 11.1 of the DSU, a panel's mandate is to make an objective assessment of the applicability of and conformity with "the relevant covered agreements", as opposed to broader categories of legal texts.

6.12 The United States asks the Panel to make a series of changes to footnote 98 of the interim report, on the basis that the Panel has misunderstood certain arguments made by the United States in its First Written Submission.

6.13 Japan asks the Panel to reject the changes proposed by the United States, on the basis that the relevant text represents the Panel's own assessment of the US argument at issue. At the same time, though, Japan proposes a number of ways in which the Panel might explain the basis for its understanding of the relevant US arguments.

6.14 In order to avoid any uncertainty in the description of our understanding of the United States' arguments, we have deleted the relevant footnote from our report.

6.15 In respect of para. 6.79 of the interim report, the United States asks the Panel to delete text allegedly suggesting that the United States might have made a concession regarding the legal status of Review 4.

6.16 Japan asks the Panel to reject the United States' request, on the basis that the relevant text represents the Panel's own assessment of the US argument at issue. At the same time, though, Japan suggests ways in which the Panel might explain the basis for its assessment.

6.17 In light of the concern expressed by the United States, we have made a number of changes to para. 7.79 of our report.

6.18 Regarding para. 6.124 of the interim report, the United States requests various changes to the Panel's summary of US arguments concerning the scope of its implementation obligations.

6.19 Japan does not object to the changes requested by the United States, except with regard to the United States' apparent desire to delete footnote 144 of the interim report. Japan asserts that footnote 144 should be maintained, albeit in a different location, since it reflects footnote 97 of the United States' First Written Submission.

6.20 We have included the changes requested by the United States in para. 7.124 of our report. We have preserved, but relocated, footnote 144 of the interim report.

6.21 The United States asks the Panel to revise the description of the United States' arguments regarding certain amendments to Reviews 1, 2 and 3 set forth in the first sentence of footnote 148 of the interim report. The United States also asks the Panel to delete the last sentence of footnote 148 of the interim report, which states that the United States has not formally challenged the inclusion of these amendments in the proceeding.

6.22 Japan does not object to the proposed change to the description of the United States' arguments. However, Japan does object to the requested deletion of the last sentence of footnote 148. Japan asserts that this sentence is accurate as drafted.

6.23 We have amended the first sentence of footnote 148 of our report. We have not deleted the last sentence of that footnote. Although the United States argued that the amendments are not

relevant to this proceeding, this is not the same as requesting a preliminary ruling that the amendments should be formally excluded from the scope of the proceeding.

6.24 The United States asks for a number of changes to the Panel's description of the United States' arguments at paras. 6.159, 6.161 (including footnote 176) and 6.162 of the interim report. The United States denies that it failed to dispute the substance of Japan's claims against Reviews 4, 5, 6 and 9.

6.25 For the most part, Japan does not object to the changes requested by the United States, except with regard to the proposed deletion of the second sentence of footnote 176 of the interim report. Japan considers that the second sentence reflects the Panel's assessment of the US argument at issue. In addition, Japan also asks the Panel to make findings to the effect that individual importer-specific assessment rates were affected by zeroing.

6.26 We have made the changes requested by the United States, in order to avoid any error in our description of the United States' arguments. We have also included the additional findings requested by Japan. These changes and additional findings are reflected in paras. 7.159 – 7.166 of our report.

6.27 Regarding para. 6.188 of the interim report, the United States asks the Panel to clarify that only certain Review 1, 2, 3, 7 and 8 entries were liquidated after expiry of the RPT.

6.28 Japan objects to the changes requested by the United States, on the basis that those changes would improperly change the Panel's discussion from the specific liquidation instructions at issue to the general process of liquidation.

6.29 We have amended the penultimate sentence of para. 7.192 of our report to clarify that our findings only concern the liquidation instructions challenged by Japan.

6.30 The United States asks the Panel to delete the parenthetical from para. 6.196 of the interim report (para. 7.200 of this report), to avoid the implication that the United States agrees with the Panel's conclusion. The United States asserts that its jurisdictional arguments regarding Reviews 4, 5, 6 and 9 are equally applicable to the relevant liquidation measures.

6.31 Japan asks the Panel to reject the United States' request, since the observation made by the Panel in the parenthetical is correct.

6.32 We reject the change requested by the United States, for it is factually accurate that the United States failed to claim that the liquidation measures are not "measures taken to comply".

6.33 Regarding para. 6.202 of the interim report (para. 7.206 of this report), the United States asks the Panel to clarify that certain Review 1, 2, 3, 7 and 8 entries were liquidated before the end of the RPT.

6.34 Japan asks the Panel to reject the United States' request, arguing that the fact that certain entries may have been liquidated before the end of the RPT is irrelevant to its claims regarding the liquidation measures issued after the end of the RPT.

6.35 We have not made the change requested by the United States. Japan's claim is based on the liquidation measures issued after the end of the RPT. The fact that other liquidation measures may have been issued before the end of the RPT is not relevant to Japan's claim.

6.36 In respect of para. 6.212 of the interim report, the United States asks the Panel to make a series of changes to clarify the United States' arguments regarding the 1999 sunset review.

6.37 Japan does not object, in principle, to the changes requested by the United States. However, Japan encourages the Panel to clarify that the United States is seeking to rely on "margins calculated without zeroing" to justify the original 1999 sunset review, rather than any subsequent re-determination.

6.38 We have amended para. 7.216 of our report to reflect the changes requested by the United States. In order to avoid any misunderstanding of the position taken by the United States in this proceeding, we have also introduced the additional clarification proposed by Japan.

6.39 Regarding paras. 6.220 and 6.223 of the interim report, the United States asks the Panel to delete text suggesting that the United States concurs that it was required to withdraw, modify or replace the 1999 sunset review.

6.40 Japan asks the Panel to reject the deletion requested by the United States, since the relevant text describes the Panel's assessment of the significance of a particular US argument.

6.41 Pursuant to the United States' comment, we have amended paras. 7.224 and 7.227 of our report in light of the United States' argument that it was not required to modify that measure because an independent WTO-consistent basis for the 1999 sunset review exists.

6.42 The United States also proposes a number of technical and typographical changes to the interim report. Japan does not object to these changes. We have incorporated the technical and typographical changes proposed by the United States into our report.

## VII. FINDINGS

7.1 Before addressing the substance of Japan's claims, we shall make a number of general remarks concerning our standard of review, the parties' burden of proof, and treaty interpretation. Thereafter, we shall consider a number of preliminary issues raised by the parties. Once we turn to the substance of Japan's claims, we shall address those claims in the following order: alleged failure to comply in respect of Reviews 1, 2, 3, 7 and 8; alleged failure to comply in respect of Reviews 4, 5, 6 and 9; alleged failure to comply in respect of the zeroing procedures as such; alleged violation of Article II of the GATT 1994; and alleged failure to comply in respect of the November 1999 sunset review.

### A. STANDARD OF REVIEW / BURDEN OF PROOF / TREATY INTERPRETATION

#### 1. Standard of Review

7.2 Panels generally are bound by the standard of review set forth in Article 11 of the DSU:

> The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

7.3 There is no specific standard of review for Article 21.5 panels. However, there are specific standard of review provisions for anti-dumping disputes, as set forth in Article 17.6 of the *AD Agreement*:

(i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;

(ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

**2. Burden of Proof**

7.4 The DSU does not include any express rule concerning the burden of proof in panel proceedings. However, the Appellate Body has found that the concept of burden of proof is implicit in the WTO dispute settlement system. In short, the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true and thus makes a *prima facie* case[18], the burden shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.[19]

7.5 The Appellate Body has provided the following guidance regarding the burden of proof in Article 21.5 proceedings:

> Neither Chile nor Argentina suggests that the general rules on burden of proof, which imply that a responding party's measure will be treated as WTO-consistent unless proven otherwise, do not apply in proceedings under Article 21.5 of the DSU. We observe, in this regard, that Article 21.5 proceedings do not occur in isolation from the original proceedings, but that both proceedings form part of a continuum of events. The text of Article 21.5 expressly links the "measures taken to comply" with the recommendations and rulings of the DSB concerning the original measure. A panel's examination of a measure taken to comply cannot, therefore, be undertaken in abstraction from the findings by the original panel and the Appellate Body adopted by the DSB. Such findings identify the WTO-inconsistency with respect to the original measure, and a panel's examination of a measure taken to comply must be conducted with due cognizance of this background. Thus, the adopted findings from the original proceedings may well figure prominently in proceedings under Article 21.5, especially where the measure taken to comply is alleged to be inconsistent with WTO law in ways similar to the original measure. In our view, these considerations may influence the way in which the complaining party presents its case, and they may also be relevant to the manner in which an Article 21.5 panel determines whether that party has discharged its burden of proof and established a *prima facie* case.[20]

7.6 At paras. 24 – 27 of its First Written Submission, the United States argues that Japan must meet the burden of proof on all aspects of its claims. In an answer to a question from the Panel, the

[18] A *prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case. Appellate Body Report, *EC – Hormones*, para. 104.

[19] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14. See also Appellate Body Report, *Japan – Apples*, para. 154; Appellate Body Report, *Canada – Dairy (21.5 – New Zealand) (II)*, para. 66.

[20] Appellate Body Report, *Chile – Price Band System (21.5 - Argentina)*, para. 136 (footnotes omitted).

United States also explains that to the extent that Japan claims that Reviews 4, 5, 6 and 9 make use of allegedly WTO-inconsistent "zeroing", it is for Japan to explain and prove what Japan means by "zeroing" in this context; that such "zeroing" in fact occurred in each review; and that "zeroing" (in its view) is WTO-inconsistent. Japan contends that the burden of proof applies solely to factual matters, and not legal interpretation.[21] We note in this regard that in *EC – Tariff Preferences,* the Appellate Body held:[22]

> We are therefore of the view that the European Communities must prove that the Drug Arrangements satisfy the conditions set out in the Enabling Clause. Consistent with the principle of *jura novit curia*, it is not the responsibility of the European Communities to provide us with the legal interpretation to be given to a particular provision in the Enabling Clause; instead, the burden of the European Communities is to adduce sufficient evidence to substantiate its assertion that the Drug Arrangements comply with the requirements of the Enabling Clause.

7.7 In a footnote to this passage, the Appellate Body quoted the International Court of Justice's interpretation of *jura novit curia*, namely:[23]

> It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court.

7.8 The Appellate Body's reasoning in *EC – Tariff Preferences* was accepted by the panel in *EC – Sugar Subsidies,* where the panel held that, for issues of legal interpretation, "there is no burden of proof as such" and it is always for the panel to provide the appropriate legal interpretation independently of what is put forward by any party.[24] We agree that there is no burden of proof for issues of legal interpretation of provisions of the covered agreements.

### 3. Treaty Interpretation

7.9 Article 3.2 of the *DSU* directs panels to clarify the existing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". It is well settled in the WTO dispute settlement system that the principles codified in Articles 31, 32 and 33 of the *Vienna Convention on the Law of Treaties* are such customary rules. These provisions read as follows:

> *Article 31: General rule of interpretation*
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

---

[21] Japan's Comments on US Replies, para. 2. Japan relies in this regard on Appellate Body Report, *EC – Tariff Preferences*, footnote 220 to paragraph 105; and Panel Report, *EC – Sugar Subsidies*, para. 7.121.

[22] Appellate Body Report, *EC –Tariff Preferences*, para. 105.

[23] Appellate Body Report, *EC –Tariff Preferences*, para. 105, footnote 220.

[24] Panel report, *EC –Sugar Subsidies,* para. 7.121 and footnote 437.

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

*Article 32: Supplementary means of interpretation*

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable.

*Article 33: Interpretation of treaties authenticated in two or more languages*

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

7.10 Article 19.2 of the *DSU* further clarifies that in their findings and recommendations, panels and the Appellate Body "cannot add to or diminish the rights and obligations provided in the covered agreements".

## B. PRELIMINARY ISSUES

7.11 The parties have raised several preliminary issues which we address in two parts.

7.12 First, we address the United States' request for a preliminary ruling that the Panel does not have jurisdiction over Reviews 4, 5 and 6 because they are not "measures taken to comply" within the meaning of Article 21.5 of the DSU.

7.13 Second, we address the United States' request for a preliminary ruling that part of Japan's request for establishment of the Panel does not meet the specificity requirement of Article 6.2 of the DSU. We address this request in the context of a request by Japan that we include Review 9, which was adopted after establishment of the Panel, in the scope of these proceedings.

**1. Are Reviews 4, 5 and 6 "measures taken to comply" within the meaning of Article 21.5 of the DSU?**

7.14 Article 21.5 of the DSU provides:

> Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. The panel shall circulate its report within 90 days after the date of referral of the matter to it. When the panel considers that it cannot provide its report within this time frame, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report.

7.15 There is no disagreement between the parties that, by virtue of the first sentence of Article 21.5 of the DSU, the jurisdiction of the Panel is restricted to instances in which there is disagreement over the existence or consistency with a covered agreement of "measures taken to comply with the recommendations and rulings" of the DSB. The disagreement between the parties hinges on the issue of whether or not Reviews 4, 5 and 6 constitute "measures taken to comply" within the meaning of Article 21.5 of the DSU.

7.16 There follows a summary of the parties' main arguments regarding this jurisdictional issue.

(a) Main arguments of the parties: Japan

7.17 **Japan** submits that Reviews 4, 5 and 6 are properly within the scope of this proceeding because they are "measures taken to comply" within the meaning of Article 21.5 of the DSU. Japan advances two arguments in support of its position. First, Japan asserts that the United States has declared that Reviews 4, 5 and 6 are "measures taken to comply". Second, Japan relies on the nexus-based test applied in *US – Softwood Lumber IV (21.5 - Canada)*.

*(i) Reviews 4, 5 and 6 as declared "measures taken to comply"*

7.18 Japan submits that the United States' own submissions to the Panel contain repeated declarations that Reviews 4, 5 and 6 are "measures taken to comply". Japan notes in this regard that the United States argues that the periodic reviews at issue in the original proceedings were "withdrawn",[25] "superceded",[26] "eliminated",[27] "replaced"[28] and "removed"[29] by the subsequent

[25] United States, Second Written Submission, para. 28; United States, First Written Submission, paras. 39, 52, 54, 58, 65, 66, 67.

[26] United States, First Written Submission, paras. 3, 44.

[27] United States, Second Written Submission, para. 8; United States, First Written Submission, paras. 44, 54.

[28] United States, Second Written Submission, para. 18; United States, First Written Submission, para. 44.

periodic reviews challenged by Japan in these compliance proceedings. Japan attaches particular significance to the United States' assertion that, with the adoption of the subsequent reviews, it "has taken measures to comply with [the DSB's] recommendations and rulings".[30] Japan also refers to the United States' assertion that, with the subsequent reviews, "compliance was accomplished".[31] Japan contends that the United States even holds out the subsequent periodic reviews as evidence that "measures taken to comply" do indeed exist:

> As to the *existence* of measures taken to comply, the United States has shown that the United States removed the WTO-inconsistent cash deposit rate for entries of merchandise occurring on or after the date of implementation. This compliance was accomplished as an incidental consequence of the U.S. antidumping duty system, where the cash deposit rate from one review is replaced by that from a subsequent review.[32]

7.19 Japan does not dispute that the United States is entitled to rely on the subsequent periodic reviews as evidence for its assertion that the original reviews have been "withdrawn" "within the meaning of DSU Article 3.7",[33] and that the United States is entitled to argue that, with the subsequent reviews, "compliance was accomplished". Japan also accepts that the United States is entitled to use the subsequent reviews to respond to Japan's claim that no "measures taken to comply" exist. According to Japan, this entitlement flows from a harmonious interpretation of Articles 3.7, 19.1 and 21.5 of the DSU, whereby an implementing Member must be able to rely on measures that "withdraw" the original measures to demonstrate that "measures taken to comply" exist.[34]

7.20 Japan contends, however, that where an implementing Member relies on a measure to meet a claim that no "measures taken to comply" exist, the same harmonious interpretation of these provisions requires a panel, upon request, to examine the WTO "consistency" of that measure. According to Japan, therefore, from the perspective of Article 21.5, where subsequent periodic reviews are offered to rebut arguments "as to the *existence* of measures taken to comply",[35] these measures cannot be anything but "measures taken to comply", which Article 21.5 directs the Panel to review for their consistency with the covered agreements.

*(ii) The nexus-based test*

7.21 Japan contends that, even if Reviews 4, 5 and 6 are not treated as declared "measures taken to comply", those measures fall within the jurisdiction of the Panel by virtue of the nexus-based test applied in various WTO dispute settlement cases, including in particular *US – Softwood Lumber IV (21.5 - Canada)*. Japan submits that, by virtue of the nexus-based test, new measures (i.e., other than those at issue in the original proceedings), not recognized by the respondent as "measures taken to comply", have been found to be covered by Article 21.5 (a) because of a close relationship to the DSB's recommendations and rulings regarding the original measures and (b) because the new measures undermine compliance with those recommendations and rulings.

7.22 Japan contends that three measures were at issue in *US – Softwood Lumber IV (21.5 - Canada)*: (i) the original investigation that was the subject of the DSB's recommendations and rulings; (ii) a "Section 129 Determination" replacing the original investigation (which the United States

[29] United States, Second Written Submission, paras. 18, 26.
[30] United States, First Written Submission, para. 51.
[31] United States, Second Written Submission, para. 18; United States, First Written Submission, paras. 52, 67.
[32] United States, Second Written Submission, para. 18 (emphasis in original).
[33] United States, First Written Submission, para. 52.
[34] Japan, Second Written Submission, paras. 24-25.
[35] United States, Second Written Submission, para. 18 (emphasis in original).

declared as the "measure taken to comply" under Article 21.5 of the DSU); and, (iii) the First Assessment Review (i.e., the first administrative review following the imposition of the countervailing duty order), which the United States argued was not a "measure taken to comply" under Article 21.5 of the DSU. Japan asserts that, in finding that the First Assessment Review did constitute a "measure taken to comply", the Appellate Body assessed the nature of the relevant measures, and attached importance to the fact that: (a) the measures all resulted from "countervailing duty proceedings conducted by the [USDOC]"; (b) the measures all involved the same type of determination by the USDOC, namely subsidization; (c) the measures all concerned the same product; and, (d) the measures all involved the same disputed issue, that is, the so-called "pass-through" aspect of the USDOC's subsidy calculation methodology.[36] Japan states that the Appellate Body also found that a substantive connection existed between the three measures because they provided succeeding bases for the "continued imposition" of countervailing duties on imports of the subject product,[37] in the sense that the original investigation measure was "superseded"[38] by the Section 129 Determination, which was, in turn, "superseded" by the new periodic review. Japan asserts that both the panel and the Appellate Body focused on the shared connection that the three measures had with respect to one particular disputed element of each measure, with the Appellate Body emphasizing that Canada was challenging "a specific component" of each measure, namely a calculation methodology.[39] According to Japan, the Appellate Body further agreed with the compliance panel's finding that this specific component of the periodic review, which "was 'so inextricably linked' and 'clearly connected' to both the Section 129 Determination and the Final Countervailing Duty Determination [i.e., the original investigation]," fell within the scope of the Article 21.5 proceeding.[40]

7.23 Japan contends that the Appellate Body, like the compliance panel, also examined the "effects" of the new periodic review on the United States' compliance with the DSB's recommendations and rulings (through the Section 129 Determination). Japan notes that the Article 21.5 panel concluded that the periodic review "impact[ed]", and "possibly undermined", the United States' implementation of the DSB's recommendations and rulings (through the adoption of the Section 129 Determination).[41] Japan further notes that the Appellate Body found that:

> The First Assessment Review also directly affected the Section 129 Determination because the cash deposit rate resulting from the Section 129 Determination . . . was 'updated', or 'superseded', by the cash deposit rate resulting from the First Assessment Review . . . . Even if, as the United States argues, modification of the cash deposit rate was not the purpose of the First Assessment Review, it was undeniably *an effect*.[42]

7.24 Japan submits that, in commenting on its findings in *US – Softwood Lumber IV (21.5 - Canada)*, the Appellate Body in *US – Upland Cotton (21.5 - Brazil)*[43] noted that the First Assessment Review was a "measure taken to comply" because of its particularly close relationship to the Section 129 Determination,[44] and emphasized that new measures are regarded as "taken to comply"

---

[36] Appellate Body Report, *US – Softwood Lumber IV (21.5 - Canada)*, para. 83.
[37] Appellate Body Report, *US – Softwood Lumber IV (21.5 - Canada)*, para. 83.
[38] Appellate Body Report, *US – Softwood Lumber IV (21.5 - Canada)*, para. 85.
[39] Appellate Body Report, *US – Softwood Lumber IV (21.5 - Canada)*, para. 83.
[40] Appellate Body Report, *US – Softwood Lumber IV (21.5 - Canada)*, para. 81.
[41] Panel Report, *US – Softwood Lumber IV (21.5 - Canada)*, para. 4.41.
[42] Appellate Body Report, *US – Softwood Lumber IV (21.5 - Canada)*, para. 85 (internal citation omitted) (emphasis in original).
[43] Appellate Body Report, *US – Upland Cotton (21.5 - Brazil)*.
[44] Appellate Body Report, *US – Upland Cotton (21.5 - Brazil)*, para. 205.

when they have "the effect of undermining compliance with the DSB's recommendations and rulings", or where justified "to avoid circumvention" of those recommendations and rulings.[45]

7.25 Japan further submits that the Appellate Body in *US – Upland Cotton (21.5 - Brazil)* added that Article 21.5 must be interpreted to prevent the implementing Member from undermining the substantive disciplines in the covered agreements and also the dispute settlement mechanism in the DSU.[46] Japan asserts that, if new subsidy payments identical to those at issue in the original proceedings had been excluded from the scope of Article 21.5, this would make the DSB's recommendations and rulings "essentially declaratory in nature", and create an endless cycle of never-ending litigation, with no implementation of the outcome forthcoming.[47] Japan also asserts that the Appellate Body has explained that its approach to Article 21.5 strikes a balance between competing considerations, taking into account, among others, that the provision "seeks to promote the prompt resolution of disputes, to avoid a complaining Member having to initiate dispute settlement proceedings afresh when an original measure found to be inconsistent has not been brought into conformity with the recommendations and rulings of the DSB, and to make efficient use of the original panel and its relevant experience."[48]

7.26 In seeking to apply the *US – Softwood Lumber IV (21.5 - Canada)* reasoning in respect of Reviews 4, 5 and 6, Japan focuses on (a) the relationship between Reviews 4, 5 and 6 and the reviews at issue in the original proceeding, and (b) the effect of Reviews 4, 5 and 6 on the United States' compliance with the recommendations and rulings of the DSB.

<u>The relationship between Reviews 4, 5 and 6 and the administrative reviews at issue in the original proceeding</u>

7.27 Japan asserts that the original and subsequent periodic reviews have essentially the same connections that led the Appellate Body to conclude in *US – Softwood Lumber IV (21.5 - Canada)* that a "particularly close relationship" existed between the three measures at issue in those proceedings:

- the original and subsequent measures all resulted from anti-dumping proceedings conducted by the USDOC and, in particular, the same type of proceeding, namely periodic reviews;

- the three subsequent reviews were all conducted pursuant to the same 1989 Anti-Dumping Order, and they all, therefore, concern the same subject product as the three relevant periodic reviews challenged in the original proceedings; and,

- the original and subsequent reviews concern dumping determinations made with respect to exports from the same companies.

7.28 Japan contends that, like the measures at issue in *US – Softwood Lumber IV (21.5 - Canada)*, a substantive relationship exists because the original and subsequent administrative reviews provide succeeding bases for the continued imposition of anti-dumping duties on ball bearings, with each new review (i) establishing a cash deposit rate that replaced the cash deposit rate from the previous review, and (ii) determining the definitive duty (*i.e.*, importer-specific assessment rate) for entries initially subjected to the cash deposit rate from a prior review. According to Japan, in substantive terms the

[45] Appellate Body Report, *US – Upland Cotton (21.5 - Brazil)*, para. 205.
[46] Appellate Body Report, *US – Upland Cotton (21.5 - Brazil)*, paras. 245-246.
[47] Appellate Body Report, *US – Upland Cotton (21.5 - Brazil)*, paras. 245-246.
[48] Appellate Body Report, *US – Softwood Lumber IV (21.5 - Brazil)*, para. 72. See also Appellate Body Report, *US – OCTG from Argentina (21.5 - Argentina)*, para. 151.

various measures form an unbroken chain of measures flowing from a single anti-dumping order. Japan also contends that, consistent with *US – Softwood Lumber IV (21.5 - Canada)*, it only contests "a specific component" of the three subsequent periodic reviews, namely, the zeroing methodology used to make the dumping determinations.[49]

7.29 Japan further submits that an important temporal relationship also exists between the three subsequent periodic reviews and the DSB's recommendations and rulings: in the case of each of the three reviews, the United States had not collected definitive anti-dumping duties on certain entries covered by these reviews at the end of the reasonable period of time ("RPT"). Japan asserts that, as a result, the United States will apply the WTO-inconsistent importer-specific assessment rate determined in these reviews after the end of the RPT.

The effect of the subsequent administrative reviews on compliance

7.30 Relying on the words of the Appellate Body in *US – Upland Cotton (21.5 - Brazil)*, Japan asserts that the three subsequent reviews have "the effect of undermining compliance", and "circumvent[ing]" the DSB's recommendations and rulings.[50] Japan contends that, instead of revising the cash deposit and importer-specific assessment rates established in the original reviews, the United States simply replaced[51] those rates with new rates determined in the subsequent reviews using the same WTO-inconsistent zeroing methodology. According to Japan, therefore, the measures found to be WTO-inconsistent have been withdrawn and replaced by new measures that simply perpetuate the WTO-inconsistency that the United States was obliged to eliminate. Japan submits that the United States itself informed the DSB that the new periodic reviews had "superseded" the original periodic reviews.

7.31 Japan contends that, if the subsequent reviews are excluded from the scope of Article 21.5 of the DSU, the United States could disregard the DSB's recommendations and rulings with impunity, and the DSB's recommendations and rulings would be "essentially declaratory in nature".[52] Japan asserts that one set of WTO-inconsistent measures could simply be replaced by another set of substantively related measures that include the same WTO-inconsistency, and an endless cycle of never-ending litigation would ensue.

(b) Main arguments of the parties: United States

7.32 The **United States** asks for a preliminary ruling that Reviews 4, 5 and 6 are not "measures taken to comply", declared or otherwise, and therefore fall outside the Panel's terms of reference. The United States also disputes the relevance of the dispute settlement reports cited by Japan in support of its jurisdictional arguments, including *US – Softwood Lumber IV (21.5 - Canada)*, and denies the existence of any comprehensive standard, such as a "nexus-based test".

---

[49] Appellate Body Report, *US – Softwood Lumber IV (21.5 - Canada)*, para. 83.

[50] Appellate Body Report, *US – Upland Cotton (21.5 - Brazil)*, para. 205.

[51] Japan asserts that there are two aspects to the way in which the subsequent reviews replaced the cash deposit rates determined in the original reviews. *First*, the original cash deposit rates applied prospectively to entries occurring after the original review was adopted; that rate was superseded on a prospective basis by a new cash deposit rate determined in a subsequent review, which was, in turn, superseded by later cash deposit rates. *Second*, although the cash deposit rate established in the original reviews applied prospectively to entries at the time of importation, that rate was subsequently replaced for certain entries by an importer-specific assessment rate established in the subsequent reviews. Japan asserts that, in these two respects, the original reviews were effectively withdrawn, and replaced, by new WTO-inconsistent rates determined in the subsequent reviews.

[52] Appellate Body Report, *US – Upland Cotton (21.5 - Brazil)*, para. 246.

*(i) Reviews 4, 5 and 6 as declared "measures taken to comply"*

7.33 The United States denies that it has expressly stated that Reviews 4, 5 and 6 are "measures taken to comply". According to the United States, saying that the results of one administrative review are superseded by the results of another administrative review is not the same thing as saying that the subsequent review was a "measure taken to comply" within the meaning of Article 21.5 of the DSU. The United States contends that the measures subject to the DSB's recommendations and rulings were eliminated as an incidental consequence of the US antidumping system when the cash deposit rate from one review was replaced by the cash deposit rate from the next review. According to the United States, this fact does not somehow transform the subsequent reviews into "measures taken to comply."

7.34 The United States rejects Japan's argument that, because the United States announced that the results of the original administrative reviews were "superseded" by subsequent reviews, those subsequent reviews should be treated as measures taken to comply. The United States asserts that the original reviews were superseded by subsequent reviews because the cash deposit rate from one review was replaced by the cash deposit rate from the next review. According to the United States, the measures subject to the DSB recommendations and rulings were therefore eliminated as an incidental consequence of a subsequent administrative review. The United States contends that this is not the same thing as saying that the subsequent review is a measure taken to comply.

*(ii) The nexus-based test*

<u>The relationship between Reviews 4, 5 and 6 and the administrative reviews at issue in the original proceeding</u>

7.35 The United States asserts that Reviews 4, 5 and 6 have no connection with the DSB's recommendations and rulings. The United States contends that Japan misunderstands the Appellate Body's findings in *US – Softwood Lumber IV (21.5 - Canada)*. The United States notes that the Appellate Body stated in that dispute, "not...every assessment review will necessarily fall within the jurisdiction of an Article 21.5 panel",[53] and that "such an approach would be too sweeping."[54] The United States asserts that the Panel should reject Japan's attempt to include the relevant subsequent reviews just because they are administrative reviews involving the same product exported from Japan by the same companies. According to the United States, if the overlap between product, exporting country, and exporting company were sufficient to establish the type of "particularly close relationship" found in *US – Softwood Lumber IV (21.5 - Canada)*, then every administrative review would fall within the jurisdiction of an Article 21.5 panel – contrary to the Appellate Body's admonition. The United States argues, moreover, that the fact that each new review "establish[es] a cash deposit rate that replace[s] the cash deposit rate from the previous review" and "determin[es] the definitive duty...rate for entries initially subjected to the cash deposit rate from a prior review"[55] does not support Japan's argument; otherwise, every succeeding administrative review would be considered a measure taken to comply.

7.36 The United States asserts that Japan, in relying on *US – Softwood Lumber IV (21.5 - Canada)*, ignores the differences between the two disputes. The United States asserts that, in making its finding in *US – Softwood Lumber IV (21.5 - Canada)*, the Appellate Body considered the timing between the two determinations at issue, in the sense that the determinations in the Section 129 proceeding – the declared measure taken to comply – and the First Assessment Review both occurred after the adoption of the DSB's recommendations and rulings, and both closely corresponded to the expiration of the

---

[53] Appellate Body Report, *US – Softwood Lumber IV (21.5 - Canada)*, para. 93 (footnote omitted).
[54] Appellate Body Report, *US – Softwood Lumber IV (21.5 - Canada)*, para. 87 (footnote omitted).
[55] Japan, First Written Submission, para. 91.

RPT.[56] The United States asserts that the timing of these two determinations thus provided USDOC with the ability to take account of the DSB's recommendations and rulings in the first administrative review, and as the Appellate Body emphasized, the United States expressly acknowledged that USDOC used the same pass-through analysis in the first administrative review as in the Section 129 Determination "in view of" the DSB's recommendations and rulings.[57]

7.37 The United States contends that the situation in this dispute does not resemble the situation in *US – Softwood Lumber IV (21.5 - Canada).* The United States asserts that two of the three subsequent determinations (Reviews 4 and 5) were made well before the adoption of the DSB's recommendations and rulings, such that these subsequent determinations could not logically have taken into consideration the recommendations and rulings of the DSB in the original dispute. The United States submits that these two measures therefore have no connection with the DSB's recommendations and rulings. According to the United States, measures taken by a Member prior to adoption of a dispute settlement report typically are not taken for the purpose of achieving compliance and would not be within the scope of an Article 21.5 proceeding. The United States notes in this regard that the Appellate Body has found that "[a]s a whole, Article 21 deals with events *subsequent* to the DSB's adoption of recommendations and rulings in a particular dispute".[58]

7.38 The United States acknowledges that USDOC issued its final results in Review 6 after the adoption of the DSB's recommendations and rulings, but asserts that this determination (dated 12 October 2007) did not occur around the same time as US withdrawal of the administrative reviews subject to the DSB's recommendations and rulings,[59] and did not closely correspond to the expiration of the RPT (on 24 December 2007). The United States further asserts that, most importantly, unlike the First Assessment Review in *US – Softwood Lumber IV (21.5 - Canada),* Review 6 did not incorporate elements from a Section 129 Determination "in view of" the DSB's recommendations and rulings.

The effect of the subsequent administrative reviews on compliance

7.39 Noting Japan's argument that the three administrative reviews "undermine" and "circumvent" the US compliance with the DSB's recommendations and rulings, the United States asserts that this dispute is distinguishable from disputes in which panels and the Appellate Body found subsequent measures to undermine the declared measure taken to comply. In particular, the United States asserts that the respondent Members chose to take the "measures taken to comply" at issue in *Australia – Leather (21.5 - US)*[60] and *Australia – Salmon (21.5 – Canada),*[61] whereas none of the three administrative reviews at issue was a voluntary action taken by the United States around the time of implementation to circumvent or undermine declared compliance with the DSB's recommendations and rulings. The United States asserts that administrative reviews occur upon request of interested parties on a schedule that is established without regard to dispute settlement proceedings, pursuant to rights and obligations established in the *AD Agreement*.

7.40 Regarding Japan's reliance on the Appellate Body report in *US – Upland Cotton (21.5 - Brazil)*, the United States asserts that Japan misunderstands the relevance of that report. The United States asserts that that dispute involved Brazil's prohibited and actionable subsidy claims

---

[56] Appellate Body Report, *US – Softwood Lumber IV (21.5 - Canada)*, para. 84.

[57] Appellate Body Report, *US – Softwood Lumber IV (21.5 - Canada)*, para. 84 (citing US additional memorandum, para. 12).

[58] Appellate Body Report, *US – Softwood Lumber IV (21.5 - Canada)*, para. 70 (emphasis in original).

[59] The United States asserts that the cash deposit rate for the most recent review that was subject to the DSB's recommendations and rulings, namely Review 3, was replaced by the cash deposit from Review 4 in 2005, around two years before the results of Review 6 review were announced.

[60] Panel Report, *Australia – Leather (21.5 - US).*

[61] Panel Report, *Australia – Salmon (21.5 – Canada).*

under the SCM Agreement, and concerned the issue of whether or not certain later payments, to the extent they were made under the same conditions and criteria as the original payments, fell within the scope of Article 21.5 because they were subject to the obligation under Article 7.8 of the SCM Agreement to withdraw the subsidy or remove its adverse effects.[62] The United States submits that, contrary to Japan's assertion,[63] the Appellate Body did not consider the subsequent payments to be "measures taken to comply" in the context of Article 21.5. The United States contends that the Appellate Body's dicta in *US – Upland Cotton (21.5 - Brazil)* were limited to concerns over the availability of relief against the adverse effects of actionable subsidies.[64]

7.41 The United States asserts that in *US – Upland Cotton (21.5 - Brazil)*, the Appellate Body also corrected the misreading by Brazil and the compliance panel of the Appellate Body report in *US – Softwood Lumber IV (21.5 - Canada)*,[65] making clear that there is no general rule that any measure that has a "particularly close relationship" to the declared measure to comply with the DSB's recommendations and rulings would also be within the scope of a compliance proceeding. According to the United States, this clarification counsels against the unwarranted expansion of Article 21.5 proceedings to cover subsequent administrative reviews simply because of the similarities between such reviews and those subject to the DSB's recommendations and rulings.

7.42 Regarding Japan's concerns about the possibility of Members never being able to obtain relief against the United States' administrative reviews,[66] the United States asserts that Japan fails to grasp that the jurisdiction of an Article 21.5 panel, and the scope of the dispute settlement system generally, is limited by the text Members have agreed to. The United States contends that the DSU and the other covered agreements cannot be re-written to apply to additional measures just because that is what Japan believes would be a better approach.

(c) Main arguments of the third parties

7.43 **China** argues that an implementing Member cannot decide for itself whether or not a measure is "taken to comply". Reviews 4, 5 and 6 have sufficiently close links to the recommendations and rulings of the DSB to fall within the scope of the proceeding.

7.44 The **European Communities** argues that Reviews 4, 5 and 6 fall under the terms of reference of the panel. The European Communities notes that a measure that essentially replaces an earlier measure remains within the terms of reference of an original panel. Therefore, a compliance panel must be in a position to assess whether an annual administrative review determination that supersedes the original determination relating to the same anti-dumping duty order, imposed on the same country and the same product, following the same WTO-inconsistent methodology, constitutes a "continuing violation". The European Communities also relies on the reasoning of the Appellate Body in *US – Upland Cotton (21.5 - Brazil)* as support for the argument that the subsequent reviews should be included within the scope of the proceeding, otherwise Japan will not be able to obtain adequate relief against the United States' violation, contrary to the objective of "prompt compliance" under the DSU. Further, the European Communities argues that even if the subsequent reviews are considered to be separate measures to those at issue in the original proceedings, they can be considered "measures taken to comply" because they are clearly connected to the DSB's recommendations and rulings in the original dispute and to the original measures. Finally, the fact that a measure may predate the

---

[62] Appellate Body Report, *US – Upland Cotton (21.5 - Brazil)*, paras. 248-49.
[63] Japan, First Written Submission, paras. 81, 101.
[64] Appellate Body Report, *US – Upland Cotton (21.5 - Brazil)*, paras. 245-46.
[65] Appellate Body Report, *US – Upland Cotton (21.5 - Brazil)*, para. 205. The United States asserts that this correction was made in connection with the Appellate Body's findings on the US preliminary objection concerning export credit guarantees.
[66] Japan, First Written Submission, paras. 101-102.

adoption of the DSB recommendations and rulings does not *per se* exclude such measures from the scope of compliance proceedings.

7.45 Hong Kong, China notes that if Reviews 4, 5 and 6 are not treated as "measures taken to comply", it will be impossible for Members to obtain an Article 21.5 remedy under a retrospective anti-dumping duty assessment system, where there is a continuous process of administrative reviews superseding one another. Hong Kong, China recalls that the aim of Article 21.5 of the DSU is to promote prompt compliance with DSB recommendations and rulings, without the necessity of initiating new proceedings, and asks the panel consider this in reaching its conclusion.

7.46 Mexico argues that Reviews 4, 5 and 6 are within the scope of the proceeding and are "measures taken to comply" because they are sufficiently closely linked to the measures at issue in the original proceedings. Further, by asserting that the subsequent administrative reviews "supersede" or "withdraw" the original measures, the United States is effectively declaring that the reviews are "measures taken to comply". Mexico asserts that the fact that Reviews 4 and 5 were implemented prior to the adoption of the DSB recommendations and rulings does not prevent their characterisation as "measures taken to comply". The subjective intent or purpose of the implementing Member cannot determine whether measures are "taken to comply".

7.47 Norway argues that applying the same nexus-based test as adopted by the Appellate Body in *US – Softwood Lumber IV (21.5 – Canada)* leads to the conclusion that Reviews 4, 5 and 6 are within the panel's terms of reference as "measures taken to comply". The fact that two of the reviews pre-dated the adoption of the DSB's recommendations and rulings does not alter this conclusion. Although these two measures may not have been taken for the purpose of achieving compliance, the panel's jurisdiction is not confined to measures that move in the direction of, or have the objective of achieving, compliance. The important point is not when a review is initiated, but whether it was completed or continued to have legal effects after the end of the RPT. Norway also notes that the three reviews have the effect of undermining compliance with the recommendations and rulings of the DSB and if they were not to fall within the scope of the proceeding they would turn the United States' system of duty assessment into a moving target that always escapes anti-dumping duty disciplines. Finally, if Japan were required to initiate new panel proceedings in order to challenge the three subsequent administrative reviews, this would run counter to the objective of Article 21.5 of the DSU, which is to promote prompt compliance with DSB recommendations and rulings.

7.48 Chinese Taipei submits that Reviews 4, 5 and 6 fall within the scope of the proceeding. The fact that Reviews 4 and 5 were implemented prior to the adoption of the DSB recommendations and rulings does not affect this conclusion because timing is only one factor for the panel to consider when determining whether a measure is "taken to comply". Further, compliance panels are not limited to measures that have the objective of achieving compliance.

7.49 Thailand argues that Reviews 4, 5 and 6 fall within the scope of the proceeding. Thailand contends that it is not up to the implementing Member to decide whether a measure is "taken to comply". Thailand notes that the zeroing methodology used as a component of all the measures creates an undeniably strong link between the original measures and the subsequent reviews. Further, if the subsequent reviews were excluded from the scope of the proceedings, a never-ending cycle of litigation would ensue.

(d) Evaluation by the Panel

7.50 By virtue of the text of Article 21.5, proceedings brought under that provision are limited to instances in which there is disagreement as to the existence or consistency with a covered agreement of "measures taken to comply" with the recommendations and rulings of the DSB. The United States denies that Reviews 4, 5 or 6 are "measures taken to comply". Since Article 21.5 does not expressly

describe the type of measure that may, or may not, be considered as having been "taken to comply", we turn to the relevant WTO dispute settlement reports for guidance.[67]

7.51 In *Australia – Salmon (21.5 – Canada)*, the panel had to decide whether it could examine (as a "measure[] taken to comply") an import ban on salmon that had been adopted by the Australian state of Tasmania shortly after the Australian federal government had notified a number of steps that it had taken in order to remove the inconsistencies identified by the original panel regarding its treatment of imported salmon. Australia argued that the panel could not examine the Tasmanian measure, and that the only relevant measures were new federal import requirements taken to comply with the recommendations and rulings of the DSB. That panel observed that it could not merely allow an implementing Member to identify the relevant measure to be assessed in Article 21.5 proceedings because:

> ... an implementing Member could simply avoid any scrutiny of certain measures by a compliance panel, even where such measures would be so clearly connected to the panel and Appellate Body reports concerned, both in time and in respect of the subject-matter, that any impartial observer would consider them to be measures "taken to comply".[68]

7.52 Focusing on timing and subject-matter, the *Australia – Salmon (21.5 – Canada)* panel found that:

> any quarantine measure introduced by Australia subsequent to the adoption on 6 November 1998 of DSB recommendations and rulings in the original dispute – and within a more or less limited period of time thereafter – that applies to imports of fresh chilled or frozen salmon from Canada, is a "measure taken to comply".[69]

7.53 In *Australia – Leather (21.5 - US)*, the panel was concerned with Australia's implementation of DSB's rulings and recommendations regarding the withdrawal of a prohibited export subsidy. In September 1999, the subsidy recipient repaid the prospective element of the subsidy. Simultaneously, the Government of Australia provided a new loan to the original subsidy recipient. In finding that both the repayment of the original subsidy, and the new loan, fell within the scope of its DSU Article 21.5 review, the panel stated:

> The 1999 loan is inextricably linked to the steps taken by Australia in response to the DSB's ruling in this dispute, in view of both its timing and its nature. In our view, the 1999 loan cannot be excluded from our consideration without severely limiting our ability to judge, on the basis of the United States' request, whether Australia has taken measures to comply with the DSB's ruling. In the absence of any compelling reason

---

[67] We have not included *US – Upland Cotton (21.5 – Brazil)* in our review of relevant case law. In that case, the Appellate Body addressed Article 21.5 in two separate sections of its Report. First, the Appellate Body found that its reasoning in *US – Softwood Lumber IV (21.5 – Canada)* was not applicable in *US – Upland Cotton (21.5 – Brazil)* (para. 205). In doing so, the Appellate Body explained that the relevant part of *US – Upland Cotton (21.5 – Brazil)* concerned the issue of "whether a single programme may be permissibly atomized" for the purpose of Article 21.5. Since this issue does not arise in the present dispute, this part of the Appellate Body's Report is not relevant to the issue under consideration. Second, the Appellate Body upheld the panel's finding that certain measures fell within the scope of Article 21.5 (para. 249). In doing so, the Appellate Body made frequent references to Article 7.8 of the *SCM Agreement*. Since that provision is not at issue in this proceeding, we do not consider those other aspects of the Appellate Body's reasoning to be particularly relevant guidance in this proceeding.

[68] Panel Report, *Australia – Salmon (21.5 – Canada),* para. 7.10, sub-para. 22.

[69] Ibid.

> to do so, we decline to conclude that a measure specifically identified in the request for establishment is not within our terms of reference.[70]

7.54 In *US – Softwood Lumber IV (21.5 – Canada)*, the United States declared that it had implemented the DSB's recommendations and rulings regarding a countervailing duty order by revising that order through a Section 129 Determination. Ten days after the Section 129 Determination was concluded, the United States published the results of the First Assessment Review, which was the first administrative review after imposition of the order. The panel had to decide whether or not the First Assessment Review could be treated as a "measure taken to comply" falling within the scope of the panel's Article 21.5 jurisdiction, even though the United States denied that it was a "measure taken to comply". The panel found that the First Assessment Review should be treated as a "measure taken to comply", because "it [was] clearly connected to the panel and Appellate Body reports concerning the Final Determination, and because it [was] inextricably linked to the treatment of pass-through [i.e., the substantive component found to be WTO-inconsistent in the original proceeding] in the Section 129 Determination".[71] The panel concluded that there was "sufficient overlap in the timing, or temporal effect, and nature of the Final Determination, Section 129 Determination and First Assessment Review for the latter to fall within the scope of the present DSU Article 21.5 proceedings."[72]

7.55 The panel's findings were referred to the Appellate Body. The Appellate Body first examined the text, context, object and purpose of Article 21.5 of the DSU. The Appellate Body stated that, although [o]n its face [] the phrase "measures taken to comply" seems to refer to measures taken *in the direction of*, or *for the purpose of achieving*, compliance", "[t]he fact that Article 21.5 mandates a panel to assess 'existence' and 'consistency' tends to weigh against an interpretation of Article 21.5 that would confine the scope of a panel's jurisdiction to measures that *move in the direction of*, or *have the objective of achieving*, compliance. These words also suggest that an examination of the effects of a measure may also be relevant to the determination of whether it constitutes, or forms part of, a 'measure[] taken to comply'."[73]

7.56 The Appellate Body found that, "in order to fulfil its mandate under Article 21.5, a panel must be able to take full account of the factual and legal background against which relevant measures are taken, so as to determine the existence, or consistency with the covered agreements, of measures taken to comply,"[74] and that "in order to fulfil its mandate under Article 21.5, a panel must be able to assess measures taken to comply in their full context, including how such measures are introduced into, and how they function within, the particular system of the implementing Member."[75]

7.57 The Appellate Body also stated that "[a] further feature of the first sentence of Article 21.5 is the express link between the 'measures taken to comply' and the recommendations and rulings of the DSB. Accordingly, determining the scope of 'measures taken to comply' in any given case must also involve examination of the recommendations and rulings contained in the original report(s) adopted by the DSB. Because such recommendations and rulings are directed at the measures found to be inconsistent in the original proceedings, such an examination necessarily involves consideration of those original measures."[76] In making this statement, the Appellate Body noted that "the text of Article 19.1 confirms the link between the measure taken to comply and the inconsistent measure that

---

[70] *Australia – Leather (21.5 - US)*, para. 6.5.

[71] Panel Report, *US – Softwood Lumber IV (21.5 - Canada )*, para. 4.41.

[72] Panel Report, *US – Softwood Lumber IV (21.5 - Canada)*, para. 4.42.

[73] Appellate Body Report, *US – Softwood Lumber IV (21.5 - Canada),* paras. 66 and 67 (emphasis in original).

[74] Appellate Body Report, *US – Softwood Lumber IV (21.5 - Canada),* para. 69.

[75] Appellate Body Report, *US – Softwood Lumber IV (21.5 - Canada),* para. 67.

[76] Appellate Body Report, *US – Softwood Lumber IV (21.5 - Canada),* para. 68, footnote omitted.

was the subject of the original proceedings."[77] The Appellate Body stated that, although "there are some limits on the claims that can be raised in Article 21.5 proceedings, [] these limits should not allow circumvention by Members by allowing them to comply through one measure, while, at the same time, negating compliance through another."[78]

7.58 The Appellate Body then examined the relevant WTO dispute settlement reports. As we have done, the Appellate Body recalled the findings of the panels in *Australia – Salmon (21.5 – Canada)* and *Australia – Leather II (21.5 - US).* Although the Appellate Body cautioned that "characterizing an act by a Member as a measure taken to comply when that Member maintains otherwise is not something that should be done lightly by a panel," the Appellate Body regarded those cases "as useful illustrations of when such a finding is appropriate."[79] The Appellate Body also recalled that, in *EC – Bed Linen (21.5 – India)*, it upheld the panel's finding that certain parts of a measure may fall within the scope of Article 21.5 proceedings when other, separate elements of the same measure do not, and recognized that the ways in which distinct elements of a measure interact with and affect each other may be relevant to the determination of which of them falls within the scope of Article 21.5 proceedings.[80]

7.59 The Appellate Body then provided the following summary of its analysis of the text, context, object and purpose of Article 21.5 of the DSU, and relevant WTO dispute settlement reports:

> Taking account of all of the above, our interpretation of Article 21.5 of the DSU confirms that a panel's mandate under Article 21.5 of the DSU is not necessarily limited to an examination of an implementing Member's measure declared to be "taken to comply". Such a declaration will always be relevant, but there are additional criteria, identified above, that should be applied by a panel to determine whether or not it may also examine other measures. Some measures with a particularly close relationship to the declared "measure taken to comply", and to the recommendations and rulings of the DSB, may also be susceptible to review by a panel acting under Article 21.5. Determining whether this is the case requires a panel to scrutinize these relationships, which may, depending on the particular facts, call for an examination of the timing, nature, and effects of the various measures. This also requires an Article 21.5 panel to examine the factual and legal background against which a declared "measure taken to comply" is adopted. Only then is a panel in a position to take a view as to whether there are sufficiently close links for it to characterize such an other measure as one "taken to comply" and, consequently, to assess its consistency with the covered agreements in an Article 21.5 proceeding.[81]

7.60 Most recently, in *EC – Bananas III (21.5 – US)*, the Appellate Body used a two-step process in determining whether or not a measure is "taken to comply":

> The Appellate Body has emphasized that the reasoning in *US – Softwood Lumber IV (21.5 – Canada)* concerned the identification of closely connected measures so as to avoid circumvention. Therefore, if the measure at issue is found to constitute in itself a measure taken to comply, it will not be necessary to establish a "particularly close relationship" of the measure at issue to the declared measure taken to comply in order to subject the measure at issue to the scope of Article 21.5. Our analysis must thus begin with the question whether the measure at issue in this case was in itself a

---

[77] Appellate Body Report, *US – Softwood Lumber IV (21.5 - Canada),* footnote 108.
[78] Appellate Body Report, *US – Softwood Lumber IV (21.5 - Canada),* para. 71.
[79] Appellate Body Report, *US – Softwood Lumber IV (21.5 - Canada),* para. 74.
[80] Appellate Body Report, *EC – Bed Linen (21.5 – India).* Appellate Body Report, *US – Softwood Lumber IV (21.5 - Canada )*, para. 76.
[81] Appellate Body Report, *US – Softwood Lumber IV (21.5 - Canada )*, para. 77.

> measure taken to comply. In the event that the measure at issue is found not to be in itself a measure taken to comply, our analysis will turn to the question whether a "particularly close relationship" exists between the measure at issue and the declared measure taken to comply, which would warrant subjecting the measure at issue to the scope of Article 21.5 of the DSU.[82]

7.61 In *EC – Bananas III (21.5 – US)*, therefore, the Appellate Body described a two-step approach. First, a determination is made whether the relevant measure is "in itself" "taken to comply". If it is not, a determination is made whether the relevant measure might nevertheless constitute a "measure taken to comply" by virtue of its "particularly close relationship" to a "declared" "measure taken to comply". Since the United States has not formally "declared" any "measure[] taken to comply",[83] we would not be able to apply the second step envisaged by the Appellate Body.[84] The absence of any "declared" "measure[] taken to comply" in the present case also renders the fact-specific reasoning in *US – Softwood Lumber IV (21.5 – Canada)* inapplicable.

7.62 Nevertheless, this does not mean that we may not be guided by the observations that the Appellate Body made in *US – Softwood Lumber IV (21.5 – Canada)* regarding the interpretation of the phrase "measures taken to comply". In this regard, we recall the Appellate Body's reference[85] to the express link between the phrase "measures taken to comply" and the recommendations and rulings of the DSB. Since Article 21.5 covers measures that are taken to comply with those recommendations and rulings, a "measure[] taken to comply" must be sufficiently closely connected to the original dispute that gave rise to those recommendations and rulings. We shall therefore consider whether Reviews 4, 5 and 6 are sufficiently closely connected[86] to the original dispute, such that they should be treated as "measures taken to comply" with the recommendations and rulings made pursuant to that dispute. In doing so, we shall examine the timing, nature and effects of the Reviews, including how they were introduced, and how they function, in the United States' anti-dumping system.[87]

7.63 In order to address the issue in its proper context, we begin by taking into account the factual and legal background against which Reviews 4, 5 and 6 were taken. In describing its retrospective anti-dumping duty assessment system in the original proceeding, the United States explained that:

> If the U.S. Department of Commerce ("Commerce") finds that dumping existed during the period of investigation, and if the U.S. International Trade Commission ("ITC") determines that a U.S. industry was injured by reason of dumped imports, the

---

[82] Appellate Body Report, *EC – Bananas III (21.5 – US)*, para. 245 (footnote omitted).

[83] In its Reply to Question 3 from the Panel (para. 10), the United States asserts that "[t]he measure bringing the United States into compliance in each instance was the act of removing the WTO-inconsistent border measure, and it is this act which can be considered the measure taken to comply". In doing so, the United States fails to identify the particular measure by which such withdrawal was accomplished. Accordingly, we are unable to identify any measure that the United States could be said to have "declared" to be a "measure[] taken to comply".

[84] As explained below, we examine whether Reviews 4, 5 and 6 are so clearly connected to the measures at issue in the original proceeding (i.e., Reviews 1, 2 and 3), and the subject-matter of that dispute, that they should be treated as "measures taken to comply" with the recommendations and rulings regarding those original measures. In our view, such an approach is not inconsistent with examining whether those measures are "in themselves" "measures taken to comply". We do not use the phrase "in themselves", though, since that phrase is not contained in Article 21.5.

[85] Appellate Body Report, *US – Softwood Lumber IV (21.5 - Canada )*, para. 68.

[86] In our view, this is the essence of the approach adopted by the panel in *Australia – Salmon (21.5 – Canada)*, which considered whether the relevant measures are "*so clearly connected* to the panel and Appellate Body reports concerned ... that any impartial observer would consider them to be measures 'taken to comply'." (para. 7.10, sub-para. 22, emphasis supplied.)

[87] Issues regarding the timing of the relevant measures are addressed separately at paras 7.76- 7.80 infra.

> investigation phase ends and the second phase of the antidumping proceeding – the assessment phase – begins. In the assessment phase, the focus is on the calculation and assessment of antidumping duties on specific entries by individual importers.[88]

7.64 The United States further explained that, under its assessment system:

> an antidumping duty liability attaches at the time of entry, but duties are not actually assessed at that time. Rather, the United States collects security in the form of a cash deposit at the time of entry, and determines the amount of duties due on the entry at a later date. Specifically, once a year (during the anniversary month of the orders) interested parties may request a review to determine the amount of duties owed on each entry made during the previous year. Antidumping duties are calculated on a transaction-specific basis and are assessed on an importer-specific basis, in much the same way as duties are assessed in prospective assessment systems. If no review is requested, the cash deposits made on the entries during the previous year are automatically assessed as the final duties.[89]

7.65 Like Reviews 1, 2 and 3, which were measures found to be WTO-inconsistent in the original proceeding, Reviews 4, 5 and 6 are administrative reviews of the 1989 Anti-Dumping Order. The nature and effect of Reviews 4, 5 and 6 is identical to that of Reviews 1, 2 and 3. In other words, like Reviews 1, 2 and 3, each of Reviews 4, 5 and 6 relates to the "assessment phase", and each determines the amount of anti-dumping duties owed on entries made during the previous year. Reviews 4, 5 and 6 are consecutive administrative reviews. Review 4, the earliest of those measures, followed immediately after Review 3, the latest administrative review in the original proceeding. Although the parties treat each administrative review as an independent legal measure, the underlying legal authority for each measure resides in the same 1989 Anti-Dumping Order. Reviews 1, 2, 3, 4, 5 and 6 (together with two additional administrative reviews found to be inconsistent in the original proceedings but not at issue in these proceedings) therefore form part of a continuum, the purpose of which is the ongoing assessment of anti-dumping duties owed under the 1989 Anti-Dumping Order.[90]

7.66 USDOC makes two different determinations in an administrative review. First, USDOC determines exporter-specific cash deposit rates that will apply prospectively to future import entries. Second, USDOC determines importer-specific assessment rates for previous entries imported during the review period. Thus, import entries subject to exporter-specific cash deposit rates determined in one administrative review become subject to importer-specific assessment rates in the following administrative review. The United States has explained in this regard that the cash deposits serve as a "place-holder" for the liability to be determined in the subsequent administrative review.[91] We recall that Reviews 1, 2, 3, 4, 5 and 6, together with two additional administrative reviews found to be inconsistent in the original proceedings but not at issue in these proceedings,[92] are consecutive measures. The fact that each preceding administrative review serves as a "place-holder" (in the form of exporter-specific cash deposit rates) for the liability to be determined in the consecutive

---

[88] United States, First Written Submission in the original proceeding, para. 7 (http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file372_7838.pdf).

[89] Ibid, para. 13, footnotes omitted.

[90] We recall that the latest administrative review in that continuum is Review 9, discussed below at para. 7.114.

[91] United States, First Written Submission, para. 61.

[92] In the original proceedings, the 1998/1999 and 2001/2002 ball bearing administrative reviews, identified in the annex to Japan's original panel request as specific cases nos. 5 and 12 (WT/DS322/8), were found to be inconsistent with Article 9.3 of the *AD Agreement* and Article VI:2 of the GATT 1994. Japan explains that it has not pursued claims in these compliance proceedings regarding these measures because the United States had already liquidated all entries covered by the reviews by the end of the RPT.

administrative review (through importer-specific assessment rates) demonstrates substantive continuity between the original and subsequent reviews.

7.67 Further substantive continuity between these consecutive administrative reviews results from the fact that the cash deposit rates applied by one administrative review are replaced or superseded[93] by the cash deposit rates applied by the subsequent administrative review. Regarding the interaction between Reviews 1, 2 and 3, on the one hand, and Reviews 4, 5 and 6, on the other, the United States asserts that "[t]he original reviews were superseded by subsequent reviews because the cash deposit rate from one review was replaced by the cash deposit rate from the next review". Through the substantive continuity outlined above, Reviews 4, 5 and 6 are closely connected to the original dispute.

7.68 We recall that the recommendations and rulings in the original dispute concerned the WTO-inconsistent application of zeroing in the context of Reviews 1, 2 and 3. We find below[94] that USDOC continued to apply zeroing in Reviews 4, 5 and 6. In our view, the continued application in subsequent administrative reviews of a methodology found WTO-inconsistent in the original proceeding is a legally relevant element connecting Reviews 4, 5 and 6 to the original dispute, and the recommendations and rulings resulting therefrom.[95]

7.69 Furthermore, we note the United States' argument that it came into compliance with the DSB's recommendations and rulings by withdrawing the WTO-inconsistent cash deposit rates. In this regard, the United States asserted:

> The United States came into compliance with the DSB's recommendations and rulings when the WTO-inconsistent cash deposit rates were removed through incidental effects of the operation of the U.S. antidumping system. *The measure bringing the United States into compliance in each instance was the act of removing the WTO-inconsistent border measure, and it is this act which can be considered the measure taken to comply*, or in the words of the Panel, "the measure that removed the specific cash deposit rates at issue in the original proceeding." The United States did not, however, adopt a *separate* measure (such as the results of another administrative review) that removed those specific cash deposit rates; rather, the removal of those cash deposit rates occurred by operation of U.S. law following those subsequent administrative reviews.[96]

7.70 We understand from this response that the United States accepts that the removal of the WTO-inconsistent cash deposit rates constitutes a "measure[] taken to comply", but nevertheless maintains that such removal is separate from Reviews 4, 5 and 6.[97]

---

[93] We note that, in *US – Softwood Lumber IV (21.5 - Canada)*, para. 85, the Appellate Body relied on the fact that the First Assessment Review "superseded" the cash deposit rate resulting from the Section 129 Determination to support its conclusion that the First Assessment Review was a "measure[] taken to comply".

[94] See paras. 7.160-7.166.

[95] Japan's claims in the present case are exclusively concerned with the continuation of zeroing in subsequent administrative reviews. We are not faced with a situation where Japan raises claims in respect of a subsequent administrative review that it could also have raised in the original proceeding, but elected not to do so. Our findings therefore have no bearing on whether such claims might properly fall within the jurisdiction of an Article 21.5 panel.

[96] United States, Reply to Question 3 from the Panel, para. 10, emphasis supplied.

[97] This is confirmed by the United States' Reply to Question 2 from the Panel, where the United States asserted that "[t]he WTO-inconsistent cash deposit rates for Review Nos. 1, 2 and 3 were removed by the time that the cash deposit rate for Review No. 4 was put in place."

7.71 In its First Written Submission, the United States asserted that Reviews 1, 2 and 3 "were superceded by subsequent reviews because the cash deposit rate from one review was replaced by the cash deposit rate from the next review".[98] This is what the United States meant when it explained "that the measures subject to the DSB's recommendations and rulings were eliminated as an incidental consequence of a subsequent administrative review".[99] However, since it is the subsequent administrative review that eliminates the cash deposit rates imposed by a prior review (and replaces them with updated cash deposit rates), the elimination of existing cash deposit rates may not be viewed separately from the superseding administrative review.

7.72 This is confirmed by the United States' description of the operation of its retrospective assessment system. In particular, the United States has asserted that "[t]he results of [an administrative] review serve as the basis for the calculation of the assessment rate for each importer of the subject merchandise covered by the review. The results also establish new cash deposit rates for the collection of estimated antidumping duties on imports going forward, *replacing any cash deposit rate already in effect* for the exporters or producers reviewed."[100]

7.73 We do not consider that the act of removing the WTO-inconsistent cash deposit rates may be viewed as having occurred independently of the subsequent administrative review. Nor do we consider that such act of removal might properly be distinguished from the contemporaneous replacement of those cash deposit rates with new cash deposit rates established in that subsequent administrative review. For these reasons, we are unable to accept that it is exclusively the act of removing the WTO-inconsistent cash deposit rates that constitutes the "measure[] taken to comply". Instead, it is the subsequent administrative review, and the process of withdrawing and replacing cash deposit rates inherent therein, that constitutes the "measure[] taken to comply".

7.74 The first subsequent administrative review after Review 3 was Review 4. Review 4, therefore, withdrew and replaced the WTO-inconsistent cash deposit rates resulting from Review 3. Indeed, had Review 4 not occurred, the cash deposit rates found to be WTO-inconsistent in the original proceeding would have remained in place. Consistent with the above analysis, we find that Review 4 is sufficiently closely connected to the original dispute, such that it should be treated as a "measure[] taken to comply" with the recommendations and rulings resulting from that dispute. This finding is confirmed by the fact that importer-specific assessment rates determined in Review 4 continued to have effects after both the adoption of the DSB's recommendations and rulings, and the expiry of the RPT.[101]

7.75 Furthermore, we recall that Review 4 was superseded by Review 5 and Review 5 was superseded by Review 6, which itself was superseded most recently by Review 9. In other words, Review 3 was actually superseded, in turn, by Reviews 4, 5 and 6 (and, most recently, 9). Thus, to say that only Review 4 constitutes a "measure[] taken to comply" does not capture the reality of the United States' assessment system, for it overlooks the continuation of the assessment chain, and the continuation of zeroing, beyond Review 4. In our view, the subsequent links of that chain are therefore sufficiently closely connected to the original dispute, such that they should also be treated as "measures taken to comply" with the recommendations and rulings resulting from that dispute. As

---

[98] United States, First Written Submission, para. 44.

[99] United States, First Written Submission, para. 44.

[100] United States, First Written Submission, para. 9 (emphasis supplied).

[101] Japan has demonstrated that some of the import entries covered by the Review 4 importer-specific assessment rates had not been liquidated by the commencement of this proceeding (Japan's Reply to Question 10, and its Comments on the United States' Replies, para. 55). Although the United States disputes Japan's claim that no entries covered by those measures had been liquidated by the end of the RPT, the United States does not exclude that some entries had not been liquidated by that date. The United States merely asserts that it is possible that some entries were liquidated prior to the end of the RPT. (United States' Comments on Japan's Replies, para. 9).

with Review 4, this finding is confirmed by the fact that importer-specific assessment rates determined in Reviews 5 and 6 continued to have effects after both the adoption of the DSB's recommendations and rulings, and the expiry of the RPT.[102]

7.76 The United States would have the Panel find that the substantive links between Reviews 4, 5 and 6 and the original dispute are broken by considerations of timing. In particular, the United States contends that Reviews 4 and 5 have "no connection with the DSB's recommendations and rulings",[103] since they were made well before the adoption of the DSB's recommendations and rulings, and therefore "could not logically have taken into consideration"[104] those recommendations and rulings. According to the United States, "measures taken by a Member prior to adoption of a dispute settlement report typically are not taken for the purpose of achieving compliance and would not be within the scope of an Article 21.5 proceeding."[105]

7.77 The United States asserts that, in making its finding in *US – Softwood Lumber IV (21.5 - Canada)*, the Appellate Body considered the timing between the two determinations at issue, in the sense that the determinations in the Section 129 proceeding – the declared measure taken to comply – and the First Assessment Review both occurred after the adoption of the DSB's recommendations and rulings, and both closely corresponded to the expiration of the RPT.[106] The United States asserts that the timing of these two determinations thus provided USDOC with the ability to take account of the DSB's recommendations and rulings in the first administrative review, and as the Appellate Body emphasized, the United States expressly acknowledged that USDOC used the same pass-through analysis in the first administrative review as in the Section 129 Determination "in view of" the DSB's recommendations and rulings.[107] The United States acknowledges that USDOC issued its final results in Review 6 after the adoption of the DSB's recommendations and rulings, but asserts that this determination (dated 12 October 2007) did not occur around the same time as US withdrawal of the administrative reviews subject to the DSB's recommendations and rulings,[108] and did not closely correspond to the expiration of the RPT (on 24 December 2007). The United States further asserts that, most importantly, unlike the first assessment review in *US – Softwood Lumber IV (21.5 - Canada),* Review 6 did not incorporate elements from a Section 129 Determination "in view of" the DSB's recommendations and rulings.

7.78 We recall that we have not sought to apply the fact-specific reasoning of either the panel or Appellate Body in *US – Softwood Lumber IV (21.5 – Canada)*. Furthermore, we note that the

---

[102] Japan has demonstrated that some of the import entries covered by the Review 5 and 6 importer-specific assessment rates had not been liquidated by the commencement of this proceeding (Japan, Reply to Question 10, and its Comments on the United States' Replies, para. 55). Although the United States disputes Japan's claim that no entries covered by those measures had been liquidated by the end of the RPT, the United States does not exclude that some entries had not been liquidated by that date. The United States merely asserts that "it is possible that some entries were liquidated prior to the effective dates of the preliminary injunction." (United States, Comments on Japan's Replies, para. 9).

[103] United States, First Written Submission, para. 34.

[104] United States, First Written Submission, para. 39.

[105] United States, First Written Submission, para. 33. In its Replies to Questions from the Panel (para. 15), the United States emphasises that it only claimed in its First Written Submission that measures taken prior to adoption of a report are not "typically" taken for the purpose of achieving compliance. The United States asserts that it "has not expressed the view that measures adopted prior to the DSB's recommendations and rulings can never be within the scope of a compliance proceeding". We consider that this nuance in the United States' position is not inconsistent with the approach that we have taken in this proceeding.

[106] Appellate Body Report, *US – Softwood Lumber IV (21.5 - Canada)*, para. 84.

[107] Appellate Body Report, *US – Softwood Lumber IV (21.5 - Canada)*, para. 84 (citing US additional memorandum, para. 12).

[108] The United States asserts that the cash deposit rate for the most recent review that was subject to the DSB's recommendations and rulings, namely Review 3, was replaced by the cash deposit from Review 4 in 2005, around two years before the results of Review 6 were announced.

Appellate Body in *US – Softwood Lumber IV (21.5 – Canada)* examined timing as one element of its scrutiny of the relationship between the Section 129 Determination and the First Assessment Review. Having examined the connections between those measures based on their nature and effects, the Appellate Body treated the fact that the publication and effective dates of both the Section 129 Determination and the First Assessment Review "coincided in time" as "an additional link".[109] We do not understand the Appellate Body to have concluded that timing was determinative. Nor do we understand the Appellate Body to have concluded that measures taken by a Member prior to adoption of a dispute settlement report might never constitute "measures taken to comply".[110] Indeed, the Appellate Body merely referred to the fact that the First Assessment Review was published ten months after adoption of the DSB's recommendations and rulings in order to reject the United States' argument that the First Assessment Review was not a "measure taken to comply" because it was initiated before the adoption of the DSB's recommendations and rulings.[111]

7.79 In our view, the fact that Reviews 4 and 5 pre-dated adoption of the DSB's recommendations and rulings is not sufficient to break the very strong substantive links between those measures and the original dispute. We recall that this proceeding concerns a series of subsequent administrative reviews that extends, through the continued application of zeroing, the chain of assessment commenced by the administrative reviews at issue in the original proceeding. We further recall that Reviews 4, 5 and 6 continue the chain of assessment through, and beyond, the "reasonable period of time" allowed to the United States for implementing the recommendations and rulings of the DSB. In addition, importer-specific assessment rates determined in Reviews 4, 5 and 6 continued to have legal effect long after the adoption of the DSB's recommendations and rulings.[112] Furthermore, regarding Review 4 in particular, we recall our rejection of the United States' argument that the removal of the WTO-inconsistent cash deposit rates, as distinct from the contemporaneous replacement of those cash deposit rates with new cash deposit rates, can be considered to be a "measure[] taken to comply".[113] We repeat that it is the subsequent administrative review as a whole, and the process of withdrawing and replacing cash deposit rates inherent therein, that constitutes the "measure[] taken to comply". Since it was Review 4 that withdrew and replaced the WTO-inconsistent cash deposit rates resulting from Reviews 1, 2 and 3, it is simply not credible for the United States to assert that Review 4 has "no connection with the DSB's recommendations and rulings" merely because Review 4 pre-dated them.

7.80 In addition, we are concerned that the United States' argument regarding timing seems to suggest that Article 21.5 should be applied in light of the intent of the implementing Member. This concern arises from the United States' argument that "[m]easures taken by a Member prior to adoption of a dispute settlement report typically are not taken for the *purpose* of achieving compliance".[114] A

---

[109] Appellate Body Report, *US – Softwood Lumber IV (21.5 - Canada)*, para. 84.

[110] We see no reason why a Member should not be able to demonstrate compliance on the basis of "measures taken to comply" that may have been adopted before the adoption of the DSB's recommendations and rulings. Indeed, we note that the United States itself appears to have adopted a similar position in *US – Gambling Services (21.5 – Antigua and Barbuda)* at para. 5.11, where "[t]he United States requested a footnote to one sentence in paragraph 6.22, clarifying that compliance need not necessarily occur subsequent to the DSB recommendation and rulings, as a WTO Member might modify or remove measures at issue after establishment of a panel but prior to adoption of the panel or Appellate Body report".

[111] That being said, we acknowledge that the panel in *Australia – Salmon (21.5 – Canada)* limited its jurisdiction to "any quarantine measure introduced by Australia subsequent to the adoption on 6 November 1998 of DSB recommendations and rulings in the original dispute". That panel was concerned primarily with examining the connections between the relevant measures and the original dispute. That that panel established such connections by reference to timing and subject-matter does not exclude that another panel, confronted with different facts, might establish such connections differently, or with different degrees of emphasis on the relevant factors.

[112] See paras. 7.74 and 7.75.

[113] See paras. 7.69, 7.72, 7.73 and 7.74.

[114] United States, First Written Submission, para. 33 (emphasis supplied).

similar concern arises in respect of the United States' argument that Review 6 was not adopted "in view of" the recommendations and rulings of the DSB, and that "none of these administrative reviews was a voluntary action taken by the United States around the time of implementation to circumvent or undermine declared compliance with the DSB's recommendations and rulings".[115] We have already noted that the Appellate Body stated in *US – Softwood Lumber IV (21.5 - Canada)* that "[t]he fact that Article 21.5 mandates a panel to assess 'existence' and 'consistency' tends to weigh against an interpretation of Article 21.5 that would confine the scope of a panel's jurisdiction to measures that *move in the direction of*, or *have the objective of achieving*, compliance".[116] Referring to this ruling by the Appellate Body, the panel in *US – Gambling Services (21.5 – Antigua and Barbuda)* declined to "exclude any potential 'measures taken to comply' due to the *purpose* for which they may have been taken".[117] We agree that Article 21.5 should not be interpreted and applied on the basis of the intent of the implementing Member. For this reason, we should not exclude any particular subsequent administrative review as a "measure[] taken to comply" simply because the United States may not have adopted that measure for the purpose, or in view, of implementing the recommendations and rulings of the DSB.[118]

7.81 Similar considerations lead us to reject the United States' argument that Reviews 4, 5 and 6 should be excluded from the scope of this proceeding because they only accomplished compliance as an "incidental consequence" of the operation of the United States' anti-dumping duty assessment system. Again, the obvious implication behind this argument is that those measures fall outside the scope of Article 21.5 because they were not adopted for the purpose of complying with the recommendations and rulings of the DSB. As indicated above, we decline to apply Article 21.5 on the basis of the intent of the United States in adopting Reviews 4, 5 and 6. In our view, this is entirely consistent with the Appellate Body's treatment of a similar argument by the United States in *US – Softwood Lumber (21.5 – Canada)*):

> [w]e recognize that the First Assessment Review was not initiated in order to comply with the recommendations and rulings of the DSB, and that it operated under its own timelines and procedures, which were independent of the Section 129 Determination. Nevertheless, these considerations are not sufficient to overcome the multiple and specific links between the Final Countervailing Duty Determination, the Section 129 Determination, and the pass-through analysis in the First Assessment Review.[119]

7.82 For the above reasons, we find that Reviews 4, 5, and 6 are sufficiently closely connected to the original dispute, such that they should be treated as "measures taken to comply" with the recommendations and rulings of the DSB.

7.83 Before proceeding to the next preliminary issue, we note the United States' reliance on the Appellate Body's statement in *US – Softwood Lumber IV (21.5 - Canada)* that "not . . . every assessment review will necessarily fall within the jurisdiction of an Article 21.5 panel."[120] The present case, however, does not concern the issue of whether or not "every assessment review" might fall within the scope of Article 21.5 of the DSU. Rather, it concerns the application of that provision only in respect of the particular subsequent administrative reviews challenged by Japan. In light of

---

[115] United States, First Written Submission, para. 43.

[116] Appellate Body Report, *US – Softwood Lumber IV (21.5 - Canada)* para. 67 (emphasis in original).

[117] Panel Report, *US – Gambling Services (21.5 – Antigua and Barbuda),* para. 6.24 (emphasis in original).

[118] Whether or not measures were adopted "in view of" DSB recommendations and rulings should not be determinative because Members could very easily exclude measures from the scope of Article 21.5 simply by omitting to state that they were adopted in view of DSB recommendations and rulings, or by expressly stating that they are not taken "in view of" any DSB recommendations and rulings.

[119] Appellate Body Report, *US – Softwood Lumber IV (21.5 - Canada)*, para. 88.

[120] Appellate Body Report, *US – Softwood Lumber IV (21.5 - Canada)*, para. 93 (footnote omitted).

the specific connections outlined above, including the continued application in Reviews 4, 5 and 6 of a methodology found WTO-inconsistent in the original proceeding, we find that Reviews 4, 5 and 6 are "measures taken to comply". This does not necessarily mean that all subsequent administrative reviews will necessarily fall within the scope of subsequent Article 21.5 proceedings.

## 2. The inclusion of Review 9 in these proceedings

(a) Main arguments of the parties

7.84 The **United States** seeks a preliminary ruling that the phrase "subsequent closely connected measures" in Japan's panel request fails specifically to identify the alleged subsequent measures, as required under Article 6.2 of the DSU. In response to Japan's submission that Review 9 should be included within the scope of the proceeding, the United States argues that it was not identified with sufficient specificity in Japan's panel request. Finally, the United States argues that, in any event, a future measure, not in existence at the time of the request for establishment of a panel, cannot be within a panel's terms of reference.

7.85 Article 6.2 of the DSU provides:

> The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, *identify the specific measures at issue* and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of the special terms of reference [emphasis added].

7.86 Japan's request for the establishment of a panel provides, relevantly:

> This request concerns five of the 11 periodic reviews…plus three closely connected periodic reviews that the United States argues "superseded" the original reviews…These eight periodic reviews…stem from anti-dumping duty orders on "Ball Bearings and Parts Thereof From Japan", "Cylindrical Roller Bearings and Parts Thereof From Japan", and "Spherical Plain Bearings and Parts Thereof From Japan"…Further, the request concerns any amendments to the eight periodic reviews…as well as *any subsequent closely connected measures* [emphasis added].[121]

7.87 According to the United States, future administrative reviews, including the subject of Japan's supplemental submission, Review 9, fall outside the scope of the proceeding. The United States asserts that Article 6.2 of the DSU requires that a panel request "identify the specific measures at issue" and under Article 7.1 of the DSU, the panel's terms of reference are limited to those specific measures. The United States contends that each determination that sets a margin of dumping for a defined period of time is separate and distinct and that Japan is required to identify each such measure in its panel request. If Japan were allowed to challenge subsequent administrative reviews, the United States would be forced to defend an ever-expanding target during the course of the proceedings.

7.88 The United States contends that whether or not it received "notice" of Japan's intention to challenge future reviews is beside the point. Neither Article 6.2 nor any other provision in a covered agreement requires a respondent to demonstrate that it failed to receive adequate notice regarding certain measures not identified in a panel request. Article 6.2 clearly requires that the specific measures be identified if they are to fall within the panel's terms of reference. The United States

[121] WT/DS322/27, para. 12.

concludes that Japan could not have identified a measure not in existence at the time of its request for the establishment of a panel. This is all the United States is required to show in order to prevail in its request for a preliminary ruling.

7.89 The United States argues that any reliance by Japan upon *Australia – Salmon (21.5 - Canada), EC – Bananas III (21.5 - US)* or *US – Zeroing II (EC)*[122] is inapposite. According to the United States, there is a key difference between *Australia – Salmon (21.5 - Canada)* and the present case. The United States argues that, unlike the situation in *Australia – Salmon (21.5 - Canada),* Japan is not challenging future measures that are related to a regulatory standard that was adopted to comply with the recommendations and rulings of the DSB. Rather, Japan is challenging a subsequent administrative review that occurred upon the request of interested parties on a schedule established without regard to the dispute settlement proceedings. The United States concludes that Review 9, and any other subsequent reviews, are independent of the dispute and of other prior reviews. Japan's challenge is not analogous to challenging subsequent measures which implement or are closely related to a framework law or regulation.

7.90 According to the United States, *EC – Bananas III (21.5 - US)* is irrelevant because the question before the panel in that case did not relate to a failure to specify a measure under Article 6.2 of the DSU, but concerned whether an unreasonable amount of time had elapsed between the adoption of the DSB's recommendations and rulings and the United States' challenge. In relation to Japan's reliance upon *US – Zeroing II (EC),* the United States notes that this ruling has not been adopted and may be appealed. In any event, the panel found that, in principle, except in exceptional circumstances, Article 6.2 does not allow a panel to make findings regarding measures that do not exist at the date of the panel's establishment.

7.91 The United States also argues that the future administrative reviews fall outside the scope of the proceeding because, under the DSU, measures not in existence at the time of panel establishment cannot be subject to dispute settlement. The United States relies on the panel report in *US – Upland Cotton*[123] to support this proposition.

7.92 **Japan** submits that the Panel should reject the United States' request for a preliminary ruling that the phrase "subsequent closely connected measures" does not meet the specificity requirement in Article 6.2 of the DSU. Further, Japan submits that Review 9 is within the scope of the proceeding.

7.93 Japan argues that the terms of its panel request were sufficiently specific. The United States understood the phrase "subsequent closely connected measures" to identify future periodic reviews, because the United States submitted that:

> Japan is trying to include in the Panel's terms of reference any future administrative reviews related to the eight identified in its panel request. [124]

7.94 For Japan, this confirms that the terms of its panel request were sufficiently specific and that the United States was put on "notice" regarding Japan's claims in respect of subsequent administrative reviews. Further, the interpretation Japan advocates promotes the prompt settlement of disputes in accordance with Articles 3.3 and 21.1 of the DSU. If Japan were required to initiate a second set of compliance proceedings in relation to subsequent administrative reviews, in particular Review 9, this would needlessly delay the settlement of the dispute.

---

[122] Panel Report, *US – Zeroing II (EC)*. During the course of these proceedings, the Panel Report was appealed by both parties. The Appellate Body issued its report on 4 February 2009. The Panel Report, as modified by the Appellate Body Report, was adopted by the DSB on 19 February 2009.

[123] Panel Report, *US – Upland Cotton*.

[124] United States, First Written Submission, para. 50.

7.95 Japan rejects the United States' argument that future measures can never be part of a panel's terms of reference. In this regard, Japan relies on the panel report in *US – Zeroing II (EC),* in which the panel recognized that, in appropriate circumstances, future measures identified in a panel request can be within a panel's terms of reference. Japan alleges that Review 9 satisfies such circumstances.

7.96 Japan also relies upon *Australia – Salmon (21.5 - Canada)* to support its argument that Review 9 was identified with sufficient specificity in its request for the establishment of a panel. Japan notes that in *Australia – Salmon (21.5 - Canada)*, a Tasmanian import ban, adopted after the parties had filed their first written submissions, was included in the panel's terms of reference. The panel in that case noted that measures taken subsequent to the establishment of a panel should not per force be excluded from the panel's mandate. In the context of compliance proceedings, there may be compelling reasons to examine measures introduced during proceedings because compliance is often an ongoing and continuous process. Japan rejects the United States' interpretation of *Australia – Salmon (21.5 - Canada).* In particular, Japan does not accept that the Tasmanian ban was within the panel's terms of reference because it "implemented" or was "similar" to a declared compliance measure, namely the removal of the federal ban. Rather, it was within the panel's jurisdiction because it belonged to a category of measures identified in the panel request and because the particular characteristics of compliance proceedings compelled its inclusion. Even if the United States' interpretation were correct, Review 9 is similar and closely related to other measures identified in the panel request.

7.97 Japan also relies upon *EC – Bananas III (21.5 - US)* to support the notion that a measure adopted many years after the end of the reasonable period of time can be a "measure[] taken to comply".

(b) Main arguments of the third parties

7.98 The **European Communities** argues that the United States' request for a preliminary ruling under Article 6.2 of the DSU should be declined. The European Communities contends that Article 6.2 requires the Member concerned to identify the specific measures at issue so that the responding party knows the case it has to answer. According to the European Communities, Japan's panel request contains a clear indication of the measures at issue and as a result, the United States was aware of the specific measures which fell under the scope of the proceeding. The fact that certain of the measures identified in the panel request were future measures is not related to the specificity requirement under Article 6.2 of the DSU, which does not have a temporal scope.

7.99 **Chinese Taipei** submits that the phrase "subsequent closely connected measures" was specific enough to identify Review 9. Further, the panel in *US – Zeroing II (EC)* recognized that, in appropriate circumstances, future measures identified in a panel request can be included in a panel's terms of reference.

(c) Evaluation by the Panel

7.100 The panel understands the parties to raise three issues associated with the inclusion of Review 9 within the scope of the proceedings. In particular, the United States seeks a preliminary ruling that the phrase "subsequent closely connected measures" does not identify the specific measures at issue, as required by Article 6.2 of the DSU. Second, Japan seeks the inclusion of Review 9 within the panel's jurisdiction. Based on its request for a preliminary ruling, the United States argues the phrase "subsequent closely connected measures" cannot support its inclusion. Finally, the United States argues that any future measures, including Review 9, cannot be within a panel's jurisdiction.

*(i) Did Japan's Request for Establishment meet the specificity requirements of Article 6.2 of the DSU?*

7.101 The issue before us is whether the phrase "subsequent closely connected measures" in Japan's request for establishment specifically identifies the measures at issue in the dispute, in accordance with Article 6.2 of the DSU.[125] In resolving this issue, we note that there are no generally applicable rules to govern whether a measure is identified with sufficient specificity for the purpose of Article 6.2. Rather, in each case, a close examination of the relevant facts is required.

7.102 We recall that the United States' retrospective anti-dumping duty assessment system requires that importers of products subject to an anti-dumping duty order post a cash deposit of the estimated amount of anti-dumping duties due. However, interested parties may request an administrative review to determine the final amount due. If requested, the review takes place each year in the anniversary month of the publication of the anti-dumping duty order.[126] The subsequent administrative review supersedes the preceding one, in the sense that the "cash deposit rate from one review [is] replaced by the cash deposit rate from the next review".[127] Therefore, there is a high degree of predictability regarding the future occurrence of subsequent administrative reviews.

7.103 In its panel request, Japan specifies that the request relates to periodic reviews stemming from a specific anti-dumping duty order, namely the 1989 Anti-Dumping Order. In particular, the request relates to certain of the periodic reviews assessed by the original panel and "three closely connected periodic reviews that the United States argues superseded the original reviews".[128] The request also includes "any subsequent closely connected measures". We recall the United States' concern that this phrase is an attempt "to include in the panel's terms of reference any future administrative reviews related to the eight identified in its panel request".[129] We consider that the phrase does identify subsequent periodic reviews, which, if requested, occur on an annual basis, with sufficient specificity under Article 6.2 of the DSU. The description of the three "supersed[ing]" periodic reviews (i.e., Reviews 4, 5 and 6) as "*closely connected*" to the original periodic reviews indicates that the phrase "subsequent *closely connected* measures" covers subsequent periodic reviews, occurring under the same identified anti-dumping duty order, which "supersede" the reviews named in the panel request.

7.104 In determining whether the panel request specifically identifies the measures at issue, we note that the request serves as the basis for the terms of reference for the panel. Further, we note that the Appellate Body held in *Brazil – Desiccated Coconut* that:

> A panel's terms of reference are important for two reasons. First, terms of reference fulfil an important due process objective -- they give the parties and third parties sufficient information concerning the claims at issue in the dispute in order to allow them an opportunity to respond to the complainant's case. Second, they establish the jurisdiction of the panel by defining the precise claims at issue in the dispute.[130]

---

[125] Although the United States begins para. 50 of its First Written Submission by referring to the whole of the phrase "any amendments to the eight periodic reviews and the closely connected instructions and notices, as well as any subsequent closely connected measures", the penultimate sentence of that paragraph makes it clear that the United States "objects to Japan's failure to specifically identify the 'subsequent closely connected measures' as required by Article 6.2 of the DSU". Therefore, the Panel does not understand the United States to dispute that the three amended periodic reviews, referred to in para. 35 of Japan's Response to the Panel Questions, were identified with sufficient specificity in the request for the establishment of the panel.

[126] United States, First Written Submission, paras. 5 and 8.

[127] United States, First Written Submission, para. 44.

[128] WT/DS322/27, para. 12.

[129] United States, First Written Submission, para. 50.

[130] Appellate Body Report, *Brazil – Desiccated Coconut*, page 22.

7.105 In the light of the Appellate Body's statement in this regard, the panel considers, contrary to the submissions of the United States, that whether or not an Article 6.2 panel request adequately puts the responding party on notice regarding the case against it is a relevant consideration when determining whether the specific measures at issue are identified under Article 6.2. In the circumstances of this case, given the terms of the panel request and the nature of the United States anti-dumping system, in particular the regularity and predictability associated with administrative reviews under an anti-dumping order, the United States should reasonably have expected that future administrative reviews may fall within the panel's jurisdiction. Indeed, in its first written submission, the United States clearly anticipates its inclusion by expressing concern "that Japan is trying to include in the panel's terms of reference any future administrative reviews related to the eight identified in its panel request".[131] Therefore, a finding that the phrase "subsequent closely connected measures" satisfies the terms of Article 6.2 would not violate any due process objective of the DSU.

7.106 The United States argues that it is impossible specifically to identify a measure not in existence at the time of a request for the establishment of a panel. As a general proposition, it may be true that it is difficult to identify a future measure. However, the particular facts of this case are such that it was not impossible for Japan to identify future administrative reviews with the specificity required by Article 6.2. Under the United States' retrospective anti-dumping duty assessment system, if requested, administrative reviews for a particular anti-dumping duty order occur at a specific time each year. Given the predictability associated with such reviews, it does not seem that it would be impossible to identify them in a panel request. Indeed, it is clear from the United States' First Written Submission that the United States realized Japan was identifying such measures.[132]

7.107 In the light of the above, we find that the phrase "subsequent closely connected measures" meets the Article 6.2 requirement to identify the specific measures at issue. The examination, in the following subsection of this report, of the more particular issue regarding whether Review 9 should be included within the panel's terms of reference, provides further explanation regarding why the United States' request for a preliminary ruling is rejected.

*(ii) Should Review 9 be included in the scope of the proceeding?*

7.108 On 11 September 2008, during the course of this Article 21.5 proceeding, the United States completed the latest administrative review (Review 9) of the 1989 Anti-Dumping Order, concerning Japanese ball bearings entering the United States during the period 1 May 2006 – 30 April 2007.[133] Japan has asked the Panel to make findings on this measure. The Panel must decide whether Review 9 may properly be included in the scope of this proceeding.

7.109 As an initial matter, Japan sought leave from the Panel to file a supplementary brief regarding Review 9. The United States objected to Japan's request to file a supplemental submission. On 1 October 2008, the Panel informed the parties that it had accepted Japan's request to file a supplementary submission regarding Review 9. The Panel noted that Japan's request, and the United States' response thereto, raised substantive issues regarding the interpretation of Article 21.5 of the DSU that, at that stage, the Panel was not in a position to rule on. Taking into account the expedited nature of Article 21.5 proceedings, the Panel considered that it would nevertheless be prudent for Japan to be allowed to file its supplementary submission without awaiting, and without prejudice to, the Panel's decision on the substantive issues involved.

---

[131] United States, First Written Submission, para. 50.

[132] United States, First Written Submission, para. 50.

[133] *Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews and Rescission of Reviews in Part*, 73 Fed. Reg. 52823 (USDOC, 11 September 2008). Available at: http://edocket.access.gpo.gov/2008/pdf/E8-21137.pdf.

7.110 The first issue we consider is whether Japan's panel request identifies Review 9 as a specific measure at issue. In this regard, we note our previous finding that the phrase "subsequent closely connected measures" is sufficiently specific to cover subsequent periodic reviews. The circumstances associated with Review 9 in particular, rather than administrative reviews in general, provide increased support for its inclusion in the panel's terms of reference. Specifically, at the time of Japan's request for establishment of the panel, Review 9 had already been initiated[134] and once finalised would become the next administrative review in the continuum of administrative reviews related to the 1989 Anti-Dumping Order.

7.111 Further, in relation to the United States' argument that it is impossible specifically to identify a measure not in existence at the time of a request for the establishment of a panel, we note our previous finding that this is not necessarily always the case, particularly in the context of the United States anti-dumping system, where there is a high degree of predictability regarding future administrative reviews. This level of predictability is even higher where a review has already been initiated at the time of the request for panel establishment.

7.112 The second issue to consider in relation to Review 9 is whether it is a "measure[] taken to comply" within the terms of Article 21.5 of the DSU. In its supplementary submission, Japan asserts that Review 9 was included in its panel request[135] and that Review 9 enjoys the same close substantive relationship to Reviews 1, 2 and 3 as Reviews 4, 5 and 6. Moreover, Review 9 constitutes a replacement measure that supersedes the previous periodic review, establishing a new cash deposit rate that replaces the cash deposit rate from the previous review and determines the importer-specific assessment rate for entries initially subjected to the cash deposit rate from previous reviews. Japan also contests the same specific component of Review 9 that it contested with respect to Reviews 4, 5 and 6, identified in its request for the establishment of a panel; namely, the zeroing methodology used to make dumping determinations.

7.113 The United States contests Japan's claims. Aside from the preliminary objection under Article 6.2 of the DSU, the United States argues that Review 9 is not a "measure[] taken to comply" with the DSB's recommendations and rulings with respect to the application of zeroing in the administrative reviews of the 1989 Anti-Dumping Order.

7.114 We recall our finding that Reviews 4, 5 and 6 are "measures taken to comply" which are properly within the scope of this Article 21.5 proceeding.[136] Review 9 is identical in nature and effect to Reviews 4, 5 and 6. Review 9 supersedes those measures, and is therefore the latest link in the chain of assessment incorporating those measures. Review 9 also continues to apply the zeroing methodology found to be WTO-inconsistent in the original proceeding.[137] Like Reviews 4, 5 and 6, therefore, Review 9 is sufficiently closely connected to the original dispute to constitute a "measure taken to comply" within the meaning of Article 21.5. For the reasons set forth above, therefore, we find that Japan's claims regarding Review 9 are also properly within the scope of this proceeding.

*(iii) Future measures*

7.115 The United States also argues that a measure not in existence at the time of a panel request cannot be the subject of dispute settlement. The United States relies on the panel's decision in *US –*

[134] Review 9 was initiated on 29 June 2007 (Initiation of Antidumping and Countervailing Duty Administrative Reviews, Request for Revocation in Part and Deferral of Administrative Review, 72 FR 35690, 29 June 2007), whereas Japan's request for establishment was filed on 7 April 2008 (WT/DS322/27).

[135] WT/DS322/27, para. 12.

[136] See para. 7.82 supra.

[137] See paras. 7.161 and 7.166 infra.

*Upland Cotton* to support its contention.[138] In that case, the panel found that a measure implemented under legislation which, at the time of the panel request, "did not exist, had never existed and might not subsequently have come into existence", was not within its terms of reference and that the claim in relation to it was "entirely speculative".[139] The panel also based its reasoning on Article 3.3 of the DSU, which provides:

> The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.

The panel found that the legislation could not have been impairing any benefits accruing to the complainant because it was not in existence at the time of the request for the establishment of a panel.[140]

7.116 While we do not disagree with the reasoning of the panel in *US – Upland Cotton,* the situation before this panel is different. Importantly, in this case Japan's claim is not "entirely speculative". As previously noted, although the parties treat Reviews 1, 2, 3, 4, 5, 6 and 9 as independent legal measures, they form part of a continuum, the purpose of which is the ongoing assessment of anti-dumping duties owed under the 1989 Anti-Dumping Order. Therefore, although Review 9 did not exist at the time of the panel request, a chain of measures or a continuum existed, in which each new review superseded the previous one. Review 9 eventually came into existence as a part of this chain. Indeed, at the time of the panel request, although the Review 9 determination had not yet been made, Review 9 had been initiated.[141] In this way, the claim in relation to Review 9 was entirely predictable, rather than "entirely speculative". In these particular circumstances, where the measure in issue eventually came into existence as part of a continuum that existed at the time of the panel request, and where the process for bringing about the measure's existence was already underway, we find that Review 9 is within the panel's terms of reference. In these circumstances, unlike the panel in *US – Upland Cotton,* we do not consider Article 3.3 of the DSU to be determinative.[142] In reaching the conclusion that in some circumstances, including in the present dispute, it is possible to challenge a measure that does not exist at the time of a panel request, we note that a measure needs to have come into existence in order for a panel to make a ruling on it. We do not speculate here regarding the point in time by which a challenge must be raised in relation to a measure not in existence at the time of a panel request, for a panel to include a ruling on it within its report.

---

[138] United States, Second Written Submission, para. 30 and United States, Response to Japan's Supplemental Submission, para. 11.

[139] Report of the Panel, *United States –Upland Cotton,* para. 7.158.

[140] Report of the Panel, *United States –Upland Cotton,* para. 7.160.

[141] Review 9 was initiated on 29 June 2007 (Initiation of Antidumping and Countervailing Duty Administrative Reviews, Request for Revocation in Part and Deferral of Administrative Review, 72 FR 35690, 29 June 2007), whereas Japan's request for establishment was filed on 7 April 2008 (WT/DS322/27).

[142] We note that the Appellate Body has not ruled out the inclusion of future measures within a panel's terms of reference. In particular, in *US – Softwood Lumber IV (21.5 - Canada)* at para. 74*,* the Appellate Body stated that it was appropriate for the panel in *Australia – Salmon (21.5 – Canada)* to have included within its jurisdiction an import ban on salmon adopted by the State of Tasmania. We note that this import ban did not exist at the time of the request for the panel's establishment in *Australia – Salmon (21.5 – Canada).* Further, in *EC - Chicken Cuts* the Appellate Body stated, at para. 156, "[t]he term 'specific measures at issue' in Article 6.2 suggests that, as a general rule, the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel. However, measures enacted subsequent to the establishment of the panel may, in certain limited circumstances, fall within a panel's terms of reference".

## C. COMPLIANCE IN RESPECT OF REVIEWS 1, 2, 3, 7 AND 8

7.117 Japan challenges an alleged failure by the United States to comply with the recommendations and rulings of the DSB in respect of the importer-specific assessment rates determined in five of the 11 periodic reviews that were at issue in the original proceeding (i.e., Reviews 1, 2, 3, 7 and 8). Japan asserts that the United States should have taken steps to bring the importer-specific assessment rates determined in Reviews 1, 2, 3, 7 and 8 into conformity, since they continue to have legal effect after the end of the RPT. Japan claims that the United States' failure to act is in violation of Articles 17.14, 21.1 and 21.3 of the DSU, and in continued violation of Articles 2.4 and 9.3 of the *AD Agreement*, and Article VI:2 of the GATT 1994.

7.118 The United States denies that it has any implementation obligations in respect of those importer-specific assessment rates, since they concern import entries that occurred before the expiry of the RPT.

### 1. Main arguments of the parties

7.119 **Japan** submits that, in accordance with the recommendations and rulings adopted by the DSB in this dispute, the United States is required to bring its WTO-inconsistent periodic reviews into conformity with the *AD Agreement* and with the GATT 1994.

7.120 In terms of when the United States must comply with the DSB's recommendations and rulings, Japan contends that Article 21.1 of the DSU provides that "prompt compliance" is "essential". Where it is "impracticable to comply immediately" with the DSB's recommendations and rulings, Article 21.3 permits an implementing Member a reasonable period of time to comply as an exception to immediate compliance. In this dispute, that period expired on 24 December 2007. In terms of what the implementing Member must achieve by the end of the RPT, Japan contends that Article 3.7 of the DSU specifies that "the first objective of the dispute settlement system is usually to secure the withdrawal" of WTO-inconsistent measures. Japan argues that Article 19.1 of the DSU formulates recommendations and rulings in terms of "bring[ing]" a WTO-inconsistent measure into conformity with WTO law. Japan asserts that the Appellate Body has recognized that implementing Members may bring a WTO-inconsistent measure into compliance "by modifying or replacing it with a revised measure."[143]

7.121 According to Japan, Articles 19.1, 21.1, and 21.3 of the DSU serve to establish that an implementing Member is required to bring a measure into conformity with WTO law by taking action to withdraw, modify, or replace the WTO-inconsistent measure before the end of the RPT. Japan submits that, pursuant to these provisions, action by an implementing Member is required to bring a WTO-inconsistent measure into conformity with its "pre-existing" WTO obligations whenever the measure is legally operational after the end of the RPT. Japan asserts that if the United States were not required to take any action to revise the WTO-inconsistent importer-specific assessment rates, the obligation to "bring the measure[s] into conformity" with WTO law by the end of the RPT is deprived of all meaning. Rather than bring the measures into conformity, the United States could continue to enforce those measures, after the end of the RPT, in blatant disregard of the WTO obligations that it should have been respecting since 1995, and which applied when the periodic reviews were originally conducted.

7.122 Japan stresses that it is not seeking a retrospective remedy. Rather, Japan asserts that, in providing prospective relief, the implementing Member is required to ensure that any further action it takes, after the end of the reasonable period of time, pursuant to a measure that has already been found to be WTO-inconsistent, is WTO-consistent. Japan contends that this obligation is consistent

[143] Appellate Body Report, *US – OCTG from Argentina (21.5 - Argentina)*, para. 173, note 367.

with the requirement under Article 19.1 of the DSU to "bring the measure into conformity". According to Japan, by requiring the United States to "bring" the importer-specific assessment rates into conformity with WTO law with effect from the end of the RPT, the DSU does not require that the United States retrospectively "undo" legal situations that were fixed at an earlier point in time. Japan submits that it challenges solely those WTO-inconsistent periodic reviews with respect to which liquidation of entries had not occurred by the end of the RPT and, consequently, the final amount of anti-dumping duties had not yet been definitively finalized or collected. Japan is not asking the United States to repay duties that have already been definitively collected on liquidated entries.

7.123 Regarding its claim under Article 17.14 of the DSU, Japan contends that the failure to comply with the recommendations and rulings of the DSB within the reasonable period of time is a violation of Article 17.14 of the DSU because it indicates that the Appellate Body report has not been "unconditionally accepted" by the United States. With respect to the five periodic reviews found inconsistent in the original proceedings, Japan argues that the United States' *omission* to bring the importer specific assessment rates into conformity with the covered agreements represents "conditional acceptance" of the Appellate Body report.

7.124 The **United States** rejects Japan's claim in respect of the five abovementioned administrative reviews. The United States relies primarily on the prospective effect of WTO dispute settlement remedies, arguing that implementation should be assessed by looking at the treatment accorded to goods entered after the expiry of the RPT. The United States submits that, because of the prospective effect of WTO dispute settlement remedies, it did not have any implementation obligations in respect of import entries subject to the administrative reviews at issue in the original proceedings because all of those entries occurred prior to the expiry of the RPT. Rather, implementation obligations arising from the DSB's recommendations and rulings in this dispute only applied to future entries. The United States asserts that the measures pertaining to the five reviews were withdrawn because the United States no longer applies these measure to future entries. As a result, the final liability determined in these no longer serves as the basis for anti-dumping liability on entries occurring after the RPT. This withdrawal was accomplished as an incidental consequence of the United States' anti-dumping system. According to the United States, it has therefore withdrawn the results of the five administrative reviews within the meaning of Article 3.7 of the DSU and fully complied with the DSB's recommendations and rulings as they relate to these administrative reviews.[144]

7.125 The United States asserts that the text of the GATT 1994 and the *AD Agreement* demonstrate that it is the legal regime in existence at the time that an import enters the Member's territory that determines whether anti-dumping duties apply to the import. The United States notes in this regard that Article VI:2 of the GATT 1994 authorises a Member to "levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product." According to the United States, 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." Furthermore, the United States asserts that 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.[145]

---

[144] The United States notes that, under Article 3.7, "[i]n the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements."

[145] Annex I, GATT 1994, Ad Article VI, paras. 2 and 3.

7.126 According to the United States, the interpretive note clarifies that, notwithstanding that duties are generally levied at the time of importation, Members may instead require cash deposits or other security, in lieu of the duty, pending final determination of the relevant information. The United States asserts that the cash deposits therefore serve as a place-holder for the liability which is incurred at the time of entry.

7.127 The United States submits that several provisions of the *AD Agreement* further demonstrate that determining whether relief is "prospective" or "retroactive" can only be assessed by reference to date of entry. The United States refers for example to Article 10.1 of the *AD Agreement*, which 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. According to the United States, Article 10.1 demonstrates that the critical factor for determining whether particular entries are liable for the assessment of antidumping or countervailing duties is the legal regime in existence on the date of entry.

7.128 The United States contends that, 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." The United States asserts that, once again, the critical factor for determining the applicability of the provision is the date of entry.

7.129 The United States further notes that 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 . . . .", whereas 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." The United States submits that, 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.

7.130 The United States asserts that Japan's argument would result in inequality between the retrospective and prospective anti-dumping systems. Thus, the United States asserts that if an anti-dumping measure in a prospective system is found to be inconsistent with the *AD Agreement*, the Member's obligation is merely to modify the measure as it applies to imports occurring on or after the date of implementation. That is, the Member changes the amount of anti-dumping duties to be collected on importations occurring after the end of the RPT, but need not remedy the effects of the measure on imports that occurred prior to the date of implementation. The United States contends that if the issuance of assessment or liquidation instructions after the RPT forms the basis for implementation obligations, as Japan wants, then retrospective systems will be subject to very different and more extensive implementation obligations than prospective antidumping systems.

7.131 Furthermore, the United States contends that Japan's argument impermissibly makes the implementation obligations of Members dependent on domestic litigation in the United States. According to the United States, liquidation of the relevant entries did not occur because those entries were subject to domestic litigation in the United States that included court injunctions suspending liquidation during the pendency of the litigation. The United States contends that Japan's theory of US implementation obligations is dependent on the existence of these injunctions because, without them, the United States would have liquidated all of the entries from the five administrative reviews long before the end of the implementation period in this dispute. The United States asserts that the fact that Japan's theory of implementation is dependent on these injunctions demonstrates that Japan is attempting to rely on domestic US litigation to alter its WTO rights, but the obligations at issue under the covered agreements do not change depending on the existence of domestic litigation.

7.132 Regarding the alleged violation of Articles 17.14, 21.1 and 21.3 of the DSU, the United States asserts that Article 21.1 imposes no substantive obligations upon Members. According to the United States, Article 21.1 merely states why "prompt compliance" is "essential" to the WTO dispute settlement system. The United States does not accept that the panel reports cited by Japan support its claim that Article 21.1 includes an obligation to comply promptly. Rather, the reports simply affirm the importance of prompt compliance in WTO disputes and do not find any measures inconsistent with Article 21.1. The United States takes particular issue with Japan's reliance upon *US – FSC (21.5 - EC)(II)*,[146] because the panel explicitly refused to consider whether Article 21.1 imposed an obligation on Members. With respect to Article 21.3, the United States claims that it provides Members with a right to a reasonable period of time in which to comply with the DSB recommendations and rulings. The only obligation it imposes upon Members is to inform the DSB of the Member's intention regarding implementation. There is no obligation of "prompt compliance".

7.133 With respect to the alleged violation of Article 17.14, the United States argues that Japan has not identified a measure that would show conditional acceptance by the United States of the Appellate Body report. In response to Japan's argument that the omission by the United States to bring the importer specific assessment rates into conformity with WTO obligations represents such a measure, the United States asserts that "nothing...can change the fact that the United States unconditionally accepted the recommendations and rulings of the DSB in this dispute. On 20 February 2007, the United States notified the DSB of its intention to implement those recommendations and rulings".[147] According to the United States, Japan is attempting to cast the disagreement concerning compliance into "conditional acceptance" by the United States.

**2. Main arguments of the third parties**

7.134 **China** notes that after the end of the RPT, the administrative reviews continue to produce legal effects that are WTO-inconsistent, in that the importer specific assessment rates that apply were determined using zeroing. Therefore, the United States has not complied with the DSB's recommendations and rulings. The approach advocated by the United States would undermine the objective and purpose of the WTO dispute settlement system.

7.135 The **European Communities** considers that the date of entry of an import is irrelevant when assessing the United States' compliance in this case. Prospective implementation requires that the United States not take any positive acts after the end of the RPT that are contrary to the DSB's recommendations and rulings in the original dispute. The European Communities considers that its interpretation does not create inequalities between retrospective and prospective anti-dumping systems. Under both systems, the implementation obligations are the same – after the end of the RPT, no new action can be taken that is inconsistent with the DSB recommendations and rulings, regardless of the date of entry of the import affected by the action. Further, in response to the United States' argument that its WTO rights and obligations should not change depending on the existence of domestic litigation, the European Communities asserts that, regardless of the existence of domestic litigation, any actions taken after the end of the RPT must conform to the AD Agreement, as interpreted in the DSB recommendations and rulings.

7.136 **Hong Kong, China** rejects the United States' argument that its implementation obligations apply only to goods imported after the expiry of the RPT. Rather, Hong Kong, China notes that certain goods that entered the United States prior to 24 December 2007 could be liquidated by the United States after the expiry of the RPT on the basis of administrative reviews already found to be WTO inconsistent. Hong Kong, China submits that it is this continuous legal effect, after the end of the RPT, that is relevant to the implementation obligations of the United States. Further, Hong Kong,

[146] Panel Report, *US – FSC (21.5 - EC)(II)*.
[147] United States, Second Written Submission, para. 72.

China argues that the relief sought by Japan is prospective rather than retrospective in nature. This is because the United States is required to ensure that any action it takes as of the end of the RPT is WTO-consistent. Finally, Hong Kong, China rejects the United States' contention that should Japan prevail, inequality between prospective and retrospective anti-dumping duty assessment systems would be created. Any differences in implementation obligations merely reflect the intrinsically different features and characteristics of the two systems, as envisaged under the AD Agreement.

7.137 **Mexico** argues that the United States has taken no implementation action in relation to Reviews 1, 2, 3, 7 and 8. The reviews continue to have significant legal effects after the end of the RPT, including the potential application of erroneous importer specific assessment rates to entries unliquidated at the end of the RPT. Further, Mexico asserts that Japan is not seeking a retrospective remedy. The implementation obligation does not require repayment of duties that have already been assessed and collected on liquidated entries. Rather, the obligation focuses on future actions to collect anti-dumping duties. Finally, the position advocated by Japan does not create an inequality between prospective and retrospective anti-dumping systems. The interpretation advocated by the United States would allow Members with retrospective systems perpetually to evade their WTO obligations, while requiring Members with prospective systems to comply.

7.138 **Thailand** argues that if the United States' implementation obligations applied only in relation to imports entering the United States after the end of the RPT, the United States will be able to escape the requirements of Article 9.3 of the AD Agreement.

### 3. Evaluation by the Panel

7.139 Japan's claims require us to determine whether or not the United States was required to comply with the recommendations and rulings of the DSB in respect of any importer-specific assessment rates determined in Reviews 1, 2, 3, 7 and 8[148] that apply to entries that were, or will be, liquidated after the end of the RPT.[149]

7.140 The United States rejects Japan's claim on the basis that Japan is seeking a "retrospective" remedy. According to the United States, "[i]mplementation of the DSB's rulings and recommendations in these disputes applies *prospectively*".[150] Japan denies that it is seeking a retrospective remedy.[151] In assessing the United States' implementation obligations, we note that neither the DSU nor the *AD Agreement* uses the terms "prospective" or "retrospective" to describe

---

[148] Japan's claims also refer to certain amendments to Reviews 1, 2 and 3 (para. 35 of Japan's replies to Questions from the Panel). These amendments are covered by Japan's request for establishment (see the reference to "any amendments to the eight periodic reviews" at para. 12 thereof). The United States asserts that these amendments are not relevant to this proceeding, since they were the result of U.S. court orders unrelated to the DSB's recommendations and rulings in this dispute and did not alter the zeroing procedures employed in Reviews 1, 2 and 3 (United States letter to the Panel of 5 December 2008, fifth paragraph, and para. 20 of United States' Comments on Japan's Replies). We note that the importer-specific assessment rates resulting from Reviews 1, 2 and 3 were recalculated following the amendments challenged by Japan (Exhibits US-A28 and A29, for example). We therefore include these recalculated importer-specific assessment rates in the scope of our findings, since the recalculated importer-specific assessment rates replace those initially determined by USDOC. In other words, it is the recalculated importer-specific assessment rates that should have been brought into conformity. We note in this regard that the United States has not formally challenged the inclusion of the amendments in this proceeding.

[149] Although the United States challenges Japan's assertion that none of the relevant entries had been liquidated by the end of the RPT, the United States does not claim that all of the entries had been liquidated by that date (United States, Comments on Japan's Replies, paras 17 and 18). At least some entries, therefore, have been, or will be, liquidated after the end of the RPT. Our findings concern the importer-specific assessment rates applicable to those entries.

[150] United States, First Written Submission, para. 54 (emphasis in original).

[151] Japan, First Written Submission, paras 141 – 145.

Members' implementation obligations. Accordingly, we do not consider it appropriate to resolve the issue before us on the basis of whether Japan is seeking a "prospective" or "retrospective" remedy.[152] Instead, we shall have regard to those provisions of the covered agreements that explicitly address Members' implementation obligations.

7.141 We begin by considering Article 19.1 of the DSU, on the basis of which the Appellate Body (and subsequently the DSB, upon its adoption of the Appellate Body's Report) recommended that the United States bring Reviews 1, 2, 3, 7 and 8 "into conformity" with the relevant covered agreements. We also consider Article 3.7 of the DSU, which specifies that "[i]n the absence of a mutually agreed solution, the first objective of the dispute settlement system is usually to secure the withdrawal" of WTO-inconsistent measures. In this regard, we note that the Appellate Body has recognized that the inconsistent measure to be withdrawn can be brought into compliance "by modifying or replacing it with a revised measure."[153] A measure may also be considered to have been withdrawn if it expires. In accordance with these provisions, therefore, the United States was required to bring Reviews 1, 2, 3, 7 and 8 "into conformity", by withdrawing, modifying or replacing them, to the extent they had not already expired.

7.142 The DSU also specifies the time-frame within which the United States must comply with that requirement. In this regard, whereas Article 19 is entitled "Panel and Appellate Body Recommendations", Article 21 of the DSU is entitled "Surveillance of Implementation of Recommendations and Rulings". Paragraph 3 of Article 21 provides in relevant part:

> At a DSB meeting held within 30 days after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB. If it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so...

7.143 We interpret the second sentence of Article 21.3 as imposing a deadline within which the United States' obligations under Article 19.1 were to be fulfilled. According to Article 21.3, the United States was required to implement the recommendations and rulings of the DSB "immediately" or, at the latest, after a specified "reasonable period of time". Consistent with this provision, the United States and Japan agreed that the United States should have a "reasonable period of time" in which to comply. That RPT expired on 24 December 2007.[154]

7.144 Thus, pursuant to Articles 3.7, 19.1, and 21.3 of the DSU, the United States was required to bring Reviews 1, 2, 3, 7 and 8 "into conformity" by 24 December 2007. By that date, the United States was required to have withdrawn, modified or replaced those measures, if they had not already expired.

7.145 The United States contends that it met its compliance obligations by withdrawing Reviews 1, 2, 3, 7 and 8 by the end of the RPT. In particular, the United States asserts that it "eliminated the cash deposit rates established by the administrative reviews that were found to be WTO-inconsistent in the original proceeding".[155] According to the United States, "nothing remains to be done to come into compliance with the DSB's recommendations and rulings".[156]

---

[152] For this reason, it is not necessary for us to review the parties' arguments regarding the application and interpretation of the *ILC Articles on State Responsibility* (which Japan "relies on ... to show that it pursues prospective relief", Japan, Second Written Submission, para. 149).

[153] Appellate Body Report, *US – OCTG from Argentina (21.5 - Argentina)*, para. 173, note 367.

[154] WT/DS322/20.

[155] United States, First Written Submission, para. 54.

[156] United States, First Written Submission, para. 54.

7.146 We recall that, in addition to fixing exporter-specific cash deposit rates to be applied to future import entries, administrative reviews also determine importer-specific assessment rates in respect of entries that occurred during the review period. The importer-specific assessment rates determined in 1, 2, 3, 7 and 8 are an integral part of those measures, and were also covered by the DSB's recommendations and rulings regarding those measures.[157] Although the United States has explained how it claims to have complied with the recommendations and rulings of the DSB regarding the relevant exporter-specific cash deposit rates, the United States has not explained how it complied with the DSB's recommendations and rulings regarding the relevant importer-specific assessment rates. Indeed, we understand the United States to assert that it has done "nothing" in respect of these measures. The United States posits that it was not required to implement in respect of the importer-specific assessment rates because they relate to import entries occurring before the expiry of the RPT. According to the United States, Article VI:2, Article VI:6(a), and the interpretative note to paragraphs 2 and 3 of Article VI of the GATT 1994, and Articles 10.1, 8.6 and 10.6 of the *AD Agreement*, dictate that "it is the legal regime in existence at the time that an import enters the Member's territory that determines whether antidumping duties may apply to the import".[158]

7.147 We do not consider that the United States' views concerning the "legal regime in existence at the time of entry" provides support for its argument that no implementation obligations exist in respect of the importer-specific assessment rates at issue. Rather, this assertion seems to be no more than a statement of a basic rule that import entries should only be liable for anti-dumping duties if an anti-dumping measure (or "order", in US parlance) was in place at the time of entry. If no such anti-dumping "regime" were in place at that time, the relevant entries should not be liable for anti-dumping duties. In addition, while the United States contends that the text of the abovementioned *AD Agreement* and GATT 1994 provisions "confirms that the focus for implementation purposes should be on the time of entry of merchandise",[159] in fact not a single word of those provisions addresses the issue of how a Member should implement the recommendations and rulings of the DSB. Thus, although the United States may be correct in asserting that "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",[160] the point is that the *AD Agreement* does not specify any applicable date for implementation action. Accordingly, the *AD Agreement* does not require that the "scope of applicability" of implementation action be based on the date of import entry.

7.148 In our view, the United States' implementation obligations should rather be determined by reference to the abovementioned provisions of the DSU, which deal specifically with the implementation of the recommendations and rulings of the DSB. The focus of those provisions is the measure found to be WTO-inconsistent, and the need to bring that measure "into conformity" by the end of the RPT. There is no reference in those provisions to the date of import entry. The relevant date for the purposes of Articles 3.7, 19.1 and 21.3 of the DSU (in cases where immediate compliance is impracticable) is rather the expiry of the RPT. If a measure found to be WTO-inconsistent is to be applied after the expiry of the RPT, that measure must have been brought "into conformity", irrespective of the date of entry of the imports covered by that measure.

[157] We note that the United States adopted a similar view in its reply to Question 9(a) from the Panel, where the United States asserted that "[t]he measure at issue in the original proceeding included the determination of final antidumping liability in Review Nos. 1, 2 and 3; and as part of the determinations of final liability in those reviews, Commerce determined importer-specific assessment rates." We therefore understand the United States to accept that importer-specific assessment rates form part of the measures at issue in the original proceeding.

[158] United States, First Written Submission, para. 59.

[159] United States, First Written Submission, para. 59.

[160] United States, First Written Submission , para. 64.

7.149 Consistent with the above analysis, the United States was required to have brought the importer-specific assessment rates determined in Reviews 1, 2, 3, 7 and 8 (and subsequent amendments thereto)[161] "into conformity" with the covered agreements by 24 December 2007. However, the importer-specific assessment rates determined in Reviews 1, 2, 3, 7 and 8 that Japan has challenged in this compliance proceeding had not been withdrawn by that date.[162] Rather, those importer-specific assessment rates continued to have legal effect after the end of the RPT,[163] in the sense that they continued to provide the authority for the collection of anti-dumping duties in respect of the relevant (unliquidated) import entries. In fact, in the absence of any modification of those importer-specific assessment rates,[164] the status of those measures has not changed since the original proceeding, in which they were found to be WTO-inconsistent. In these circumstances, we conclude that the United States failed to bring those importer-specific assessment rates "into conformity" by 24 December 2007.

7.150 The United States contends that such an approach creates inequality between retrospective and prospective anti-dumping systems, primarily because the concept of an unliquidated entry does not exist in the context of prospective systems. We understand the United States to argue that, since anti-dumping duties under a prospective system are collected, or liquidated, at the time of entry, there is in principle no possibility of entries remaining unliquidated at the end of any RPT. Even if the prospective anti-dumping duty were found to be WTO-inconsistent, the collection, or liquidation, of that duty would remain unaffected by the relevant Member's implementation obligations, since it would have occurred long before the end of the RPT. Under a retrospective system, though, the collection of anti-dumping duties might not occur until after the expiry of the RPT. If the relevant Member's implementation obligations were not restricted to the date of the import entry in respect of which collection is being made, those implementation obligations would affect the collection of the anti-dumping duty.

7.151 There is disagreement between the parties regarding the validity of the concern raised by the United States. Japan submits that, even under a prospective assessment system, a periodic review found to be WTO-inconsistent could produce legal effects after the end of the RPT. Japan contends that such review would have to be brought into conformity as of the end of the RPT, even though the relevant (unliquidated) entries occurred before that date. According to Japan, therefore, the implementation obligations under both the prospective and retrospective assessment systems are equal.

7.152 We see no need to resolve this particular disagreement between the parties, for we do not consider that our task is to ensure that the implementation obligations under prospective and retrospective assessment systems are identical. The fact is that the two systems are different, and it is presumably such differences that lead Members to choose one system over the other. If we were required to ensure that there were no material differences between the operation of the two systems, there would be little point in Article 9 of the *AD Agreement* providing Members with that choice. Having chosen one system over the other, Members must respect the consequences of that choice. Contrary to the United States, we do not consider that such an approach is at odds with the Appellate Body's view that "[t]he *Anti-Dumping Agreement* is neutral as between different systems for levy and

---

[161] We refer in this regard to the amendments cited at para. 35 of Japan's Replies to Questions from the Panel.

[162] The United States has not alleged that the importer-specific assessment rates expired before the end of the RPT.

[163] We are guided in this regard by the Panel Report, *EC – Commercial Vessels*, in which the panel required the European Communities to take action to implement the recommendations and rulings of the DSB with respect to WTO-inconsistent measures "to the extent that [they] continue to be operational" (para. 8.4).

[164] We note that the United States does not argue that the amendments specified at para. 35 of Japan's Replies to Questions constitute withdrawal of the relevant WTO-inconsistent measures.

collection of anti-dumping duties".[165] First, we note that the Appellate Body's statement confirms the fact that the prospective and retrospective assessment systems are indeed "different". Second, the Appellate Body's statement concerns the *AD Agreement*, not the DSU. Third, the fact that the underlying differences between the prospective and retrospective assessment systems may have practical consequences for how Members come into compliance with the recommendations and rulings of the DSB does not mean that the DSU favours one system over the other; it is simply a reflection of those underlying differences.

7.153 Finally, we note the United States' argument that the only reason why liquidation did not occur before the end of the RPT was because the relevant import entries were subject to domestic litigation that included court injunctions suspending liquidation during the pendency of that litigation.[166] We do not consider that the abovementioned provisions of the DSU provide for such considerations to be taken into account.[167] Instead, those provisions require universal compliance by the end of the RPT, no matter the factual circumstances of any given case.

7.154 In light of the above, we find that the United States has failed to comply with the recommendations and rulings of the DSB regarding the importer-specific assessment rates determined in Reviews 1, 2, 3, 7 and 8 that apply to entries covered by those Reviews that were, or will be, liquidated after the expiry of the RPT. Accordingly, we find that the United States remains in violation of Articles 2.4 and 9.3 of the *AD Agreement*, and Article VI:2 of the GATT 1994, in respect of those importer-specific assessment rates.

7.155 We recall that Japan has also brought claims under Articles 21.1, 21.3 and 17.14 of the DSU. The basic issue before us is whether or not the United States has complied with the recommendations and rulings of the DSB regarding the relevant importer-specific assessment rates.[168] We have found that it has not, and that it therefore remains in violation of Articles 2.4 and 9.3 of the *AD Agreement*, and Article VI:2 of the GATT 1994. In this context we do not need to examine whether the United States' failure to implement violates various provisions of the DSU. This is in accordance with the Appellate Body's statement in *Canada – Wheat Exports* that a panel may refrain from making multiple findings that the same measure is inconsistent with various provisions of covered agreements when a single finding will resolve the dispute.[169] Accordingly, we decline to consider Japan's claims under the abovementioned provisions of the DSU.

---

[165] Appellate Body Report, *US – Zeroing (Japan)*, para. 163.

[166] The United States also argues that Japan's theory of implementation is dependent on such injunctions, demonstrating that Japan is attempting to rely on US litigation to alter its WTO rights. We do not consider that the United States' implementation obligations may be said to have been altered by virtue of the relevant injunctions. The United States' basic implementation obligation is to bring the relevant measures into conformity by the end of the RPT. That obligation derives from the abovementioned provisions of the DSU. It does not result from US domestic law.

[167] The United States asserts that the Panel should not allow factors "not provided for by the terms of" the covered agreements, such as the rights of private parties in domestic litigation, "to add to or diminish the rights and obligations of Members" (United States, Second Written Submission, para. 56). We are not persuaded by this argument. We have found that the United States is in continued violation of various provisions of the covered agreements. The reasons why the United States finds itself in continuing violation are not pertinent to our findings.

[168] We accept that Article 21.5 proceedings are not concerned uniquely with implementation of the DSB's recommendations and rulings. Article 21.5 proceedings might also include additional claims regarding "measures taken to comply" that were necessarily not raised in the original dispute (see Appellate Body Report, *Canada – Aircraft ( 21.5 – Brazil)*, para. 40). This is not the case here, though, since Japan's DSU claims are entirely dependent on a finding that the United States has failed to implement the recommendations and rulings of the DSB.

[169] Appellate Body Report, *Canada – Wheat Exports,* para. 133.

D. COMPLIANCE IN RESPECT OF REVIEWS 4, 5, 6 AND 9

7.156 We recall our earlier findings that Japan's claims regarding Reviews 4, 5, 6 and 9 are properly within the scope of this Article 21.5 proceeding.[170] We shall now examine the substance of those claims.

(a) Main arguments of the parties

7.157 **Japan** claims that Reviews 4, 5, 6 and 9 are inconsistent with Articles 2.4 and 9.3 of the *AD Agreement*, and Article VI:2 of the GATT 1994, because the United States applied zeroing when calculating margins of dumping to determine cash deposit rates and importer-specific assessment rates.

7.158 Japan refers to Computer Program Excerpts to demonstrate that zeroing was used by USDOC in the context of Reviews 4, 5, 6 and 9. Japan contends that the United States' use of zeroing in Reviews 4, 5, 6 and 9 is confirmed by USDOC's Issues and Decisions Memoranda. Japan asserts that USDOC expressly confirms the use of zeroing in these documents, rejecting the respondents' requests for it to abandon zeroing. In addition, in its replies to certain Questions from the Panel, Japan calculated what the cash deposit rates and importer-specific assessment rates in Reviews 4, 5, 6 and 9 would have been had USDOC not used zeroing in those reviews. According to Japan, the margins of dumping determined in Reviews 4, 5, 6 and 9 would, in most cases, have been zero without zeroing. Japan asserts that the margins determined in the remaining cases would have been significantly reduced.

7.159 The **United States** does not deny that it applied zeroing in these administrative reviews.[171] However, the United States argues that Japan must establish a *prima facie* case with respect to the inconsistency of these reviews and that Japan's mere reference to prior reports on this subject is insufficient for this purpose. Additionally, the United States argues more generally that the presence of zeroing programming language in reviews does not establish that individual importer-specific assessment rates were affected by zeroing procedures because, if a given importer had no sales with "negative margins", zeroing would not be employed in that importer's assessment rate, irrespective of the presence of the programming language.

(b) Evaluation by the Panel

7.160 We recall that, in the original proceeding, USDOC's use of zeroing was established by reference to the use of a line of computer code called the "standard zeroing line".[172] In this proceeding, Japan has provided evidence that the standard zeroing line was also applied by USDOC in Reviews 4, 5, 6 and 9. This evidence takes the form of the Computer Program Excerpts submitted to the Panel as Exhibits JPN-91.1.A, JPN-91.1.B, JPN-91.1.C, JPN-91.1.D, JPN-91.2.A, JPN-91.2.B, JPN-91.2.C, JPN-91.2.D, JPN-91.3.A, JPN-91.3.B, JPN-91.3.C, JPN-91.3.D, JPN-91.3.E, JPN-91.4.A and JPN-91.4.B.[173] An overview of these exhibits is provided in Exhibit JPN-91.A. Japan relies on an explanation of the mechanics of the standard zeroing line submitted as Exhibit JPN-1 in the original proceeding. Japan has also submitted an updated version of that document, as well as a

[170] See paras. 7.82 and 7.114.

[171] The United States' position is premised on its argument that Reviews 4, 5, 6 and 9 are not covered by these proceedings because they are not "measures taken to comply" within the meaning of Article 21.5 of the DSU.

[172] See, for example, para. 7.51 of the original Panel Report, *US – Zeroing (Japan)*.

[173] The Exhibit JPN-91 series updates and supplements the Exhibit JPN-42, 43 and 44 series. Whereas the latter detailed USDOC's overall weighted-average margin of dumping calculations for Reviews 4, 5 and 6, the Exhibit JPN-91 series details both USDOC's overall weighted-average margin of dumping calculations and its import-specific assessment rate calculations, for Reviews 4, 5, 6 and 9.

supplement to the updated version, in the form of Exhibits JPN-37 and JPN-91, which explain the application of the standard zeroing line in the context of Reviews 4, 5, 6 and 9. The evidence submitted by Japan shows that USDOC applied the standard zeroing line, "WHERE EMARGIN GT 0", in each of Reviews 4, 5, 6 and 9.

7.161 Japan has also submitted the USDOC Issues and Decisions Memoranda for Reviews 4, 5, 6 and 9. These documents are set forth in Exhibits JPN-74, JPN-75, JPN-76 and JPN-67.B respectively. In the Issues and Decision Memorandum concerning Review 4, USDOC states "we do not allow U.S. sales that were not priced below normal value ... to offset dumping margins we find on other U.S. sales."[174] The same statement is contained in the Memorandum concerning Review 5. [175] Regarding Reviews 6 and 9, USDOC states that it does "not permit the[] non-dumped sales to offset the amount of dumping found with respect to other sales."[176] Having reviewed the abovementioned evidence submitted by Japan, we find that Japan has established *prima facie* that the United States applied zeroing in Reviews 4, 5, 6 and 9. The United States has not denied that it applied zeroing in those determinations.[177] Accordingly, we find that USDOC applied zeroing in Reviews 4, 5, 6 and 9.

7.162 With regard to the United States' argument about a lack of evidence demonstrating that individual importer-specific assessment rates were affected by zeroing, we note that the Appellate Body's findings in the original proceeding were not based on evidence that particular importers had sales with negative margins or that individual importer-specific assessment rates were affected by the application of zeroing procedures. We do not consider, therefore, that Japan must show that given importers had sales with negative margins under Reviews 4, 5, 6 and 9, or the effect of zeroing on the importer-specific assessment rates determined in those Reviews. In any event, Japan has submitted evidence establishing the quantitative impact of zeroing on the duty collection rates in the subsequent administrative reviews at issue in this proceeding. In particular, Japan has submitted calculations of what the exporter-specific margins of dumping and importer-specific assessment rates in Reviews 4, 5, 6 and 9 would have been if the "standard zeroing line" of computer code had been switched off.[178] Japan claims that its calculations used exactly the same data set as that initially used by USDOC. Japan also claims that, other than switching off the relevant line of computer code, its calculations are identical to those initially performed by USDOC. Japan's calculations show that, in the majority of cases, no anti-dumping duties would have been collected if zeroing had not been employed. Japan's calculations further show that, in the remaining cases, the amounts of anti-dumping duties would be significantly lower absent zeroing.

7.163 The United States has challenged neither the results of the calculations performed by Japan, nor the accuracy of the data set used in those calculations. Instead, the United States argues that Japan has "improperly relied on"[179] the abovementioned revised dumping programs with the specific programming language eliminated to switch off the zeroing procedures. The United States contends that these revised programs were created by Japan for this compliance proceeding, and that USDOC has never employed these programs. Accordingly, "the United States does not concede that the results obtained by Japan would be the results obtained by Commerce if it had not employed zeroing."[180]

---

[174] Exhibit-JPN 74, page 10.

[175] Exhibit JPN-75, page 11.

[176] Exhibit JPN-76, page 8, and Exhibit JPN-67.B, page 9.

[177] We recall that the United States' position is premised on its argument that Reviews 4, 5, 6 and 9 are not covered by these proceedings because they are not "measures taken to comply" within the meaning of Article 21.5 of the DSU.

[178] Japan's Response to Question 19 from the Panel (including in particular Table 3, and Annexes 4, 5, 6 and 9), as updated by Japan's Updated Response of 10 December 2008.

[179] United States' Comments on Japan's Replies, para. 22.

[180] United States' Comments on Japan's Replies, para. 22, note 38.

7.164 We do not accept the United States' argument that it was "improper" for Japan to rely on amended USDOC programmes so as to show the impact of zeroing on the relevant margins and assessment rates. Indeed, it is difficult to conceive of - and the United States (as the party asserting that Japan must demonstrate the impact of zeroing) has not identified - other means available to Japan to show the impact of zeroing. Furthermore, although the United States does not concede that the results obtained by Japan would be the results obtained by USDOC if it had not employed zeroing, the absence of such concession is not equivalent to a rebuttal of Japan's evidence, or a demonstration that the results of Japan's calculations are somehow erroneous. Furthermore, we note the following findings by the Appellate Body regarding the treatment of a similar issue by another panel:

> Even if printouts of margin calculation programs, or the calculation tables prepared by the European Communities, were not issued by the USDOC during the review at issue, we question the significance of this for a conclusion that the documents submitted are not probative as evidence of simple zeroing in periodic reviews. While it may have simplified the Panel's task if the evidence submitted by the European Communities had been confirmed as original USDOC documents, the absence of authentication does not negate the evidentiary significance of those documents. As we understand it, the USDOC provides margin calculation programs at the end of anti-dumping proceedings to interested parties in paper and/or electronic format, and it is from these programs that the original margin calculation program can be replicated, or the underlying data can be extracted to produce other documents such as the calculation tables submitted by the European Communities. As the European Communities maintains, "the printed paper version of the margin programme is identical to the electronic version provided by [the] USDOC". We also note the argument of the European Communities that the United States does not allege that the printouts have been altered, or otherwise challenge that the content or underlying data of the documents was generated by the USDOC. Accordingly, the printouts of the margin calculation programs appear to have their origins in original USDOC documents, and we see no basis to conclude that such documentation differs in any material respect from the original program. Thus, while an authenticated USDOC document may have offered greater certainty as to its content, we do not agree that this renders a document that has not been authenticated not probative of the fact asserted, particularly if it is produced or replicated from documents or data supplied by the USDOC.[181]

7.165 The Appellate Body further found:

> that the Panel, by insisting on authenticated USDOC documents to demonstrate or show the use of simple zeroing, also failed to make an objective assessment by allowing a challenge to the authenticity of evidence originating from the USDOC, but later reproduced by interested parties, to skew its consideration of the probative value of that evidence.[182]

7.166 For these reasons, we reject the United States' arguments against the evidence submitted by Japan to show that the relevant margins and assessment rates were affected by zeroing. In our view, the evidence submitted by Japan is sufficient to establish a *prima facie* case that the exporter-specific margins of dumping and importer-specific assessment rates determined pursuant to Reviews 4, 5, 6 and 9 were affected by USDOC's application of zeroing. Since the United States has failed to rebut Japan's *prima facie* case, we find that the exporter-specific margins of dumping and importer-specific assessment rates in Reviews 4, 5, 6 and 9 were affected (in the sense of being inflated) by zeroing.

---

[181] Appellate Body Report, *US – Zeroing II (EC)*, para. 340.
[182] Appellate Body Report, *US – Zeroing II (EC)*, para. 341.

7.167 In support of its claim that the application of zeroing in Reviews 4, 5, 6 and 9 is inconsistent with Articles 2.4 and 9.3 of the *AD Agreement*, and Article VI.2 of the GATT 1994, Japan relies *inter alia* on the reasoning of the Appellate Body in the original proceeding. The United States has not advanced any arguments to the effect that the application of zeroing in Reviews 4, 5, 6 and 9 is WTO-consistent. We are required by Article 11 of the DSU to conduct an "objective assessment" of the matter referred to us by Japan. In the context of an Article 21.5 proceeding, we consider it appropriate that such "objective assessment" should take into account the findings and conclusions resulting from the original proceeding. This is because Article 21.5 proceedings are concerned with the implementation of recommendations and rulings based on such findings and conclusions.

7.168 In making its finding that the application of zeroing in the administrative reviews at issue in the original proceeding is WTO-inconsistent, the Appellate Body referred to its finding that the maintenance of the zeroing procedures as such in the context of administrative reviews was inconsistent with Articles 2.4 and 9.3 of the *AD Agreement*, and Article VI:2 of the GATT 1994.[183] The Appellate Body also referred to its prior finding in *US – Zeroing (EC)* that the application of zeroing in administrative reviews is inconsistent with Article 9.3 of the *AD Agreement* and Article VI:2 of the GATT 1994.[184] We have studied closely, and are guided by, the adopted report of the Appellate Body in the original proceeding. Accordingly, we find that the application of zeroing in the context of Reviews 4, 5, 6 and 9 is inconsistent with Articles 2.4 and 9.3 of the *AD Agreement*, and Article VI:2 of the GATT 1994.

E. THE ZEROING PROCEDURES AS SUCH

7.169 Japan submits that the United States has failed to eliminate the "zeroing procedures" as such in the following situations: (i) in T-to-T comparisons in original investigations; (ii) under any comparison methodology in periodic reviews; and (iii) under any comparison methodology in new shipper reviews. Japan submits that the United States is therefore in violation of Articles 17.14, 21.1 and 21.3 of the DSU, in the sense that these provisions aim at achieving a satisfactory and prompt settlement of the matter. Japan contends that the United States also continues the original violation of Articles 2.4, 2.4.2, 9.3 and 9.5 of the *AD Agreement*.

7.170 The United States denies Japan's claim. The United States contends that, by virtue of USDOC's final notice discontinuing zeroing in the context of W-to-W comparisons in original investigations, it has eliminated the single as such measure that was subject to the DSB's recommendations and rulings by the end of the RPT, and has therefore fully implemented the DSB's recommendations and rulings with respect to the zeroing procedures.

(a) Main arguments of the parties

7.171 According to **Japan**, on 6 March 2006 (two days before the original panel circulated its interim report), USDOC published a notice of its intention to abandon the use of the zeroing procedures in W-to-W comparisons in original investigations "in light of the panel's report in US – Zeroing [(EC)]".[185] Japan notes that the zeroing procedures at issue in *US – Zeroing (EC)* were found to be WTO-inconsistent, as such, in W-to-W comparisons in original investigations, and that the Appellate Body did not rule whether the zeroing procedures were WTO-inconsistent, as such, in T-to-T comparisons in original investigations or under any comparison methodology in periodic and new shipper reviews. Japan asserts that on 27 December 2006, almost one month before the DSB's

---

[183] Appellate Body Report, *US – Zeroing (Japan),* para. 174.

[184] The Appellate Body referred in this regard to its Report in *US – Zeroing (EC)*, para. 133. See Appellate Body Report, *US – Zeroing (Japan),* para. 174.

[185] Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation, 71 Fed. Reg. 11189 (USDOC, 6 March 2006) (Exhibit JPN-34).

adoption of the original panel and Appellate Body reports in the present dispute, the USDOC published a final notice announcing that it would no longer apply the zeroing procedures in W-to-W comparisons in original investigations.[186] According to Japan, USDOC stated that:

> The Department is adopting as its final modification its proposal that it will no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons. The Department is doing so in response to the panel's report in *US - Zeroing (EC)*, following the procedures set forth in section 123 of the URAA.[187]
>
> …
>
> In its March 6, 2006 Federal Register notice, the Department proposed only that it would no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons. *The Department made no proposals with respect to any other comparison methodology or any other segment of an antidumping proceeding, and thus declines to adopt any such modifications concerning those other methodologies in this proceeding*.[188]

7.172 According to Japan, therefore, the USDOC expressly stated that it was not modifying any aspect of its comparison methodologies for calculating dumping, other than the abandonment of zeroing in W-to-W comparisons in original investigations. Japan contends that the United States therefore failed to implement the DSB's recommendations and rulings in this dispute with respect to the maintenance of the zeroing procedures as such in T-to-T comparisons in original investigations, and under any comparison methodology in periodic and new shipper reviews.

7.173 In the alternative, Japan claims that the United States has replaced the zeroing procedures by a new WTO-inconsistent measure providing for the continued use of zeroing in all cases except W-to-W comparisons in original investigations.

7.174 The **United States** asserts that, in the original proceeding, Japan challenged, *inter alia*, the US "zeroing procedures" as being as such inconsistent with various provisions of the *AD Agreement* and the GATT 1994.[189] The United States argues that the original panel and the Appellate Body agreed with Japan's argument that the zeroing procedures are "a *single measure* that applies to W-to-W comparisons, T-to-T comparisons and W-to-T comparisons, used in any type of anti-dumping proceeding."[190] The United States notes the Appellate Body's conclusion that "the Panel had sufficient evidence before it to conclude that the 'zeroing procedures' under different comparison methodologies, and in different stages of anti-dumping proceedings, do not correspond to separate rules or norms, but simply reflect different manifestations of a single rule or norm."[191] According to the United States, the DSB's recommendations and rulings applied exclusively to this single measure.

---

[186] Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 Fed. Reg. 77722, 77723 (USDOC, 27 December 2006) (Exhibit JPN-35).

[187] Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 Fed. Reg. 77722, 77723 (USDOC, 27 December 2006) (Exhibit JPN-35).

[188] Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 Fed. Reg. 77722, 77724 (USDOC, 27 December 2006) (emphasis added) (Exhibit JPN-35).

[189] Japan, First Written Submission, 9 May 2005, para. 9.

[190] Japan, Opening Statement at the Third Meeting of the Panel, 12 June 2006, para. 4; Panel Report *US – Zeroing (Japan)*, para. 6.19 (emphasis in original).

[191] Appellate Body Report, *US – Zeroing (Japan)*, para. 88.

The United States submits that Japan cannot have it both ways, and now treat the DSB's recommendations and rulings as though they applied to more than one measure, by claiming that the United States should also have eliminated the "zeroing procedures" as such in T-T comparisons in original investigations, under any comparison methodology in periodic reviews, and under any comparison methodology in new shipper reviews.

(b) Main arguments of the third parties

7.175 The **European Communities** argues that the United States has failed to comply with the "as such" finding in the DSB's recommendations and rulings. The European Communities contends that the single measure, namely "zeroing procedures", was not limited to one type of comparison in original investigations. The single rule or norm the subject of the original proceedings was the use of zeroing in *any* anti-dumping proceeding. By failing to modify the WTO-inconsistent practice in any context apart from W-to-W comparisons in original investigations, the United States has failed to comply with the DSB ruling by the end of the RPT and therefore is in violation of Articles 21.1, 21.3 and 17.14 of the DSU.

7.176 **Korea** argues that the United States has not complied with the DSB recommendations and rulings. Korea contends that although the "zeroing procedures" as a whole may be a single rule or norm, that does not mean that remedial action in relation to one manifestation of that rule exonerates the implementing Member from taking all necessary action to comply fully with the DSB recommendations and rulings.

7.177 **Mexico** argues that the United States has failed to comply with the recommendations and rulings of the DSB in relation to the Appellate Body's "as such" findings. Mexico contends that, in order to comply, the United States must eliminate zeroing in all four procedural settings to which the DSB's rulings relate. Eliminating zeroing only in W-to-W comparisons in original investigations is inadequate.

7.178 **Thailand** notes that the DSB made four rulings regarding the inconsistency of zeroing procedures and argues that implementing only one of the recommendations and rulings does not amount to implementing all four of them.

(c) Evaluation by the Panel

7.179 The Panel must determine whether or not the United States has complied with the recommendations and rulings of the DSB regarding the zeroing procedures as such. In order to better understand the arguments of the parties regarding this issue, we shall briefly revisit the relevant findings of the original panel and Appellate Body.

7.180 Before turning to the substance of Japan's as such claims, the original panel first had to determine whether or not the zeroing procedures, which were not set forth in any written form, constituted a measure that could be challenged as such. The original panel found that "the consistent use of zeroing in specific cases reflects a rule or norm of general and prospective application, which provides that non-dumped export sales are not allowed to offset margins found on dumped export sales and which is applied regardless of the basis upon which export price and normal value are compared and regardless of the type of proceeding in which margins are calculated."[192] As a result, the original panel found that the zeroing procedures could be challenged as such. On the question of the WTO-consistency of the zeroing procedures as such, the original panel concluded that:

[192] Panel Report, *US – Zeroing (Japan)*, para. 7.53, footnotes omitted.

> [b]y maintaining *model zeroing* procedures in the context of original investigations USDOC acts inconsistently with Article 2.4.2 of the *AD Agreement*.[193]

7.181 The original panel rejected Japan's claims that the United States violated the *AD Agreement* by maintaining zeroing procedures as such in T-to-T comparisons in original investigations, in periodic reviews, and in new shipper reviews.

7.182 The United States appealed from the original panel's finding that the zeroing procedures could be challenged as such. The United States asserted that the original panel did not have sufficient evidentiary basis to conclude that USDOC applied zeroing in all anti-dumping proceedings, regardless of the comparison methodology used, since the original panel did not have context-specific evidence to demonstrate the existence of the zeroing procedures in T-to-T and W-to-T comparisons in original investigations. The United States argued before the Appellate Body that "the existence of a rule or norm requiring the application of zeroing must be examined separately for each comparison methodology and for each type of anti-dumping proceeding".[194]

7.183 The Appellate Body rejected the United States' appeal. In doing so, the Appellate Body accepted "that a single rule or norm of general and prospective application that provides for disregarding negative comparison results exists."[195] The Appellate Body stated that the original panel had not been required to establish the existence of a general rule or norm directing the use of zeroing "through evidence of the actual application of [the zeroing] procedures in all possible situations, as long as they were applied every time the occasion arose."[196] The Appellate Body found that, even without evidence of the application of zeroing in T-to-T and W-to-T comparisons in original investigations, "the Panel had sufficient evidence before it to conclude that the 'zeroing procedures' under different comparison methodologies, and in different stages of anti-dumping proceedings, do not correspond to separate rules or norms, but simply reflect different manifestations of a single rule or norm."[197] On the question of the WTO-consistency of the zeroing procedures as such, the Appellate Body upheld the abovementioned substantive finding of the original panel, and concluded in addition:

> that the United States acts inconsistently with Articles 2.4 and 2.4.2 of the *AD Agreement* by maintaining zeroing procedures when calculating margins of dumping on the basis of transaction-to-transaction comparisons in original investigations;
>
> that the United States acts inconsistently with Articles 2.4 and 9.3 of the *AD Agreement* and Article VI:2 of the GATT 1994 by maintaining zeroing procedures in periodic reviews; [and]
>
> that the United States acts inconsistently with Articles 2.4 and 9.5 of the *AD Agreement* by maintaining zeroing procedures in new shipper reviews. [198]

7.184 Shortly before the adoption of the original panel and Appellate Body reports, and in the context of a separate WTO dispute settlement proceeding, the USDOC announced in a December 2006 Notice:

---

[193] Panel Report, *US – Zeroing (Japan)*, para. 7.258(a).
[194] See Appellate Body Report, *US – Zeroing (Japan)*, para. 87.
[195] Appellate Body Report, *US – Zeroing (Japan)*, para. 86.
[196] Appellate Body Report, *US – Zeroing (Japan)*, para. 87.
[197] Appellate Body Report, *US – Zeroing (Japan)*, para. 88.
[198] Appellate Body Report, *US – Zeroing (Japan)*, para. 190. In making these findings, the Appellate Body reversed the original panel's finding that the maintenance of zeroing procedures in: T-to-T comparisons in original investigations; periodic reviews; and new shipper reviews was not WTO-inconsistent.

> The Department is adopting as its final modification its proposal that it will no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons. The Department is doing so in response to the panel's report in *US - Zeroing (EC)*, following the procedures set forth in section 123 of the URAA.[199]

7.185 The United States asserts that, since (by virtue of the December 2006 Notice) it no longer applies zeroing in W-to-W comparisons in original investigations, the zeroing procedures no longer have universal application. According to the United States, this means that the measure at issue in the original proceeding, whose existence was based on the universal application of zeroing in all contexts, and when using all comparison methodologies, no longer exists. The United States contends that it has therefore complied with the recommendations and rulings of the DSB by withdrawing the WTO-inconsistent measure at issue in the original proceeding.

7.186 We are unable to accept the United States' argument, for it confuses (1) the existence of the zeroing procedures as a measure that can be challenged as such, and (2) the scope of application of that measure. In this regard, we note the Appellate Body's conclusion that "the 'zeroing procedures' under different comparison methodologies, and in different stages of anti-dumping proceedings, [] reflect different manifestations of a single rule or norm."[200] We understand this to be a reference to the fact that, although the zeroing procedures are a single rule or norm, that single rule or norm applies in different contexts, or "manifestations". To the extent that the December 2006 Notice eliminates zeroing in W-to-W comparisons in original investigations, the Notice certainly addresses one "manifestation" of the single rule or norm. However, the Notice does not address the three remaining "manifestations" of that rule or norm which were the object of findings by the Appellate Body, namely T-to-T comparisons in original investigations, periodic reviews, and new shipper reviews.[201] Thus, although the scope of application of the rule or norm has been reduced, the rule or norm *per se* has not been eliminated and, as noted below, zeroing continues to be applied in contexts other than W-to-W comparisons in original investigations. In order to eliminate the zeroing procedures *per se*, the Notice would have had to eliminate zeroing in the context of all of the "different manifestations". The Notice fails to do this.

7.187 Furthermore, the United States neither identified any other measure that would eliminate zeroing in the context of the three remaining "different manifestations", nor demonstrated that USDOC has ceased to apply zeroing in any context other than W-to-W comparisons in original investigations.[202] By contrast, Japan has provided evidence that USDOC has consistently applied

---

[199] Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 Fed. Reg. 77722, 77723 (USDOC, 27 December 2006) (Exhibit JPN-35).

[200] Appellate Body Report, *US – Zeroing (Japan)*, para. 88.

[201] The United States asserts that such an approach suggests that the zeroing procedures at issue in the original proceeding consisted of at least four different measures: zeroing procedures in W-to-W comparisons in original investigations, zeroing procedures in T-to-T comparisons in original investigations, zeroing procedures in any comparison methodology in administrative reviews, and zeroing procedures in any comparison methodology in new shipper reviews (note 110 to the United States' Second Written Submission). We disagree, since the Appellate Body clearly distinguished between (i) the existence of the single rule or norm of zeroing, and (ii) the application, or "manifestation", of that rule in different contexts. Although the December 2006 Notice changes the scope of application of the rule or norm, the rule or norm (i.e., the zeroing of non-dumped export sales) persists in other contexts not addressed by the Notice.

[202] United States Reply to Question 31(b) from the Panel. Although the United States contends that "the single measure 'zeroing procedures' was not employed in any" of the investigations and reviews occurring after the end of the RPT, the United States does not claim that it did not zero in those proceedings.

zeroing in 13 anti-dumping proceedings other than W-to-W comparisons in original determinations since the end of the RPT.[203]

7.188 In light of the above, we find that the December 2006 Notice fails to comply with the recommendations and rulings of the DSB:

> that the United States acts inconsistently with Articles 2.4 and 2.4.2 of the *AD Agreement* by maintaining zeroing procedures when calculating margins of dumping on the basis of transaction-to-transaction comparisons in original investigations;
>
> that the United States acts inconsistently with Articles 2.4 and 9.3 of the *AD Agreement* and Article VI:2 of the GATT 1994 by maintaining zeroing procedures in periodic reviews; [and]
>
> that the United States acts inconsistently with Articles 2.4 and 9.5 of the *AD Agreement* by maintaining zeroing procedures in new shipper reviews.[204]

7.189 Accordingly, we find that the United States remains in violation of Articles 2.4, 2.4.2, 9.3 and 9.5 of the *AD Agreement*, and Article VI:2 of the GATT 1994.[205]

7.190 We recall that Japan has also made claims under Articles 17.14, 21.1 and 21.3 of the DSU. For the reasons cited above,[206] we do not consider it necessary to consider those claims.

## F. ARTICLE II OF THE GATT 1994

### (a) Introduction

7.191 Japan claims that the United States has collected anti-dumping duties on ball-bearing products in excess of the bound rates set forth in the United States' Schedule of Concessions, contrary to Articles II:1(a) and (b) of the GATT 1994. The United States contends that Japan's Article II:1 claims are entirely derivative, and that the Panel need not address them to resolve the matter before it.

7.192 Japan's claims under Article II of the GATT 1994 concern certain liquidation actions taken by the United States pursuant to Reviews 1, 2, 7 and 8 since the expiry of the RPT. These liquidation actions are the means by which the United States collects or levies its definitive anti-dumping duties. The relevant actions are (i) liquidation instructions issued by USDOC and (ii) liquidation notices issued by USCBP. USDOC's established practice is to send liquidation instructions to USCBP within 15 days of publication of the final results of antidumping administrative reviews.[207] In this way, USDOC instructs USCBP to collect anti-dumping duties at the rate, and from the importers, specified therein.[208] In the present case, issuance of the liquidation instructions challenged by Japan was delayed beyond the 15-day limit cited above, as a result of injunctions issued pursuant to domestic legal proceedings brought against USDOC's determinations. For this reason, the liquidation instructions challenged by Japan were not issued by USDOC until after the end of the RPT.

---

[203] Japan, Second Written Submission, paras. 82 to 102, referring to the application of zeroing in 11 administrative reviews, one changed circumstances review, and one new shipper review.

[204] Appellate Body Report, *US – Zeroing (Japan)*, para. 190.

[205] In light of this finding, there is no need for us to consider Japan's alternative claim that the zeroing procedures have been replaced by a new WTO-inconsistent measure.

[206] See para. 7.155.

[207] United States, Response to Question 17 from the Panel.

[208] Exhibit JPN-88.

7.193 Upon receipt of USDOC's liquidation instructions, USCBP is required to liquidate the entries, "to the greatest extent practicable", within 90 days. To effect liquidation, the USCBP issues a notice to importers of the amount of definitive duties for each entry covered by the importer-specific assessment rate. When the amount of the cash deposit paid at the time of importation equals the amount of definitive duties due at liquidation, the importer receives only a liquidation notice from the USCBP. When the amount of the cash deposit exceeds the amount due at liquidation, a refund cheque accompanies the USCBP's liquidation notice. And when the amount of the cash deposit is less than the amount due at liquidation, a request for payment is included with the notice. USCBP's liquidation notices specify a cumulative amount to be liquidated, including both anti-dumping duties and ordinary customs duties.[209]

(b) Main arguments of the parties

7.194 **Japan** submits that, since the end of the RPT, the United States has issued instructions and notices for the liquidation of entries at WTO-inconsistent importer-specific assessment rates determined in Reviews 1, 2, 7 and 8. Japan asserts that, because these importer-specific assessment rates were found to be WTO-inconsistent in the original proceeding, the United States' liquidation actions give rise to new violations, after the end of the RPT, of the United States' obligations under Articles II:1(a) and II:1(b) of the GATT 1994 because, at that time, the cumulative *ad valorem* duty rate applied to the relevant imports (i.e., ordinary customs duties plus anti-dumping duties) exceeds the bound tariff that applies to the products concerned.

7.195 Japan asserts that, although Article II:2(b) of the GATT 1994 permits Members to impose anti-dumping duties in excess of bound rates, such duties must be "applied consistently with the provisions of Article VI" of the GATT 1994 and, as a consequence, the *AD Agreement*. Japan submits that this provision does not apply to the United States' liquidation actions at issue in this proceeding, because Reviews 1, 2, 7 and 8 were found to be in violation of Article 9.3 of the *AD Agreement* and Article VI:2 of the GATT 1994.

7.196 The **United States** contends that Japan's Article II claims are entirely derivative, and that the Panel is not required to address them to resolve the matter before it. The United States asks the Panel to exercise judicial economy in respect thereof. The United States also asserts that Japan failed to request findings from the Panel under these Article II claims in its First Written Submission.

7.197 Regarding the substance of Japan's claims, the United States notes that the liability for anti-dumping duties, that Japan claims resulted in collection of duties above the bound rate, was incurred prior to the expiry of the RPT, when the subject merchandise entered the United States and a cash deposit was paid. In addition, the United States asserts that it was no longer collecting cash deposits pursuant to the administrative reviews that were subject to the DSB's recommendations and rulings. According to the United States, therefore, Japan has no basis to claim that the United States, after the RPT, collected duties in excess of the bound rates, and in a manner inconsistent with Article VI of the GATT 1994.

(c) Evaluation by the Panel

7.198 We shall first consider whether or not Japan's Article II claims are properly within the scope of this Article 21.5 proceeding.[210] We shall then consider the United States' arguments that there is no

[209] Exhibit JPN-89.

[210] The United States does not dispute that Japan's Article II claims are properly within the Panel's terms of reference. We note in this regard that Japan's Article II claims were specified at paragraph 12 of its request for establishment (WT/DS322/27), which refers to "United States Government instructions and notices

need for the Panel to address Japan's Article II claims. Thereafter, we turn to the substance of Japan's Article II claims.

*(i) Are Japan's claims properly within the scope of this Article 21.5 proceeding?*

7.199 As noted above, the jurisdiction of a panel established under Article 21.5 of the DSU is limited to "measures taken to comply" with the recommendations and rulings of the DSB. Although the United States has not challenged Japan's inclusion of the relevant liquidation measures in these proceedings, we are entitled to consider on our own initiative, as a preliminary jurisdictional matter,[211] whether or not such liquidation measures are properly within the scope of these proceedings by virtue of being "measures taken to comply" in the meaning of Article 21.5 of the DSU.

7.200 In our view, the relevant liquidation measures are sufficiently closely connected to the original dispute, such that they should be treated as "measures taken to comply" with the recommendations and rulings resulting from that dispute. This is because the relevant liquidation measures are the means by which the United States collects the final anti-dumping duties assessed in the administrative reviews at issue in the original proceeding. Any WTO-inconsistency in those administrative reviews regarding the calculation of the margin of dumping established in the original dispute is necessarily carried over into the subsequent liquidation measures. For these reasons, (and in the absence of any claims by the United States to the contrary) we find that the liquidation measures challenged by Japan are "measures taken to comply" within the meaning of Article 21.5 of the DSU.

*(ii) The United States' arguments that there is no need to address Japan's Article II claims*

7.201 The United States asserts that Japan's Article II claims are "entirely derivative"[212] of its claims that the United States violated Articles 2.4 and 9.3 of the *AD Agreement*, and Article VI:2 of the GATT 1994, by failing to implement the recommendations and rulings of the DSB in respect of the importer-specific assessment rates.

7.202 While we accept Japan's argument that its Article II claims relate to different measures than its Article 2.4 and 9.3 claims, we nevertheless note that the alleged violation of Article II is dependent on a finding that the underlying administrative review is WTO-inconsistent. Only if the underlying anti-dumping measure is WTO-inconsistent will the safe harbour provided for in Article II:2(b) become unavailable.[213] Accordingly, we agree with the United States that Japan's Article II claims are derivative of its claims under Articles 2.4 and 9.3 of the *AD Agreement*.[214]

---

... to liquidate entries". Nor does the United States deny that the relevant liquidation actions are measures that may be challenged in WTO dispute settlement proceedings.

[211] We are guided in this regard by the Appellate Body's statement that "it is a widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative, and to satisfy itself that it has jurisdiction in any case that comes before it" (see Appellate Body Report, *US – 1916 Act*, note 30).

[212] United States, First Written Submission, note 116.

[213] See analysis infra. at para. 7.207.

[214] We also note the United States' argument that Japan failed to request any Article II findings in its First Written Submission. Although it is true that Japan did not ask the Panel to make findings under Article II of the GATT 1994 in the conclusory section at paragraph 159 of its First Written Submission, there is no provision in the DSU or the WTO Agreement requiring it to do so. Although Japan might have argued its Article II claims more fully in its First Written Submission, the basic essence of those claims was clearly stated in note 142 of that submission. Japan's Article II claims were subsequently developed more fully in its later submissions to the Panel.

7.203 Nevertheless, we consider that Japan's Article II claims raise an important point of contention between the parties regarding the right of the United States to continue liquidating entries after the expiry of the RPT on the basis of liquidation measures issued pursuant to administrative reviews that have already been found to be WTO-inconsistent. We consider it important that the United States' obligations under Articles II:1(a) and II:1(b) should be properly determined in this context. For this reason, we consider it appropriate to rule on Japan's Article II claims, in order to resolve this particular dispute between the parties. Accordingly, we decline the United States' request to exercise judicial economy in respect of Japan's Article II claims.

*(iii) The substance of Japan's Article II claims*

7.204 Turning to the substance of Japan's claims, we note that Articles II.1(a) and (b), and Article II.2(b) of the GATT 1994 provide:

> 1. (*a*) Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.
>
> (*b*) The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.
>
> 2. Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product:
>
> (*b*) any anti-dumping or countervailing duty applied consistently with the provisions of Article VI.

7.205 According to these provisions, the United States is generally precluded from imposing on imports of ball bearings from Japan any customs duties or other charges in excess of those provided for in the United States Schedule of Concessions. Although the United States may normally levy anti-dumping duties in excess of such bound rates, Article II:2(b) provides that it may only do so if those duties are "applied consistently with the provisions of Article VI" of the GATT 1994, as implemented by the *AD Agreement*.

7.206 Japan has submitted evidence demonstrating that the cumulative liquidation amounts set forth in a series of USCBP liquidation notices,[215] issued pursuant to particular USDOC liquidation instructions,[216] are well in excess of the bound rates for ball-bearing products set forth in the United States' Schedule of Concessions. This evidence, which is summarized in Exhibit JPN-90, has not been challenged by the United States.

7.207 To the extent that such excess is attributable to anti-dumping duties applied consistently with the provisions of Article VI of the GATT 1994, such excess would not constitute a violation of Articles II:1(a) and (b). This is because of the safe harbour provided for in Article II:2(b) of the

[215] The relevant liquidation notices are set forth in Exhibits JPN-81 to JPN-87.
[216] The relevant liquidation instructions are set forth in Exhibits JPN-40.A, and JPN-77 to JPN-80.

GATT 1994, which allows the imposition of anti-dumping duties in excess of the bound rate set forth in the Schedule of Concessions. In the present case, though, the safe harbour provided for in Article II:2(b) does not apply to the liquidation actions at issue in this proceeding, since those actions were taken pursuant to administrative reviews, and importer-specific assessment rates determined therein, that had been found to be WTO-inconsistent in the original proceeding. In particular, the Appellate Body found that, in determining importer-specific assessment rates in *inter alia* Reviews 1, 2, 7 and 8, USDOC disregarded the results of comparisons for transactions where the export price exceeded the contemporaneous normal value, in violation of Article 2.4 and 9.3 of the *AD Agreement*, and Article VI:2 of the GATT 1994.[217] We recall that, in cases where administrative reviews are conducted, the liquidation notices and instructions are based entirely on the determinations made by USDOC in such reviews. Since the underlying basis of the liquidation actions challenged by Japan was WTO-inconsistent, we conclude that anti-dumping duties collected[218] pursuant to those liquidation actions were not "applied consistently with the provisions of Article VI" of the GATT 1994, as implemented by the *AD Agreement*.[219]

7.208 For the above reasons, we find that the USDOC liquidation instructions set forth in Exhibits JPN-40.A, and JPN-77 to JPN-80, and the USCBP liquidation notices set forth in Exhibits JPN-81 to JPN-87, are in violation of Articles II:1(a) and (b) of the GATT 1994.[220]

## G. SUNSET REVIEW DETERMINATION OF 4 NOVEMBER 1999

### (a) Main arguments of the parties

7.209 **Japan** challenges the United States' omission to take any action to implement the recommendations and rulings of the DSB with respect to the sunset review determination of 4 November 1999 ("the 1999 sunset review"), which was found to be WTO-inconsistent by the Appellate Body in the original proceedings. Japan claims that the omission constitutes a violation of Articles 17.14, 21.1 and 21.3 of the DSU and a continued violation of Article 11.3 of the *AD Agreement.* Japan argues that because the 1999 sunset review is WTO-inconsistent, the United States' imposition of anti-dumping duties on ball bearings has been bereft of legal basis since 4 November 1999. Japan notes that the United States has failed, despite a Japanese invitation, to make any statement at DSB meetings regarding the status of its implementation action with respect to the 1999 sunset review.

7.210 Although the United States argues that it was not necessary to modify the results of the 1999 sunset review because an independent WTO-consistent basis for the likelihood of continued dumping

---

[217] Appellate Body Report, *US – Zeroing (Japan)*, paras. 175 and 176.

[218] According to the United States, "[l]iquidation is the ministerial act whereby CBP finally collects the antidumping duties" (US response to Question 14 from the Panel, at para. 27). The abovementioned liquidation actions, therefore, involved the collection of anti-dumping duties.

[219] We recall the United States' arguments that the liability for anti-dumping duties challenged by Japan was incurred prior to the expiry of the RPT, and that the United States was no longer collecting cash deposits pursuant to the administrative reviews that were subject to the DSB's recommendations and rulings after the end of the RPT. We have already explained that the United States' implementation obligations apply to actions taken after the expiry of the RPT, even if those actions relate to import entries that occurred at an earlier date. Furthermore, the liquidation actions challenged by Japan are new measures, separate from the cash deposits applied at the time of import entry. The fact that the United States no longer collects those cash deposit rates therefore has no bearing on Japan's Article II claims regarding those new measures. Accordingly, the United States' arguments do not cause us to change our finding under Article II of the GATT 1994.

[220] We note that our approach differs from that adopted by the panel in *US – Zeroing (EC) (21.5 – EC)*, which found that "the relevant date for implementation of DSB recommendations and rulings concerning anti-dumping duties by a Member operating a retrospective duty assessment system is the date of the final determination of liability" (para. 8.174).

exists, Japan contends that this argument is baseless. In particular, Japan notes that the Appellate Body found the 1999 sunset review inconsistent with Article 11.3 of the *AD Agreement*. Since the Appellate Body made that finding, the 1999 sunset review has not been changed in any way and nor have any of the facts underlying it. According to Japan, the United States is presenting new arguments, based on old facts, to seek a reassessment of the Appellate Body's conclusion regarding the 1999 sunset review. Japan argues that this is not possible because, absent a change in facts, the Appellate Body's determination represents a "final resolution" to the dispute.[221] Japan relies on the Appellate Body's decision in *US – OCTG from Argentina (21.5 - Argentina)*[222] as coming to a "similar finding".[223]

7.211 According to Japan, the Panel need go no further than conclude that the United States has taken no implementation action to bring the 1999 sunset review into conformity with Article 11.3 of the *AD Agreement.* Nevertheless, Japan also addresses the United States' arguments that the 1999 sunset review is WTO-consistent, despite the Appellate Body's ruling to the contrary. In particular, Japan notes that the United States has not substantiated its assertion that the majority of dumping margins relied on in the 1999 sunset review determination were WTO-consistent. The evidence provided concerns only ten out of 21 margins calculated in the 1996 periodic review, which is only one of nine periodic reviews covered by the 1999 sunset review determination. Further, Japan notes that the United States' *ex post facto* rationalization does not meet the standard set for sunset reviews by the Appellate Body in the original dispute, namely, as requiring "rigorous examination" and "reasoned and adequate conclusions".[224]

7.212 Japan argues that the ten adverse facts margins relied upon by the United States to support the WTO-consistency of the 1999 sunset review do not provide "positive evidence" for an order-wide determination that dumping is likely to recur or continue. This is because the basis for the margins is the petitioners' allegations of dumping, rather than a comprehensive investigation verifying the accuracy of such allegations. Japan also questions whether the ten margins in issue were calculated consistently with WTO requirements, detailed in Annex II(7) of the *AD Agreement,* regarding the use of facts available. In particular, Japan alleges that the United States did not use "special circumspection" in relying on the facts available.

7.213 Finally, Japan dismisses as misguided the United States' argument that an authority may rely on margins of dumping determined, using zeroing, before the *AD Agreement* entered into force. Japan alleges that at the time an authority makes a determination under Article 11.3 of the *AD Agreement*, it must have reliable evidence regarding the likelihood of "dumping", as that term is understood in the *AD Agreement.* Evidence drawn from a determination based on a different understanding of the term is not pertinent because it does not give any indication of "dumping" according to the standard under Article 11.3 of the *AD Agreement.*

7.214 The **United States** asserts that it has complied with the DSB recommendations and rulings in relation to the 1999 sunset review. The Appellate Body found that the United States acted inconsistently with the *AD Agreement* in the 1999 sunset review "when it relied on margins of dumping calculated in previous proceedings through the use of zeroing".[225] Therefore, the United States contends that, apart from the extent to which it relied on margins calculated using zeroing, the Appellate Body found no WTO-inconsistency with the 1999 sunset review.

---

[221] Japan, Second Written Submission, para. 193.
[222] Appellate Body Report, *US – OCTG from Argentina (21.5 - Argentina)*.
[223] Japan, Opening Statement at Meeting with the Panel, para. 115.
[224] Japan, Opening Statement at Meeting with the Panel, paras. 118-119.
[225] United States, First Written Submission, para. 74.

7.215 The United States asserts that the 1999 sunset review determination does not rest exclusively upon margins that the Appellate Body found inconsistent with Article 11.3 of the *AD Agreement.* In fact, the majority of margins are WTO-consistent, either because they predate the *AD Agreement* or do not involve the use of zeroing. Such margins independently support the conclusion that USDOC reached, namely that dumping continued at above *de minimis* levels after the imposition of the anti-dumping duty order. To support this contention, the United States notes that in the fifth administrative review, which covered part of the relevant sunset review period, twenty-one respondents were reviewed, eleven of which failed to cooperate. For ten of these non-cooperating respondents, USDOC applied a dumping margin based upon a petition rate that used actual pricing data and was calculated without zeroing. In response to a Panel question, the United States notes that the first and second administrative reviews also contain margins calculated without zeroing. Further, the United States rejects Japan's argument that a Member cannot rely on margins, calculated using zeroing, that pre-date the *AD Agreement.* The United States concludes that "because an independent WTO-consistent basis for the likelihood of the continuance of dumping…exists, it was unnecessary to modify the final results of the challenged sunset review".[226] The United States relies on the Appellate Body's decision in *US – Corrosion Resistant Steel Sunset Review*[227] to support its contention that it can rely on previously calculated dumping margins that were not challenged by Japan, to support the validity of the 1999 sunset review.

7.216 In response to Japan's argument that the Appellate Body's decision in the original dispute must be treated as a "final resolution", the United States contends that it is not seeking a new finding with respect to that part of the sunset review on which the DSB made recommendations and rulings. Rather, the United States argues that the Appellate Body's findings in this dispute do not prohibit the United States from relying in these Article 21.5 proceedings on margins calculated without zeroing to justify the 1999 sunset reviews as originally found to be WTO-inconsistent. Contrary to Japan's argument that the United States should have presented the arguments defending its reliance on non-zeroed margins and pre-WTO margins in the original proceeding, the United States asserts that it was not required to present arguments in the original proceedings regarding its reliance on these WTO-consistent margins because they were not challenged by Japan.

7.217 The United States notes that the requirement either to withdraw or revise a WTO-inconsistent measure applies when there is only a single basis to support a measure and it is found to be inconsistent with a covered agreement. In the present case, there were other bases for the validity of the measure than that ruled upon by the Appellate Body in the original proceedings. Therefore, it is unnecessary for the United States to withdraw or modify the 1999 sunset review.

(b) Main arguments of the third parties

7.218 The **European Communities** argues that the United States has not changed any aspect of the 1999 sunset review, which was found to be WTO-inconsistent and is disregarding the specific findings of the DSB. Therefore, the original violation of Article 11.3 of the *AD Agreement* continues. According to the European Communities, the United States was required, as a minimum, to carry out a new determination of the likelihood of the recurrence of dumping.

7.219 With respect to the argument that there were other bases to support the validity of the 1999 sunset review, the European Communities contends that the United States is attempting to reopen a factual issue that has already been ruled upon in the original proceedings. Further, the European Communities questions whether the United States has made a *prima facie* case that there were margins of dumping calculated without zeroing on which it relied to maintain the 1999 sunset review determination. In particular, the United States has not provided evidence to demonstrate that *all* the

[226] United States, First Written Submission, para. 75.
[227] Appellate Body, *US – Corrosion Resistant Steel Sunset Review*.

comparisons between normal values and export prices with respect to *all* the dumping margins relied upon by USDOC in the 1999 sunset review resulted in positive results of "dumping". In any event, the European Communities asserts that the argument that there is a WTO-consistent basis for the validity of the 1999 sunset review should be rejected because the United States should not have a second chance to defend a measure that the Appellate Body has already found to be WTO-inconsistent.

7.220 **Korea** argues that the United States does not explain why or how it was able to reach the same finding regarding the likelihood of dumping in relation to the 1999 sunset review. Further, Korea notes that in conducting a sunset review, the margins and results of the original investigations and administrative reviews are key factors relied upon by USDOC. The sunset reviews cannot be separated from previous anti-dumping proceedings. Korea argues that because the United States continues to use zeroing in the original investigations and the periodic reviews, the subsequent sunset reviews are tainted. Therefore, the United States has failed to implement the decisions of the DSB in relation to the 1999 sunset review.

7.221 **Norway** argues that a mere statement by the United States that it would have come to the same conclusion under the 1999 sunset review whether or not zeroing was used is not sufficient to demonstrate compliance. Rather, the United States is required to show, with correctly calculated dumping margins, that it would have reached the same likelihood determination. Further, only the correctly calculated margins could then be used to set anti-dumping rates for the future. Norway contends that in order to comply with the DSB recommendations and rulings, the United States should have conducted a Section 129 review of the 1999 sunset review, including recalculating all margins determined using zeroing and presenting fresh information that could credibly support a likelihood determination. The omission of the United States to do anything at all indicates that it remains in violation of Article 11.3 of the *AD Agreement.*

(c) Evaluation by the Panel

7.222 Article 11.3 of the *AD Agreement* provides, relevantly:

> …any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition…unless the authorities determine…that the expiry of that duty would lead to a continuance or a recurrence of dumping and injury.

7.223 In the original proceedings, the Appellate Body concluded:

> As the likelihood-of-dumping determinations in the sunset reviews at issue in this appeal relied on margins of dumping calculated inconsistently with the *Anti-Dumping Agreement*, they are inconsistent with Article 11.3 of that Agreement.[228]

This was accompanied by a recommendation from the DSB, pursuant to Article 19.1 of the DSU, that the United States bring the inconsistent measures into conformity with the *AD Agreement.* The Appellate Body's finding of WTO-inconsistency in the original proceedings of this case is addressed to USDOC's likelihood of dumping determination. Therefore, in order to implement the recommendations and rulings of the DSB, the United States was required to bring the likelihood of dumping determination into conformity with Article 11.3 of the *AD Agreement.*

7.224 We have already explained that, in order to implement the recommendations and ruling of the DSB, the United States was required to withdraw, modify or replace the 1999 sunset review, to the extent it had not already expired.[229]

---

[228] Appellate Body Report, *United States – Zeroing (Japan),* para. 185.

7.225 However, by its own admission, the United States has neither withdrawn nor revised the likelihood of dumping determination. The United States contends that it was "unnecessary to modify the final results of the challenged sunset review" because an independent WTO-consistent basis for the likelihood of continuance of dumping determination in the 1999 sunset review exists.[230]

7.226 It is possible to interpret the United States' submissions as suggesting that USDOC did make a new determination, without using zeroed margins, regarding the likelihood of dumping and came to same conclusion as under the 1999 sunset review. For example, in its closing statement at the substantive meeting of the Panel, the United States noted that:

> Because Japanese respondents continued to dump, even when the antidumping duties were in effect, Commerce made a reasoned and adequate conclusion that dumping would continue if the antidumping order was revoked.[231]

Further, in response to a Panel question, the United States argued that the allegedly WTO-consistent margins demonstrate continued dumping after the imposition of the anti-dumping duties and "accordingly, *it was apparent* that is was unnecessary to change the November 4, 1999 likelihood of dumping determination".[232] Both of these submissions suggest that a fresh consideration of the likelihood of dumping was conducted. However, despite being pressed at the substantive meeting of the Panel and through written questions to provide details and a copy of any new determination reached by USDOC, the United States provides no evidence regarding any such new determination.[233]

7.227 Therefore, there is nothing upon which the Panel can conclude that the United States has withdrawn or revised the likelihood of dumping determinations in the 1999 sunset review. In the absence of such evidence, the determinations remain unchanged and therefore, we must confirm their inconsistency with Article 11.3 of the *AD Agreement.*[234]

7.228 Having reached this conclusion, there is no need for the Panel to determine whether certain of the margins relied upon in the 1999 sunset review were WTO-consistent. We do not disagree with the United States' argument that *United States – Corrosion-Resistant Steel Sunset Review* supports the notion that it can rely on previously calculated dumping margins that were not challenged by Japan in the original proceedings. However, the previously calculated margins can be relied upon only in the context of a new determination. *United States – Corrosion-Resistant Steel Sunset Review* does not

---

[229] See para. 7.141. A similar finding was made in *United States – OCTG from Argentina.* In the corresponding compliance proceedings, the Appellate Body held:

> The original panel concluded that 'the USDOC's likelihood determination in the instant sunset review was inconsistent with Article 11.3 of the *Anti-Dumping Agreement*'. It is evident from this language that the original panel's finding of WTO-inconsistency is addressed to the USDOC's likelihood-of-dumping determination. Therefore, to comply with the original panel's finding, as adopted by the DSB, the United States had to bring its determination of likelihood of dumping into conformity with Article 11.3 of the *Anti-Dumping Agreement.* (Appellate Body Report, *United States – OCTG from Argentina (21.5 - Argentina),* para. 143.)

[230] United States, First Written Submission, para. 75.

[231] United States, Closing Statement at Meeting with the Panel, para. 13.

[232] United States, Response to Panel Question 28, para. 45 (emphasis added).

[233] The Panel asked the United States to provide information, including documentation, pertaining to the "conclusion" referred to in para. 13 of the United States' closing statement (Question 28 from the Panel to the Parties in Connection with the Substantive Meeting of the Panel, 7 November 2008). The United States replied that "the term 'conclusion' ... refers to the conclusion regarding the likelihood of dumping in the 4 November 1999 sunset determination" (United States, Response to Panel Questions, para. 43).

[234] The United States asserts that the WTO-consistent and inconsistent margins each independently support the conclusion reached in the 1999 sunset review. However, in the absence of a reasoned determination from USDOC, there is nothing upon which we are able to conclude that the United States is now relying solely on the allegedly WTO-consistent margins and is no longer relying on the margins determined using zeroing.

require the Panel to accept a simple assertion that the 1999 sunset review may be justified on the basis of previously calculated margins.

7.229 Therefore, we conclude that the United States has failed to comply with the DSB recommendations and rulings with respect to the 1999 sunset review, and that the violation of Article 11.3 of the *AD Agreement* continues. For the reasons set forth at para. 7.155 above, we decline to consider Japan's claims in relation to Articles 21.1, 21.3 and 17.14 of the DSU.

## VIII. CONCLUSIONS AND RECOMMENDATIONS

8.1 In accordance with our mandate under Article 21.5 of the DSU, we have examined the existence or consistency with covered agreements of measures taken by the United States to comply with recommendations and rulings adopted by the DSB in the original proceeding. In the light of our reasoning above:

(a) We find that the United States has failed to comply with the DSB's recommendations and rulings regarding the importer-specific assessment rates determined in Reviews 1, 2, 3, 7 and 8 that apply to entries covered by those Reviews that were, or will be, liquidated after the expiry of the RPT.

(i) Accordingly, we find that the United States is in continued violation of its obligations under Articles 2.4 and 9.3 of the *AD Agreement* and Article VI:2 of the GATT 1994.

(ii) We decline to rule on Japan's claim that this failure to comply is inconsistent with the United States' obligations under Articles 17.14, 21.1 and 21.3 of the DSU.

(b) We find that the United States has acted inconsistently with Articles 2.4 and 9.3 of the *AD Agreement* and Article VI:2 of the GATT 1994 by applying zeroing in the context of Reviews 4, 5, 6 and 9.

(c) We find that the United States has failed to comply with the recommendations and rulings of the DSB regarding the United States' maintenance of zeroing procedures challenged "as such" in the original proceedings. In particular, we find that the United States has failed to implement the DSB's recommendations and rulings in the context of T-to-T comparisons in original investigations and under any comparison methodology in periodic and new shipper reviews.

(i) Accordingly, we find that the United States remains in violation of Articles 2.4, 2.4.2, 9.3 and 9.5 of the *AD Agreement* and Article VI:2 of the GATT 1994.

(ii) We decline to rule on Japan's claim that this failure to comply is inconsistent with the United States' obligations under Articles 17.14, 21.1 and 21.3 of the DSU.

(d) We find that the United States is in violation of Articles II:1(a) and II:1(b) of the GATT 1994 with respect to certain liquidation actions taken after the expiry of the RPT, namely with respect to the USDOC liquidation instructions set forth in Exhibits JPN-40A and JPN-77 to JPN-80 and the USCBP liquidation notices set forth in Exhibits JPN-81 to JPN-87.

(e) We find that the United States has failed to comply with the DSB's recommendations and rulings with respect to the 1999 sunset review.

(i) Accordingly, we find that the United States remains in violation of Article 11.3 of the *AD Agreement.*

(ii) We decline to rule on Japan's claim that this failure to implement is inconsistent with the United States' obligations under Articles 17.14, 21.1 and 21.3 of the DSU.

8.2 To the extent that the United States has failed to comply with the recommendations and rulings of the DSB in the original dispute, the recommendations and rulings remain operative. We also recommend that the DSB request the United States to bring Reviews 4, 5, 6 and 9, and the liquidation actions referred to in para. 7.1(d) above, into conformity with the *AD Agreement* and the GATT 1994.

---