

**UNITED STATES – MEASURES RELATED TO ZEROING
AND SUNSET REVIEWS**

RECOURSE TO ARTICLE 21.5 OF THE DSU BY JAPAN

WT/DS322

**FIRST WRITTEN SUBMISSION OF
THE UNITED STATES OF AMERICA**

JULY 28, 2008

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<i>Argentina – Poultry (Panel)</i>	Panel Report, <i>Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil</i> , WT/DS241/R, adopted 19 May 2003
<i>Australia – Leather (Article 21.5)</i>	Panel Report, <i>Australia – Subsidies Provided to Producers and Exporters of Automotive Leather – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS126/RW and Corr.1, adopted 11 February 2000
<i>Australia – Salmon (Article 21.5)</i>	Panel Report, <i>Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS18/RW, adopted 20 March 2000
<i>Brazil – Desiccated Coconut (AB)</i>	Appellate Body Report, <i>Brazil – Measures Affecting Desiccated Coconut</i> , WT/DS22/AB/R, adopted 20 March 1997
<i>Canada – Aircraft (Article 21.5) (AB)</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU</i> , WT/DS70/AB/RW, adopted 4 August 2000
<i>US – Corrosion-Resistant Steel Sunset Review (Panel)</i>	Panel Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/R, adopted 9 January 2004, as modified by the Appellate Body Report, WTDS244/AB/R
<i>US – Corrosion-Resistant Steel Sunset Review (AB)</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R, adopted 9 January 2004

<i>US – Corrosion-Resistant Steel CVD (AB)</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R, adopted 19 December 2002
<i>US – Korea DRAMS (Panel)</i>	Panel Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea</i> , WT/DS296/R, adopted 20 July 2005, as modified by the Appellate Body Report, WT/DS296/AB/R
<i>US – OCTG from Argentina (Article 21.5) (AB)</i>	Appellate Body Report, <i>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</i> , WT/DS268/AB/RW, adopted 11 May 2007
<i>US – Shrimp AD (Ecuador) (Panel)</i>	Panel Report, <i>United States – Anti-Dumping Measure on Shrimp from Ecuador</i> , WT/DS335/R, adopted 20 February 2007
<i>US – Softwood Lumber Dumping (AB)</i>	Appellate Body Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/AB/R, adopted 31 August 2004
<i>US – Softwood Lumber IV (Article 21.5) (AB)</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS257/AB/RW, adopted 20 December 2005
<i>US – Upland Cotton (AB)</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/AB/R, adopted 21 March 2005
<i>US – Upland Cotton (Article 21.5) (AB)</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil</i> , WT/DS267/AB/RW, adopted 20 June 2008

<i>US – Wool Shirts and Blouses (AB)</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R and Corr.1, adopted 23 May 1997
<i>US – Zeroing (Japan) (AB)</i>	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews</i> , WT/DS322/AB/R, adopted 23 January 2007
<i>US – Stainless Steel (Mexico) (AB)</i>	Appellate Body Report, <i>United States – Final Anti-Dumping Measures on Stainless Steel from Mexico</i> , WT/DS344/R, adopted 20 May 2008

I. INTRODUCTION

1. Proceedings under Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”) are meant to address disagreements “as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings [of the Dispute Settlement Body (“DSB”).” A panel composed under Article 21.5, therefore, begins with the recommendations and rulings of the DSB.

2. Japan erroneously claims that the United States has failed to implement the DSB’s recommendations and rulings in *US – Zeroing (Japan)*. Japan also attempts to expand the proper scope of this Article 21.5 proceeding by challenging the WTO-consistency of three administrative reviews that are not measures taken to comply.

3. As demonstrated below, the United States has implemented the recommendations and rulings of the DSB, and has thus complied with its obligations under the DSU. Subsequent administrative reviews have superceded the administrative reviews found to be WTO-inconsistent, thereby eliminating the WTO inconsistencies found in the original proceeding. As to the challenged sunset review, the majority of the dumping margins relied on in that determination are not WTO-inconsistent and independently demonstrate that dumping at above the *de minimis* level continued after the imposition of the order. Accordingly, it was unnecessary to change the challenged sunset review determination. And lastly, the United States has eliminated the single measure known as the “zeroing procedures” that was found to be WTO-inconsistent “as such.” This Panel should therefore reject Japan’s claims of non-compliance and its effort to enlarge the obligations of the United States.

4. The United States has structured its First Written Submission as follows. First, the United States provides a brief overview of how its retrospective antidumping assessment system operates. Next, the United States addresses the specific measures challenged by Japan in its original request for the establishment of a panel, the recommendations and rulings of the DSB, and the actions taken by the United States in response to those recommendations and rulings. The United States then addresses the terms of reference of this Panel and requests that the Panel find that three administrative reviews, and “subsequent closely connected measures,” are outside the scope of this Article 21.5 proceeding. Finally, the United States explains why it has complied with the recommendations and rulings of the DSB in this dispute.

II. FACTUAL BACKGROUND

A. The U.S. Antidumping System

5. The United States maintains a retrospective antidumping duty assessment system. Pursuant to this system, at the time of importation, importers of products subject to an antidumping duty order post a cash deposit of the estimated amount of antidumping duties due.¹

¹ 19 U.S.C. § 1673e(a)(3) (Exhibit US-A1).

On request, the U.S. Department of Commerce (“Commerce”) determines the final amount of antidumping duties due through a proceeding commonly referred to as an administrative review.²

1. The Investigation

6. In an antidumping duty investigation, Commerce determines an individual margin of dumping for each exporter or producer of the subject merchandise that it investigates individually.³ Commerce also determines an “all others” rate which applies to imports from those exporters or producers that were not investigated individually.⁴

7. If the margins of dumping determined by Commerce are above *de minimis*, and the U.S. International Trade Commission (“ITC”) determines that the domestic industry is being materially injured, or is threatened with material injury, because of the dumped imports, Commerce will publish an antidumping duty order.⁵ The order provides the United States with the authority to collect cash deposits of estimated antidumping duties at the time of importation, and to assess final antidumping duties.⁶

2. Administrative Reviews

8. Interested parties may request an administrative review of the antidumping duty order each year in the anniversary month of the publication of the order.⁷ Through these administrative reviews, for each of the exporters or producers for whom a review has been requested, Commerce reexamines whether that exporter or producer was dumping.⁸ The administrative review normally covers sales of the subject merchandise during the twelve months preceding the most recent anniversary month.⁹

² 19 C.F.R. § 351.213(a) (Exhibit US-A2). There are several different types of reviews in the U.S. system. The U.S. antidumping statute identifies periodic reviews of the amount of duty, reviews based on changed circumstances, five-year (or sunset) reviews, and new shipper reviews. *See* 19 U.S.C. § 1675 (Exhibit US-A3). In this submission, the United States uses the term “administrative review” to refer to the periodic review of the amount of duty, which may be requested every year during the anniversary month of the publication of an antidumping duty order. *See* 19 U.S.C. § 1675(a)(1) (Exhibit US-A3).

³ 19 U.S.C. § 1677f-1(c)(1) (Exhibit US-A4). Where the number of exporters or producers is so large so as to render the determination of margins of dumping for each impractical, Commerce may either limit its examination to a sample of exporters or producers, or to those exporters or producers who account for the largest volume of subject merchandise that can be reasonably examined. 19 U.S.C. § 1677f-1(c)(2) (Exhibit US-A4).

⁴ 19 U.S.C. § 1673d(c)(5)(A) (Exhibit US-A5).

⁵ 19 U.S.C. § 1673e (Exhibit US-A1).

⁶ 19 U.S.C. § 1673e(a) (Exhibit US-A1).

⁷ 19 C.F.R. § 351.213(b)(1) (Exhibit US-A2).

⁸ 19 C.F.R. § 351.213(b)(1) (Exhibit US-A2).

⁹ 19 C.F.R. § 351.213(e)(1)(i) (Exhibit US-A2).

9. The results of the review serve as the basis for the calculation of the assessment rate for each importer of the subject merchandise covered by the review.¹⁰ 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.¹¹ If no review is requested, the estimated duties collected in the form of cash deposits are finally assessed.¹² Commerce communicates the results of its determinations to U.S. Customs and Border Protection (“CBP”) by issuing what are referred to as “instructions.”

3. Sunset Reviews

10. Every five years after the publication of an antidumping duty order, Commerce and the ITC will conduct a “sunset review”¹³ to determine whether revocation of the antidumping duty order would be likely to lead to a continuation or recurrence of dumping,¹⁴ and the recurrence or continuation of material injury.¹⁵ The United States will revoke an antidumping duty order unless both Commerce and the ITC make an affirmative finding of likelihood in a sunset review.¹⁶

B. Original Dispute

1. Japan’s Claims

11. In the original panel proceeding, Japan claimed that, in calculating a margin of dumping, authorities must provide an offset for non-dumped sales or “negative dumping margins.” The calculation of dumping margins without such offsets is commonly referred to as “zeroing.” Japan alleged that U.S. laws, regulations, and administrative procedures for determining dumping in original investigations, administrative reviews, new shipper reviews, sunset reviews, and changed circumstances reviews were inconsistent, “as such,” with the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (“AD Agreement”), the General Agreement on Tariffs and Trade 1994 (“GATT 1994”), and the *Marrakesh Agreement Establishing the World Trade Organization* (“WTO Agreement”), because they require zeroing.¹⁷ Japan also claimed that one original investigation, twelve administrative reviews, and two sunset reviews were inconsistent, “as applied,” with the AD

¹⁰ 19 U.S.C. § 1675(a)(2)(C) (Exhibit US-A3); 19 C.F.R. § 351.212(b)(1) (Exhibit US-A6).

¹¹ 19 U.S.C. § 1675(a)(2)(C) (Exhibit US-A3).

¹² 19 C.F.R. § 351.212(c)(1) (Exhibit US-A6).

¹³ 19 U.S.C. § 1675(c)(1) (Exhibit US-A3).

¹⁴ 19 U.S.C. § 1675a(c)(1) (Exhibit US-A7).

¹⁵ 19 U.S.C. § 1675a(a)(1) (Exhibit US-A7).

¹⁶ 19 U.S.C. § 1675(d)(2) (Exhibit US-A3).

¹⁷ Request for the Establishment of a Panel by Japan, *United States – Measures Relating to Zeroing and Sunset Reviews*, pp. 1-3, WT/DS322/8 (Feb. 7, 2005) (“Japan Panel Request”).

Agreement, the GATT 1994, and the WTO Agreement, because Commerce relied upon zeroing in making each of the determinations in question.¹⁸

2. The Panel Report

12. The original panel found that Commerce’s use of so-called “model zeroing”¹⁹ in investigations was “as such” inconsistent with Article 2.4.2 of the AD Agreement.²⁰ The panel further found that, “as applied,” the United States acted inconsistently with Article 2.4.2 with respect to its use of model zeroing in the single antidumping investigation challenged by Japan.²¹ However, the panel found that Commerce’s use of so-called “simple zeroing”²² in investigations was not inconsistent with Articles 1, 2.1, 2.4.2, 2.4, 3.1-3.5, 5.8 and 18.4 of the AD Agreement, Articles VI:1 and VI:2 of the GATT 1994, and Article XVI:4 of the WTO Agreement.²³

13. The panel found that Commerce’s use of zeroing in administrative reviews and new shipper reviews was not inconsistent, “as such,” with Articles 1, 2.1, 2.4.2, 2.4, 9.1-9.3, 9.5 and 18.4 of the AD Agreement, Articles VI:1 and VI:2 of the GATT 1994, and Article XVI:4 of the WTO Agreement.²⁴ With regard to Commerce’s use of zeroing in eleven of the challenged administrative reviews, the panel found that, “as applied,” the United States had not acted inconsistently with Articles 1, 2.1, 2.4.2, 2.4, 9.1-9.3 of the AD Agreement and Articles VI:1 and VI:2 of the GATT 1994.²⁵

14. Additionally, the panel found that Japan had failed to make a *prima facie* case with respect to its “as such” claims pertaining to zeroing in changed circumstances reviews and sunset reviews.²⁶ With regard to Commerce’s alleged use of zeroing in the two challenged sunset reviews, the panel found that, “as applied,” the United States had not acted inconsistently with Articles 2 and 11 of the AD Agreement.²⁷

¹⁸ Japan Panel Request, pp. 3-13.

¹⁹ “Model zeroing” refers to zeroing in average-to-average comparisons. *US – Zeroing (Japan) (Panel)*, paras. 7.1-7.5.

²⁰ *US – Zeroing (Japan) (Panel)*, para. 7.258(a).

²¹ *US – Zeroing (Japan) (Panel)*, para. 7.258(b).

²² “Simple zeroing” refers to zeroing in average-to-transaction or transaction-to-transaction comparisons. *US – Zeroing (Japan) (Panel)*, paras. 7.1-7.5.

²³ *US – Zeroing (Japan) (Panel)*, para. 7.259(a).

²⁴ *US – Zeroing (Japan) (Panel)*, para. 7.259(b).

²⁵ *US – Zeroing (Japan) (Panel)*, para. 7.259(c). Japan challenged twelve administrative reviews, but the original panel only made findings as to eleven of the reviews.

²⁶ *US – Zeroing (Japan) (Panel)*, para. 7.259(d).

²⁷ *US – Zeroing (Japan) (Panel)*, para. 7.259(e). In an exercise of judicial economy, the panel did not reach Japan’s claims either “as such” or “as applied” as to model zeroing in investigations under Articles 1, 2.1, 2.4, 3.1-3.5, 5.8 and 18.4 of the AD Agreement, Articles VI:1 and VI:2 of the GATT 1994, and Article XVI:4 of the WTO Agreement. *US – Zeroing (Japan) (Panel)*, paras. 7.260(a) and (b).

3. Appellate Body Report

15. Japan appealed most of the panel’s findings,²⁸ and the Appellate Body reversed the panel’s findings with regard to each of the issues Japan appealed.²⁹ The Appellate Body found that the United States acted inconsistently, “as such,” 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.³⁰ The Appellate Body also found that the United States acted inconsistently, “as such,” with Articles 2.4 and 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 by maintaining zeroing procedures in administrative reviews.³¹ Next, the Appellate Body found that the United States acted inconsistently, “as such,” with Articles 2.4 and 9.5 of the AD Agreement by maintaining zeroing procedures in new shipper reviews.³² Further, the Appellate Body found that the United States acted inconsistently, “as applied,” with Articles 2.4 and 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 by applying zeroing procedures in the eleven challenged administrative reviews.³³ Lastly, the Appellate Body found that the United States acted inconsistently, “as applied,” with Article 11.3 of the AD Agreement by relying, in the challenged sunset reviews, on margins of dumping calculated in previous administrative reviews through the use of zeroing.³⁴

4. Implementation of the DSB’s Recommendations and Rulings

16. On January 23, 2007, the DSB adopted the Appellate Body report and the panel report, as modified by the Appellate Body report.³⁵ On February 20, 2007, the United States informed the DSB of its intention to comply with its WTO obligations in this dispute. On May 4, 2007, the United States and Japan agreed on a reasonable period of time (“RPT”) pursuant to Article 21.3 of the DSU of eleven months from the date of DSB adoption.³⁶ The RPT expired on December 24, 2007.

²⁸ Japan did not appeal the panel’s findings on changed circumstances reviews.

²⁹ With regard to the U.S. appeal, the Appellate Body upheld the panel’s findings and conclusions that the U.S. “zeroing procedures” constituted a measure which could be challenged “as such” in transaction-to-transaction and average-to-transaction comparisons in original investigations. *US – Zeroing (Japan) (AB)*, para. 190(a).

³⁰ *US – Zeroing (Japan) (AB)*, para. 190(b).

³¹ *US – Zeroing (Japan) (AB)*, para. 190(c).

³² *US – Zeroing (Japan) (AB)*, para. 190(d).

³³ *US – Zeroing (Japan) (AB)*, para. 190(e).

³⁴ *US – Zeroing (Japan) (AB)*, para. 190(f).

³⁵ See Action by Dispute Settlement Body; Appellate Body Report and Panel Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/15 (Jan. 30, 2007).

³⁶ Agreement under Article 21.3(b) of the DSU, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/20 (May 8, 2007).

a. Investigations

17. On December 27, 2006, Commerce announced that it would no longer calculate the margin of dumping in antidumping investigations using comparisons of weighted-average normal values and weighted-average export prices without providing offsets for sales made at greater than normal value.³⁷ On January 26, 2007, Commerce published a notice that this modification of Commerce’s methodology would become effective for all future investigations and those pending before Commerce as of February 22, 2007.³⁸ As of that date, Commerce no longer performs average-to-average comparisons in antidumping investigations without offsets.³⁹

18. On November 19, 2007, Commerce advised interested parties that it was initiating a proceeding under Section 129 of the Uruguay Round Agreements Act (“URAA”)⁴⁰ in order to implement the DSB’s recommendations and rulings concerning the one antidumping investigation that was challenged by Japan.⁴¹ On November 26, 2007, Commerce issued its preliminary results, in which it recalculated the weighted-average margins from the antidumping investigation of *Certain Cut-to-Length Carbon-Quality Steel Plate Products from Japan*, by applying the methodology described in *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77722 (Dec. 27, 2006).⁴² Commerce also invited interested parties to comment on the preliminary results. On December 3, 2007, Commerce received a case brief from IPSCO

³⁷ *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77722 (Dec. 27, 2006) (Exhibit JPN-25).

³⁸ *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Change in Effective Date of Final Modification*, 72 Fed. Reg. 3783 (Jan. 26, 2007) (Exhibit US-A8).

³⁹ See, e.g., *Notice of Final Determination of Sales at Less Than Fair Value: Light-Walled Rectangular Pipe and Tube from Mexico*, 73 Fed. Reg. 35649 (June 24, 2008) (Exhibit US-A9) and I&D Memo at Comment 3 (Exhibits US-A10); *Notice of Final Determination of Sales at Less Than Fair Value: Light-Walled Rectangular Pipe and Tube from Republic of Korea*, 73 Fed. Reg. 35655 (June 24, 2008) (Exhibit US-A11) and I&D Memo at Comment 2 (Exhibit US-A12); *Notice of Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances: Certain Polyester Staple Fiber from the Peoples Republic of China*, 72 Fed. Reg. 19690 (Apr. 19, 2007) (Exhibit US-A13) and I&D Memo at Comment 1 (Exhibit US-A14); *Final Determination of Sales at Less Than Fair Value: Certain Activated Carbon from the Peoples Republic of China*, 72 Fed. Reg. 9508 (Mar. 2, 2007) (Exhibit US-A15) and I&D Memo at Comment 4 (Exhibit US-A16).

⁴⁰ 19 U.S.C. § 3538 (Exhibit US-A17). Section 129 provides a mechanism under U.S. law to implement DSB recommendations and rulings in antidumping and countervailing duty disputes by authorizing the authorities to revise determinations that have been found to be WTO-inconsistent.

⁴¹ *Notice of Implementation of Determination under Section 129 of the Uruguay Round Agreements Act Regarding the Antidumping Duty Order on Certain Cut-to-Length Carbon-Quality Steel Plate Products from Japan*, 73 Fed. Reg. 29109, 29109 (May 20, 2008) (Exhibit US-A18).

⁴² *Notice of Implementation of Determination under Section 129 of the Uruguay Round Agreements Act Regarding the Antidumping Duty Order on Certain Cut-to-Length Carbon-Quality Steel Plate Products from Japan*, 73 Fed. Reg. 29109, 29109 (May 20, 2008) (Exhibit US-A18).

Steel, Inc. (“IPSCO”), a domestic interested party. No Japanese interested party submitted a case brief.⁴³

19. On December 21, 2007, Commerce issued its final results for the Section 129 determination.⁴⁴ On May 20, 2008, Commerce published a notice of implementation of determination under Section 129 of the URAA, in which it recalculated the margins with offsets, as it did in the preliminary results.⁴⁵ As a result, the margin for Kawasaki Steel Corporation and the “all others” rate decreased from 10.78 percent to 9.46 percent.⁴⁶

b. Administrative Reviews

20. With respect to the administrative reviews of *Tapered Roller Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings* that Japan challenged in the original proceeding, Commerce had revoked the antidumping duty orders on these products prior to the adoption of the Appellate Body and panel reports, the effective date of revocation being January 1, 2000.⁴⁷ Commerce instructed CBP to discontinue suspension of liquidation and collection of cash deposits on entries entered or withdrawn from warehouse after the effective date of revocation.⁴⁸

21. With respect to the administrative reviews of *Ball Bearings* that Japan challenged in the original proceeding, in each case and for every exporter or producer, Commerce withdrew the WTO-inconsistent cash deposit rate with prospective effect. Commerce established new cash deposit rates in administrative reviews conducted subsequently to the reviews challenged by Japan in the original proceeding.⁴⁹

⁴³ *Notice of Implementation of Determination under Section 129 of the Uruguay Round Agreements Act Regarding the Antidumping Duty Order on Certain Cut-to-Length Carbon-Quality Steel Plate Products from Japan*, 73 Fed. Reg. 29109, 29109 (May 20, 2008) (Exhibit US-A18).

⁴⁴ *Notice of Implementation of Determination under Section 129 of the Uruguay Round Agreements Act Regarding the Antidumping Duty Order on Certain Cut-to-Length Carbon-Quality Steel Plate Products from Japan*, 73 Fed. Reg. 29109, 29109 (May 20, 2008) (Exhibit US-A18).

⁴⁵ *Notice of Implementation of Determination under Section 129 of the Uruguay Round Agreements Act Regarding the Antidumping Duty Order on Certain Cut-to-Length Carbon-Quality Steel Plate Products from Japan*, 73 Fed. Reg. 29109, 29109 (May 20, 2008) (Exhibit US-A18).

⁴⁶ *Notice of Implementation of Determination under Section 129 of the Uruguay Round Agreements Act Regarding the Antidumping Duty Order on Certain Cut-to-Length Carbon-Quality Steel Plate Products from Japan*, 73 Fed. Reg. 29109, 29110 (May 20, 2008) (Exhibit US-A18).

⁴⁷ *Revocation of Antidumping Duty Orders on Certain Bearings from Hungary, Japan, Romania, Sweden, France, Germany, Italy and the United Kingdom*, 65 Fed. Reg. 42667 (July 11, 2000) (Exhibit US-A19); *Certain Bearings from China, France, Germany, Hungary, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom*, 65 Fed. Reg. 39925 (June 28, 2000) (Exhibit US-A21).

⁴⁸ *Revocation of Antidumping Duty Orders on Certain Bearings from Hungary, Japan, Romania, Sweden, France, Germany, Italy and the United Kingdom*, 65 Fed. Reg. 42667 (July 11, 2000) (Exhibit US-A19).

⁴⁹ *See, e.g., Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews*, 70 Fed. Reg. 54711, 54713-14 (Sept. 16, 2005) (establishing new cash deposit requirements for various companies, including Asahi Seiko Co., Ltd, Koyo

c. Sunset Reviews

22. With respect to the two sunset reviews that Japan challenged in the original proceeding, on February 14, 2007, Commerce revoked the order on corrosion resistant carbon steel flat products from Japan effective as of December 15, 2005.⁵⁰ No further action was necessary with respect to the sunset review of *Antifriction Bearings from Japan*. In that case, the likelihood of dumping determination was based, among other things, on a number of findings of dumping. As discussed below, the Appellate Body report, while calling some of those findings WTO-inconsistent, did not call into question other rates relied upon by Commerce. Thus, further action by Commerce was unnecessary.

III. STANDARD OF REVIEW AND BURDEN OF PROOF

23. Under Article 11 of the DSU, a panel must “make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability and conformity with the relevant covered agreements.”⁵¹ This Panel must therefore conduct an objective assessment of Japan’s claims concerning U.S. compliance with the DSB’s recommendations and rulings, and cannot blindly adhere to prior panel or Appellate Body reports. Moreover, under Articles 3.2 and 19.2 of the DSU, the Panel’s findings may not add to or diminish the rights and obligations of Members under the covered agreements.

24. In anticipation of U.S. arguments on zeroing, Japan cites dicta from the recent Appellate Body report in *US – Stainless Steel (Mexico)* indicating that panels are allegedly bound to follow

Seiko Co., Ltd, NSK Ltd., NTN Corporation and Nippon Pillow Block Company, Ltd.) (Exhibit JPN-32); *Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews*, 71 Fed. Reg. 40064, 40066-67 (July 14, 2006) (establishing new cash deposit requirements for various companies, including JTEKT (formerly known as Koyo Seiko Co., Ltd.), NSK Ltd., NTN Corporation and Nippon Pillow Block Company, Ltd.) (Exhibit JPN-33).

⁵⁰ *Revocation Pursuant to Second Five-Year (“Sunset”) Reviews of Antidumping and Countervailing Duty Orders: Certain Corrosion Resistant Carbon Steel Flat Products from Australia, Canada, Japan and France*, 72 Fed. Reg. 7010 (February 14, 2007) (Exhibit US-A20).

⁵¹ This Panel, where relevant, must also follow the standard of review under Article 17.6(ii) of the AD Agreement. That provision states: “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.” The question under Article 17.6(ii) is whether an investigating authority’s interpretation of the AD Agreement is a permissible interpretation. Article 17.6(ii) confirms that there are provisions of the Agreement that “admit[] of more than one permissible interpretation.” Where that is the case, and where the investigating authority has relied upon one such interpretation, a panel is to find that interpretation to be in conformity with the Agreement. *See Argentina – Poultry (Panel)*, para. 7.341 and n. 223.

adopted Appellate Body reports on the same legal issues.⁵² However, the Appellate Body itself has stated that its adopted reports are not binding, except with respect to resolving the particular dispute between the parties to that dispute.⁵³ To the extent that the reasoning in prior dispute settlement reports is persuasive, those reports may be taken into account, but they have no *stare decisis* effect.

25. Japan is so focused on how the United States will respond on the issue of zeroing,⁵⁴ that it never mentions that Japan has the burden of proof as to its claims in this dispute. As the Appellate Body explained in *US – Corrosion-Resistant Steel CVD*:

[t]he complaining Member bears the burden of proving its claim. In this regard, we recall our observation in *US – Wool Shirts and Blouses* that:

... it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that *the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.*⁵⁵

26. In *US – Shrimp AD (Ecuador)* the panel explained the relationship between Article 11 and the burden of proof. There, the panel correctly stated that in accordance with its obligations under Article 11 of the DSU, it had to satisfy itself that, even though the responding party did not contest Ecuador's claims, Ecuador had established a *prima facie* case by presenting evidence and arguments to identify the measure being challenged and explaining the basis for the claimed inconsistency of zeroing with a WTO provision.⁵⁶ The panel stated that:

[T]he fact that the United States does not contest Ecuador's claims is not sufficient basis for us to summarily conclude that Ecuador's claims are well-founded. Rather, we can only rule in favour of Ecuador if we are satisfied that Ecuador has made a *prima facie* case.⁵⁷

27. Accordingly, the burden in this dispute is on Japan to prove that the United States failed to implement the DSB's recommendations and rulings. The Appellate Body's findings in the original proceeding do not excuse Japan from meeting the burden of proof on all aspects of its

⁵² First Written Submission by Japan, *United States – Measures Relating to Zeroing and Sunset Reviews: Recourse to Article 21.5 of the DSU by Japan*, para. 53, WT/DS322 (June 30, 2008) (“Japan First Written Submission”), paras. 9-10.

⁵³ *US–Softwood Lumber Dumping (AB)*, para. 111 (citing *Japan – Alcohol Taxes (AB)* and *US – Shrimp (Article 21.5)(AB)*).

⁵⁴ First Written Submission, paras. 11-12.

⁵⁵ *US – Corrosion-Resistant Steel CVD (AB)*, paras. 156-157 (footnote omitted) (emphasis added).

⁵⁶ *US – Shrimp AD (Ecuador) (Panel)*, paras. 7.10-7.11 (quoting *US - Gambling (AB)*, para. 141).

⁵⁷ *US – Shrimp AD (Ecuador) (Panel)*, para. 7.9.

claims in this proceeding. And Article 11 of the DSU requires that the Panel be satisfied that Japan has met its burden.

IV. PRELIMINARY RULING REQUESTS

28. The United States requests a preliminary ruling concerning Japan’s attempt to include three administrative reviews within the Panel’s terms of reference that are not measures taken to comply with the DSB’s recommendations and rulings. These three administrative reviews of *Ball Bearings and Parts Thereof from Japan* are identified as Review Nos. 4, 5, and 6 in Japan’s first written submission.⁵⁸ The Panel should find that these three reviews are outside the scope of this Article 21.5 proceeding.⁵⁹

29. The United States also requests a preliminary ruling that Japan fails to meet the specificity requirement of Article 6.2 of the DSU. By listing “subsequent closely connected measures” in its panel request, it has attempted to include future, indeterminate measures within the scope of this proceeding.

A. The Three Administrative Reviews on *Ball Bearings* Are not Measures “Taken to Comply”

30. Article 21.5 of the DSU applies when there is a disagreement as to the existence or consistency with a covered agreement of a measure taken to comply with the recommendations and rulings of the DSB. Therefore, the scope of an Article 21.5 compliance panel is inherently limited – it may only examine a claim that a measure taken to comply does not exist, or that a measure taken to comply is inconsistent with a covered agreement.

31. Where a measure is not subject to any DSB recommendations and rulings, there is logically no basis for any claim that a Member has not implemented the DSB’s recommendations and rulings with respect to that measure. As the Appellate Body noted in *Canada – Aircraft (Article 21.5)*:

⁵⁸ Japan First Written Submission, paras. 52-53. More specifically, the reviews are: Review No. 4 – *Ball Bearings and Parts Thereof From Japan* (May 1, 2003 through April 30, 2004) (JTEKT, NSK, NPB and NTN); Review No. 5 – *Ball Bearings and Parts Thereof From Japan* (May 1, 2004 through April 30, 2005) (JTEK, NS, NPB, and NTN); Review No. 6 – *Ball Bearings and Parts Thereof From Japan* (May 1, 2005 through April 30, 2006) (Asahi Seiko, JTEKT, NSK, NPB and NTN).

⁵⁹ The United States notes that Japan identified the 2000-05 sunset review of *Antifriction Bearings* in its Article 21.5 panel request. It appears that in its first written submission, Japan has decided not to pursue any claims related to this sunset review, nor has it asked for any findings related to it. See Japan First Written Submission, paras. 155-59. However, to the extent that Japan is still pursuing such claims, they are outside the scope of this proceeding, as the 2000-05 sunset review is not a measure to taken to comply with the DSB ’s recommendations and rulings.

[p]roceedings under Article 21.5 do not concern just any measure of a Member of the WTO; rather, Article 21.5 proceedings are limited to those “measures taken to comply with the recommendations and rulings” of the DSB. In our view, the phrase “*measures taken to comply*” refers to measures which have been, or which should be, adopted by a Member to bring about compliance with the recommendations and rulings of the DSB.⁶⁰

32. The Appellate Body thus confirmed that the focus of compliance proceedings is on the DSB’s recommendations and rulings – whether measures have been taken to comply and, if so, whether those measures are themselves inconsistent with a covered agreement. Accordingly, in assessing whether a challenged measure is a “measure taken to comply,” the Panel must first look to the recommendations and rulings of the DSB.⁶¹

1. Measures Pre-Dating the DSB’s Recommendations and Rulings Are Not Measures Taken to Comply

33. Two of the administrative review determinations identified by Japan in its Article 21.5 panel request – Review Nos. 4 and 5 – cannot be considered measures taken to comply because they pre-date the adoption of the DSB’s recommendations and rulings on January 23, 2007. 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.”⁶² 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.

34. In its Article 21.5 panel request, Japan identifies Commerce’s determinations in the 2003-04 and 2004-05 administrative reviews of *Ball Bearings* (Review Nos. 4 and 5). These two determinations were not identified by Japan in its original panel request. The DSB adopted the Appellate Body report in this dispute on January 23, 2007. Commerce, however, made and published the final results of the 2003-04 administrative review in 2005, well before the adoption of the Appellate Body report. Likewise, Commerce made and published the final results of the 2004-05 administrative review in 2006, months before the adoption of the report. These measures have no connection with the DSB’s recommendations and rulings, and cannot be considered measures taken to comply. Accordingly, these measures are outside the terms of reference of this Panel.

⁶⁰ *Canada – Aircraft (Article 21.5) (AB)*, para. 36 (emphasis added).

⁶¹ *US – OCTG from Argentina (Article 21.5) (AB)*, para. 142; *US – Softwood Lumber IV (Article 21.5) (AB)*, para. 68.

⁶² *US – Softwood Lumber IV (Article 21.5) (AB)*, para. 70 (emphasis in original).

2. Japan Erroneously Claims that the Three Subsequent Reviews Are Within the Scope of This Proceeding

35. Relying on prior panel and Appellate Body reports, including *US – Softwood Lumber IV (Article 21.5)*,⁶³ Japan asserts that the three subsequent administrative reviews are within the scope of the Article 21.5 proceeding. In these prior reports, the Appellate Body and other compliance panels explained how they were applying the particular requirements of Article 21.5 to the dispute at issue. None of these reports established a comprehensive standard to replace the agreed text of Article 21.5. And the reasoning in the reports cited by Japan is inapplicable to the present dispute.

36. Japan asserts that the original administrative reviews and the three subsequent reviews have “essentially the same connections that led the Appellate Body to conclude in *U.S. – Softwood Lumber IV (Article 21.5)* that a ‘particularly close relationship’ existed between the three measures at issue in those proceedings.”⁶⁴ Japan points to the alleged “substantive relationship” between the original and subsequent measures, including the fact that they all are antidumping administrative reviews involving ball bearings exported from Japan by the same companies.⁶⁵ Japan also notes that the original and subsequent reviews “provide succeeding bases for the continued imposition of anti-dumping duties on ball bearings. . . .”⁶⁶

37. Japan misunderstands the Appellate Body’s findings in *US – Softwood Lumber IV (Article 21.5)*. As the Appellate Body stated in that dispute, “not . . . every assessment review will necessarily fall within the jurisdiction of an Article 21.5 panel.”⁶⁷ According to the Appellate Body, “such an approach would be too sweeping.”⁶⁸ This Panel should reject Japan’s attempt to include subsequent reviews of *Ball Bearings* just because they are administrative reviews involving the same product exported from Japan by the same companies.⁶⁹ If the overlap between product, exporting country, and exporting company were sufficient to establish the type of

⁶³ Japan First Written Submission, paras. 62-105.

⁶⁴ Japan First Written Submission, para. 90.

⁶⁵ Japan First Written Submission, para. 90.

⁶⁶ Japan First Written Submission, para. 91.

⁶⁷ *US – Softwood Lumber IV (Article 21.5) (AB)*, para. 93 (footnote omitted).

⁶⁸ *US – Softwood Lumber IV (Article 21.5) (AB)*, para. 87 (footnote omitted).

⁶⁹ In its panel request in the original proceeding, Japan recognized that a determination from one administrative review is separate and distinct from a determination made in a different administrative review, including a different review of the same antidumping duty order. Japan identified determinations made by Commerce in twelve administrative reviews, and specifically challenged particular margins for particular companies in those determinations. See Japan Panel Request, Specific Case Nos. 2-13. Japan also challenged multiple reviews of the same product. This treatment is consistent with the fact that in each administrative review, Commerce examines different facts, a different time period, and a different set of transactions. Japan cannot ignore the consequences of this fact. Accordingly, Japan cannot bring entirely new and distinct determinations concerning different periods of time into this compliance proceeding simply because those determinations involved the same subject merchandise (i.e., ball bearings).

“particularly close relationship” found in *US – Softwood Lumber IV (Article 21.5)*, then every administrative review would fall within the jurisdiction of an Article 21.5 panel – contrary to the Appellate Body’s admonition. Moreover, 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”⁷⁰ does not support Japan’s argument; otherwise, every succeeding administrative review would be considered a measure taken to comply.

38. Japan, in relying on *US – Softwood Lumber IV (Article 21.5)*, ignores the differences between the two disputes. In making its finding in *US – Softwood Lumber IV (Article 21.5)*, the Appellate Body considered the timing between the two determinations at issue. The determinations in the Section 129 proceeding – the declared measure taken to comply – and the first administrative review both occurred after the adoption of the DSB’s recommendations and rulings. In addition, the Section 129 determination and the determination in the first administrative review, which was issued a few days after the Section 129 determination, both closely corresponded to the expiration of the RPT.⁷¹ Thus, the timing of these two determinations provided Commerce 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 Commerce 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.⁷²

39. The situation in this dispute does not resemble the situation in *US – Softwood Lumber IV (Article 21.5)*. As the United States has demonstrated above, two of the three subsequent determinations were made well before the adoption of the DSB’s recommendations and rulings. These subsequent determinations thus could not logically have taken into consideration the recommendations and rulings of the DSB in the original dispute. As to the administrative review of *Ball Bearings* for 2005-06, Commerce issued its final results after the adoption of the DSB’s recommendations and rulings. However, this determination did not occur around the same time as U.S. withdrawal of the administrative reviews subject to the DSB’s recommendations and rulings,⁷³ and did not closely correspond to the expiration of the RPT. Most importantly, unlike the first assessment review in *US – Softwood Lumber IV (Article 21.5)*, the 2005-06 administrative review did not incorporate elements from a section 129 determination “in view of”

⁷⁰ Japan First Written Submission, para. 91.

⁷¹ *US – Softwood Lumber IV (Article 21.5) (AB)*, para. 84.

⁷² *US – Softwood Lumber IV (Article 21.5) (AB)*, para. 84 (citing U.S. additional memorandum, para. 12).

⁷³ The cash deposit rate for the most recent review of *Ball Bearings* that was subject to the DSB’s recommendations and rulings was replaced by the cash deposit from the 2003-04 review in 2005, around two years before the results of the 2005-06 review were announced.

the DSB’s recommendations and rulings.⁷⁴

40. Japan, seeking to draw support from prior dispute settlement reports, claims that because the three subsequent *Ball Bearings* reviews “undermine” and “circumvent” the U.S. compliance with the DSB’s recommendations and rulings, they should be subject to Article 21.5.⁷⁵ However, this dispute is distinguishable from disputes in which panels and the Appellate Body found subsequent measures to undermine the declared measure taken to comply. For example, in *Australia – Leather (Article 21.5)*, a report discussed by Japan,⁷⁶ the DSB found that a grant contract by Australia to a particular company was inconsistent with Australia’s obligations pursuant to the *Agreement on Subsidies and Countervailing Measures* (“SCM Agreement”).⁷⁷ Australia notified the DSB that the subsidy that had been found to be inconsistent had been withdrawn.⁷⁸ The next day, Australia announced a new grant contract, made to the company’s parent.⁷⁹ In concluding that the new grant contract was within the compliance proceeding’s terms of reference, the compliance panel noted that the contract was “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.”⁸⁰

41. Australia thus chose to undertake action coincident with its implementation of the DSB’s recommendations and rulings. Grant contracts are not *required* by the SCM Agreement. But assessment reviews *are* required under the AD Agreement, when requested. In *Australia – Leather (Article 21.5)*, Australia *chose* to provide a grant the day after it withdrew the WTO-inconsistent measure, thus affecting the existence of the withdrawal of the prohibited subsidy.

42. The facts are similar in *Australia – Salmon (Article 21.5)*, another dispute relied on by Japan.⁸¹ There, Australia claimed compliance with the recommendations and rulings of the DSB

⁷⁴ Japan asserts that an “important temporal relationship” exists between the three subsequent reviews and the DSB’s recommendations and rulings because the United States has not yet collected definitive duties on certain entries covered by these reviews by the end of the RPT, and therefore will apply the rate determined in these reviews using zeroing after the end of the RPT. See Japan First Written Submission, para. 93. That duties may be collected after the end of the RPT is irrelevant – there may always be entries that are not liquidated immediately following the issuance of final results in an administrative review, and this fact has no relation to the DSB’s recommendations and rulings, nor to the RPT. The timing issue considered important by the Appellate Body in *US – Softwood Lumber IV (Article 21.5)* pertained to (i) the relationship between the date the recommendations and rulings were adopted, and the date the declared measure taken to comply, and the alleged measure take to comply, were taken, and (ii) whether the alleged measure was made “in view of” the recommendations and rulings. The analysis related to the determinations, and not to the existence of unliquidated entries.

⁷⁵ Japan First Written Submission, paras. 94-105.

⁷⁶ Japan First Written Submission, paras. 67-68.

⁷⁷ *Australia – Leather (Article 21.5) (Panel)*, para. 1.1.

⁷⁸ *Australia – Leather (Article 21.5) (Panel)*, para. 1.4.

⁷⁹ *Australia – Leather (Article 21.5) (Panel)*, para. 5.1.

⁸⁰ *Australia – Leather (Article 21.5) (Panel)*, para. 6.5.

⁸¹ Japan First Written Submission, para. 66.

in July 1999, but in October 1999 Tasmania chose to impose a new import ban on salmonids. The panel noted its concern about a situation in which “an implementing Member could simply avoid any scrutiny of certain measures by a compliance panel” by claiming one measure was a measure taken to comply and that another was not,⁸² even though the latter, voluntary action had the effect of undoing the compliance.

43. That is not the situation generally presented with administrative reviews, which occur upon request of interested parties on a schedule that is established without regard to dispute settlement proceedings and pursuant to rights and obligations established in the AD Agreement. The three subsequent reviews of *Ball Bearings* therefore had a timetable independent of the present dispute. In fact, the final results of two of the three reviews, as noted above, were issued well before the DSB’s recommendations and rulings in the original dispute. And 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.

44. Japan believes that because the United States announced that the results of the original administrative reviews were “superceded” by subsequent reviews, those subsequent reviews should be treated as measures taken to comply.⁸³ The original reviews were superceded by subsequent reviews because the cash deposit rate from one review was replaced by the cash deposit rate from the next review. It is for this reason that the United States announced to the DSB that “no further action is necessary for the United States to bring these challenged measures into compliance. . . .”⁸⁴ This is not the same thing as saying that the subsequent review is a measure taken to comply. The United States was merely noting that the measures subject to the DSB’s recommendations and rulings were eliminated as an incidental consequence of a subsequent administrative review – an entirely different proposition from the (incorrect) suggestion that the subsequent administrative review was a measure taken to comply. Japan is wrong to assert that the U.S. position before the DSB “confirms and supports Japan’s argument that the three subsequent administrative reviews are measures taken to comply.”⁸⁵

45. Japan also relies heavily on the Appellate Body report in *US – Upland Cotton (Article 21.5)*, describing the situation here as “very similar” to the one in the *Upland Cotton*.⁸⁶ Japan misunderstands the relevancy of the report in *US – Upland Cotton (Article 21.5)*. That dispute involved Brazil’s prohibited and actionable subsidies claims under the SCM Agreement. The Appellate Body considered whether actionable subsidies claims against U.S. support payments

⁸² *Australia – Salmon (Article 21.5) (Panel)*, para. 7.10.

⁸³ Japan First Written Submission, paras. 96-97.

⁸⁴ Status Report by the United States, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/22/Add.2 (Jan. 11, 2008) (cited in Japan First Written Submission, para. 96).

⁸⁵ Japan First Written Submission, para. 97.

⁸⁶ Japan First Written Submission, para. 101.

made after the end of the RPT were properly within the scope of the Article 21.5 proceeding, even though the DSB’s recommendations and rulings were limited to payments made in prior years. The Appellate Body considered that the later payments, to the extent they were made under the same conditions and criteria as the original payments, were subject to the obligation under Article 7.8 of the SCM agreement to withdraw the subsidy or remove its adverse effects and that they therefore were properly within the scope of the Article 21.5 proceeding.⁸⁷ Contrary to Japan’s assertion,⁸⁸ the Appellate Body did not consider the subsequent payments to be “measures taken to comply” in the context of Article 21.5.

46. The Appellate Body’s findings concerning the U.S. payments in *US – Upland Cotton (Article 21.5)* are limited to the specific facts and circumstances of that dispute and cannot be treated as instructive for purposes of this proceeding. The Appellate Body did not adopt a broad test in *US – Upland Cotton (Article 21.5)* as to what should be considered a “measure taken to comply” in any and all proceedings under Article 21.5. Rather, it was interpreting compliance obligations in a specific dispute in light of Article 7.8 of the SCM Agreement, for which there is no analogous provision in the AD Agreement. Moreover, although Japan would like to think that the Appellate Body was expressing a wider view,⁸⁹ the Appellate Body’s dicta in *US – Upland Cotton (Article 21.5)* were limited to concerns over the availability of relief against the adverse effects of actionable subsidies.⁹⁰

47. In *US – Upland Cotton (Article 21.5)*, the Appellate Body also corrected the misreading by Brazil and the compliance panel of the Appellate Body report in *US – Softwood Lumber IV (Article 21.5)*.⁹¹ The Appellate Body made 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. 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.

48. Japan also worries that if the Panel excludes subsequent reviews, then Members could never obtain relief against administrative reviews.⁹² 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 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.

⁸⁷ *US – Upland Cotton (Article 21.5) (AB)*, paras. 248-49.

⁸⁸ Japan First Written Submission, paras. 81, 101.

⁸⁹ Japan First Written Submission, paras. 100-01.

⁹⁰ *US – Upland Cotton (Article 21.5) (AB)*, paras. 245-46.

⁹¹ *US – Upland Cotton (Article 21.5) (AB)*, para. 205. This correction was made in connection with the Appellate Body’s findings on the U.S. preliminary objection concerning export credit guarantees.

⁹² Japan First Written Submission, paras. 101-02.

In any event, the United States has complied with the DSB’s recommendations and rulings here, and so there is no issue about obtaining relief against non-compliance.

49. Lastly, further undermining Japan’s contention that the three reviews are measures taken to comply is Japan’s argument that it is, in fact, challenging the “*omission*” by the United States to take the necessary action to implement the DSB’s recommendations and rulings with respect to the three administrative reviews of *Ball Bearings* (Review Nos. 1, 2, and 3).⁹³ Japan is taking mutually exclusive positions. If Japan is making a claim under Article 21.5 that measures taken to comply do not exist, then it cannot at the same time assert that such measures exist, and that they are inconsistent with the covered agreements.

B. Japan Cannot Include Measures Not yet in Existence at the Time of Its Request for Establishment

50. Under Article 6.2, a panel request must identify the “*specific measures at issue*” in the dispute,⁹⁴ and a panel’s terms of reference under Article 7.1 are limited to those specific measures. Japan in its Article 21.5 panel request identified as measures “any amendments to the eight periodic reviews and the closely connected instructions and notices, as well as any subsequent closely connected measures.” Japan also states in its first written submission that in addition to the claims it is making against the three subsequent administrative reviews, “Japan reserves the rights to address any other subsequent closely connected measures.”⁹⁵ Japan nowhere has identified these alleged subsequent measures. 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. In particular, the United States is concerned 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; this would, of course, be improper.

V. ARGUMENT

A. The United States Has Complied with the DSB’s Recommendations and Rulings Concerning the “As Applied” Findings With Respect to Administrative Reviews

51. In the underlying dispute, Japan obtained DSB recommendations and rulings with respect to Commerce determinations in eleven administrative reviews, including the five at issue here. For the reasons set forth in this section, the United States has taken measures to comply with those recommendations and rulings.

⁹³ Japan First Written Submission, para. 51 (emphasis added).

⁹⁴ Emphasis added.

⁹⁵ Japan First Written Submission, para. 28, n.40.

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

52. Japan included eleven administrative reviews in the underlying dispute. Before this Panel, Japan argues that the United States has failed to eliminate zeroing in five of these reviews.⁹⁶ As explained below, the United States has withdrawn these five administrative reviews within the meaning of DSU Article 3.7.⁹⁷ Thus, the United States has fully complied with the DSB's recommendations and rulings as they relate to these administrative reviews.

53. Japan's argument is premised on the incorrect and entirely unsupported assumption that this Panel should consider assessment (or "liquidation") of duties years after Japanese bearings entered the United States when determining whether the United States has complied with the DSB's recommendations and rulings in this dispute.⁹⁸ Japan maintains that the United States is not in compliance because "[s]ince the end of the RPT, the United States has taken, and will continue to take, action to collect these excessive duties [pertaining to the five reviews], by issuing liquidation instructions and notices on the basis of WTO-inconsistent importer-specific assessment rates."⁹⁹ Despite Japan's denials,¹⁰⁰ Japan is asking this Panel to award retroactive relief for *past* entries of subject merchandise.

54. Japan misapprehends the nature and scope of WTO disputes challenging antidumping and countervailing duty measures. Implementation of the DSB's rulings and recommendations in these disputes applies *prospectively*. When – as is the case with the administrative reviews at issue in this proceeding – the United States has eliminated the cash deposit rates established by the administrative reviews that were found to be WTO-inconsistent in the original proceeding, nothing remains to be done to come into compliance with the DSB's recommendations and rulings. Accordingly, the United States has withdrawn (within the meaning of DSU Article 3.7) the measures that the DSB found inconsistent with U.S. WTO obligations.¹⁰¹

55. Other Members have acknowledged that, for purposes of assessing compliance with the rulings and recommendations of the DSB relating to duties, one examines the treatment accorded to goods entered after the expiration of the reasonable period of time. As the EC explained to the panel that considered the *Section 129* dispute:

⁹⁶ Japan 21.5 Panel Request, para. 12.

⁹⁷ 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."

⁹⁸ Japan First Written Submission, paras. 132-36.

⁹⁹ Japan First Written Submission, para. 138.

¹⁰⁰ Japan First Written Submission, paras. 143-45.

¹⁰¹ Japan recognizes that withdraw of a measure is one way for a Member to bring a measure into conformity with the a Member's WTO obligations. *See* Japan First Written Submission, para. 128.

The EC is concerned that Canada’s claim implies a legal obligation of WTO Members not to act inconsistently with the DSB ruling with respect to all decisions taken after the expiry of the reasonable period of time even if these concern goods that entered before the expiry of the reasonable period of time or even before the adoption of the DSB ruling. Yet, for all the reasons set out earlier in its Oral Statement, the EC considers that no such obligation has been incurred by WTO Members under the DSU. Such broad reasoning could not be limited to administrative decisions, but would also entail judgements of courts.¹⁰²

56. Likewise, in the preamble to its regulation entitled *On the Measures that May be Taken by the Community Following a Report Adopted by the WTO Dispute Settlement Body Concerning Anti-Dumping and Anti-Subsidy Matters*, the EC said:

Recourse to the DSU is not subject to time limits. The recommendations in the reports adopted by the DSB only have prospective effect. Consequently, it is appropriate to specify that any measures taken under this Regulation will take effect from the date of their entry into force, unless otherwise specified, and, therefore, do not provide any basis for the reimbursement of the duties collected prior to that date¹⁰³

57. The EC took a similar view when it implemented the recommendations and rulings of the DSB in the dispute *EC – Customs Classification of Frozen Boneless Chicken Cuts*. Commission Regulation (EC) No. 949/2006 (to which the EC referred in a status report announcing compliance in that dispute, WT/DS269/15/Add.1) provides, in paragraph (9) of the preamble, that:

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

¹⁰² *United States – Section 129(c)(1) of the Uruguay Round Agreements Act (DS221)*, Replies to Questions by the Panel from the European Communities (March 4, 2002) (Exhibit US-A25).

¹⁰³ Council Regulation (EC) 1515/2001 of 23 July 2001, *On the Measures that May be Taken by the Community Following a Report Adopted by the WTO Dispute Settlement Body Concerning Anti-Dumping and Anti-Subsidy Matters*, 2001 O.J. (L 201) 10. Article 3 of Regulation 1515/2001 provides that “[a]ny measure adopted pursuant to this Regulation shall take effect from the date of their [sic] entry into force and shall not serve as basis for the reimbursement of the duties collected prior to that date, unless otherwise provided for.”

58. Similarly, in this dispute, implementation should be assessed by looking at the treatment accorded to goods entered after the expiration of the RPT. The cash deposit rates arising from the five administrative reviews challenged in the original proceeding no longer applied at the time of the expiration of the RPT, and goods entered on or after that date were not subject to those five administrative reviews. The United States therefore had withdrawn the WTO-inconsistent measure.

59. The text of GATT 1994 and the AD Agreement also demonstrate that it is the legal regime in existence at the time that an import enters the Member's territory that determines whether antidumping duties apply to the import. The text therefore confirms that the focus for implementation purposes should be on the time of entry of merchandise. Article VI:2 of GATT 1994 provides:

In order to offset or prevent dumping, a contracting party may *levy* on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product.¹⁰⁴

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

As in many other cases in customs administration, a contracting party may require reasonable security (bond or cash deposit) for the payment of anti-dumping or countervailing duty pending final determination of the facts in any case of suspected dumping or subsidization.¹⁰⁵

61. 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. Thus, the cash deposits serve as a place-holder for the liability which is incurred *at the time of entry*.

62. Several provisions of the AD Agreement further demonstrate that determining whether relief is “prospective” or “retroactive” can only be determined by reference to date of entry. For example, Article 10.1 of the AD Agreement states that provisional measures and antidumping duties shall only be applied to “products which *enter for consumption* after the time” when the provisional or final determination enters into force, subject to certain exceptions.¹⁰⁶ This limitation applies even though the dumping activity that forms the basis for the dumping and

¹⁰⁴ Emphasis added.

¹⁰⁵ GATT, Ad Article VI, paras. 2 and 3.

¹⁰⁶ Emphasis added.

injury findings necessarily occurs prior to the time that the determination enters into force. As Article 10.1 demonstrates, the critical factor for determining whether particular entries are liable for the assessment of antidumping or countervailing duties is the legal regime in existence on the date of entry.

63. 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.”¹⁰⁷ Once again, the critical factor for determining the applicability of the provision is the date of entry.

64. In addition, Article 10.6 of the AD Agreement states that when certain criteria are met, “[a] definitive anti-dumping duty may be levied on products which were *entered for consumption* not more than 90 days prior to the date of application of provisional measures”¹⁰⁸ However, under Article 10.8, “[n]o duties shall be levied retroactively pursuant to paragraph 6 on products *entered for consumption* prior to the date of initiation of the investigation.”¹⁰⁹ 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.

65. Contrary to Japan’s claim, the United States is not attempting to transform “prompt compliance” under the DSU into “an endless period of non-compliance.”¹¹⁰ Rather, in each of the five challenged administrative reviews that were the subject of the DSB’s recommendations and rulings in the original dispute, the United States has withdrawn the cash deposit rate resulting from the challenged review and calculated new cash deposit rates pursuant to separate and distinct administrative reviews.

66. With regard to the 1999 administrative reviews of *Cylindrical Roller Bearings* and *Spherical Plain Bearings* (i.e., Reviews Nos. 7 and 8),¹¹¹ the United States revoked these

¹⁰⁷ Emphasis added.

¹⁰⁸ Emphasis added.

¹⁰⁹ Emphasis added.

¹¹⁰ Japan First Written Submission, para. 148.

¹¹¹ The five administrative reviews that were the subject of the DSB’s recommendations and rulings are numbered by Japan as follows:

- (1) *Ball Bearings and Parts Thereof From Japan* (1 May 1999 through 30 April 2000) (JTEKT and NTN);
- (2) *Ball Bearings and Parts Thereof From Japan* (1 May 2000 through 30 April 2001) (NTN);
- (3) *Ball Bearings and Parts Thereof From Japan* (1 May 2002 through 30 April 2003) (JTEKT, NSK, and NTN);
- (7) *Cylindrical Roller Bearings and Parts Thereof From Japan* (1 May 1999 through 31 December 1999) (JTEKT and NTN); and,
- (8) *Spherical Plain Bearings and Parts Thereof From Japan* (1 May 1999 through 31 December 1999) (NTN).

antidumping duty orders effective January 1, 2000.¹¹² Under U.S. law, the United States no longer has authority to collect cash deposits or assess antidumping duties on products subject to these revoked antidumping orders which are imported on or after January 1, 2000.¹¹³ Thus, Japanese cylindrical roller bearings and spherical plain bearings are entering the United States without regard to antidumping duties and the United States is not collecting cash deposits pursuant to Reviews Nos. 7 and 8. The United States has complied with the recommendations and rulings of the DSB pertaining to those orders by withdrawing the challenged measures within the meaning of DSU Article 3.7.

67. Turning to the remaining three administrative reviews (Reviews Nos. 1, 2, and 3), the United States is no longer collecting cash deposits pursuant to these administrative reviews, nor do these administrative reviews provide authority to assess antidumping duties on these products that enter the United States after December 24, 2007 (i.e., the end of the RPT). Commerce has completed subsequent administrative reviews of *Ball Bearings* which cover the same merchandise and the same exporters or producers identified by Japan.¹¹⁴ These subsequent reviews examined a wholly different set of sales transactions occurring during a different period of time. In these subsequent determinations, Commerce calculated new margins of dumping, *and put in place new cash deposits for the companies examined*. Cash deposit rates from a determination in one administrative review remain in effect only until a determination in a subsequent administrative review establishes a new cash deposit rate – once Commerce issues a determination in a subsequent administrative review involving the same product and the same exporter or producer, *the former cash deposit rate is terminated*. As a result, the cash deposit rates that had been established in the administrative reviews that Japan originally challenged are no longer applied at the border. Thus, the United States has complied with the recommendations and rulings of the DSB by withdrawing the challenged measures.

¹¹² *Revocation of Antidumping Duty Orders on Certain Bearings from Hungary, Japan, Romania, Sweden, France, Germany, Italy, and the United Kingdom*, 65 Fed. Reg. 42667, 42668 (July 11, 2000) (Exhibit US-A19).

¹¹³ See, e.g., 19 U.S.C. § 1675(d)(2) (Exhibit US-A3); 19 CFR § 351.222(i)(2) (Exhibit US-A22).

¹¹⁴ *Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews*, 70 Fed. Reg. 54711 (Sept. 16, 2005) (Exhibit JPN-32), *as amended*, 70 Fed. Reg. 61252 (Oct. 21, 2005) (Exhibit JPN-32.A), *as corrected*, 70 Fed. Reg. 69316 (Nov. 15, 2005) (Exhibit JPN-32.B) (Review No. 4); *Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews*, 71 Fed. Reg. 40064 (July 14, 2006) (Exhibit JPN-33) (Review No. 5); *Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews and Rescission of Reviews in Part*, 72 Fed. Reg. 58053 (Oct. 12, 2007) (Exhibit JPN-34), *as amended*, 72 Fed. Reg. 64578 (Nov. 16, 2007) (Review No. 6) (Exhibit US-A23).

2. Japan’s Approach Would Create Inequality Between Retrospective and Prospective Antidumping Systems

68. A proper interpretation of a Member’s implementation obligations requires that retrospective duty assessment systems and prospective antidumping systems be placed on a “level playing field,” unless a provision of the WTO Agreement provides otherwise. Under prospective antidumping systems, the Member collects the amount of antidumping duties at the time of importation. There is no distinction between potential and final liability in such systems, and a Member with a prospective system will never send out assessment instructions after importation, as in a retrospective system. If an antidumping 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 importation. That is, the Member changes the amount of antidumping duties to be collected on importations occurring after the end of the RPT. The Member need not remedy the effects of the measure on imports that occurred *prior* to the date of implementation.

69. Neither the AD Agreement, nor the DSU authorizes different implementation obligations in respect of the types of systems. Yet 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.

3. This Panel Must Reject Japan’s Claims Pursuant to Articles 2.4 and 9.3 of the AD Agreement, Article VI:2 of the GATT 1994, and Articles 17.14, 21.1, 21.4 of the DSU

70. Japan argues that the alleged U.S. failure to bring the five challenged administrative reviews into conformity with its WTO obligations is a continuing violation of Articles 2.4 and 9.3 of the AD Agreement and Article VI:2 of the GATT 1994.¹¹⁵ Because the United States has complied with the DSB’s “as applied” findings, Japan has no basis upon which to assert that the United States continues to be in violation of Articles 2.4 and 9.3 of the AD Agreement and Article VI:2 of GATT 1994 with respect to the challenged administrative reviews.¹¹⁶

¹¹⁵ Japan First Written Submission, para. 140.

¹¹⁶ Japan also argues that the United States acted inconsistently with its obligations under Article II:1(a) and II:1(b) of the GATT 1994 because after the RPT, it collected import duties on bearings in excess of the bound tariff that applies to the subject merchandise, and in a manner inconsistent with Article VI of the AD Agreement. *See* Japan First Written Submission, para. 139, n. 142. These Article II claims are entirely derivative, and the Panel need not address them to resolve the matter before it. *See US – Upland Cotton (AB)*, paras. 731-32 (determining that a panel properly exercised judicial economy when it refrained from ruling on claims that were unnecessary to resolving the matter in dispute). Japan also failed to request findings from the Panel under these Article II claims. *See* Japan First Written Submission, para. 159. For these reasons, the Panel should refrain from ruling on Japan’s claims under Article II of the GATT 1994.

71. Japan also claims that as to these five reviews, the United States has acted inconsistently with Article 17.14 of the DSU.¹¹⁷ The United States objects to Japan’s assertion that inconsistent with Article 17.14, the United States has not “unconditionally accepted” the Appellate Body report in the original dispute. Japan has not identified – whether in its Article 21.5 panel request or in its submission – a measure that would show conditional acceptance by the United States. Moreover, the United States has complied with the Appellate Body’s findings in the original dispute, and therefore, Japan has no basis on which to assert that the United States conditionally accepted those findings.

72. Japan also claims that as to the five reviews, the United States has acted inconsistently with Articles 21.1 and 21.3 of the DSU.¹¹⁸ Japan has failed to show how the alleged U.S. failure to implement within the RPT amounts to a breach of either of these DSU articles. Article 21.1 merely states why “prompt compliance” is “essential” to the WTO dispute settlement system. This article imposes no substantive obligation.¹¹⁹ In addition, Article 21.3 provides a Member with the *right* to a “reasonable period of time” in which to comply with the DSB’s recommendations and rulings if it is impracticable for that Member to comply immediately. It does not impose any *obligation* on Members, apart from the obligation to inform the DSB of the Member’s intention regarding implementation. In any event, even if Articles 21.1 and 21.3 impose relevant obligations, the United States has not acted inconsistently with them because, as explained above, it has implemented the DSB’s recommendations and rulings with respect to the challenged administrative reviews.

B. The United States Has Complied with the DSB’s Recommendations and Rulings Concerning the “As Applied” Findings for Sunset Reviews

73. Japan argues that the alleged U.S. failure to take any action to implement the DSB’s recommendations and rulings with respect to the sunset review of *Antifriction Bearings* is a

Even were the Panel to address these claims under GATT Article II, the United States recalls that the liability for antidumping duties that Japan claims resulted in collection of duties above the bound rate was incurred prior to the expiration of the RPT, when the subject merchandise entered the United States and a cash deposit was paid. See Part V.A.1, *supra*. Liability does not result from post-RPT liquidation of entries that were made prior to the expiration of the RPT. Moreover, at the time the RPT expired, the United States was no longer collecting cash deposits pursuant to the administrative reviews that were subject to the DSB’s recommendations and rulings. New cash deposit rates were established prior to the end of the RPT. There is no basis for Japan 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 AD Agreement.

¹¹⁷ Japan First Written Submission, para. 140.

¹¹⁸ Japan First Written Submission, para. 140.

¹¹⁹ Not all WTO provisions impose obligations on Members. For example, Article 1 of the SCM Agreement, which defines a subsidy for purposes of the SCM Agreement, does not.

continuing violation of Article 11.3 of the AD Agreement.¹²⁰ Because the United States has complied with the DSB’s findings, Japan has no basis upon which to assert that the United States continues to be in violation of Article 11.3 of the AD Agreement with respect to the challenged administrative reviews.¹²¹

74. The Appellate Body found that with respect to the November 4, 1999 sunset review determination, the United States acted inconsistently with Articles 2 and 11 of the AD Agreement in that particular review, “when it relied on margins of dumping calculated in previous proceedings through the use of zeroing.”¹²² To reach this conclusion, the Appellate Body primarily relied upon its own statement that “[i]f these margins were legally flawed because they were calculated in a manner inconsistent with Article 2.4, this *could* give rise to an inconsistency not only with Article 2.4, but also with Article 11.3 of the Anti-Dumping Agreement.”¹²³ The Appellate Body explained that “[a]s 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.”¹²⁴ Apart from the extent to which Commerce relied on dumping margins calculated in previous proceedings through the use of zeroing to determine the likelihood of dumping, the Appellate Body found no inconsistency with the WTO obligations in this sunset review.

75. The original likelihood of dumping determination in *Antifriction Bearings from Japan* did not rest exclusively upon margins that the Appellate Body found inconsistent with Article 11.3 of the AD Agreement.¹²⁵ Rather, this sunset review presents a situation in which the DSB’s recommendations and rulings addressed a minority of margins considered in the likelihood of dumping determination.¹²⁶ The remaining margins – in fact, the *majority* of margins – cannot be characterized as inconsistent with the AD Agreement because they either *predate* the AD

¹²⁰ Japan First Written Submission, para. 158. The United States notes that Japan identified the 2000-05 sunset review of *Antifriction Bearings* in its Article 21.5 panel request. It appears that in its first written submission, Japan has decided not to pursue any claims related to this sunset review, nor has it asked for any findings related to it. See Japan First Written Submission, paras. 155-59.

¹²¹ Japan also claims that as to the one sunset review, the United States has acted inconsistently with Articles 17.14, 21.1, and 21.3 of the DSU. See Japan First Written Submission, para. 158. For the reasons discussed in Part V.A.3, *supra*, Japan’s claims under these articles must fail.

¹²² *US – Zeroing (Japan) (AB)*, para. 190(e) (emphasis added).

¹²³ *US – Zeroing (Japan) (AB)*, para. 183 (emphasis added) (citing *US – Corrosion-Resistant Steel Sunset Review (AB)*).

¹²⁴ *US – Zeroing (Japan) (AB)*, para. 185.

¹²⁵ Notably, the Appellate Body did not make any findings regarding the legal validity of underlying administrative review determinations that predate the AD Agreement and the WTO. Nor did the Appellate Body find that the rates of non-cooperating respondents in the underlying administrative reviews that were determined without zeroing are legally flawed.

¹²⁶ See *Final Results of Expedited Sunset Reviews: Antifriction Bearings from Japan*, 64 Fed. Reg. 60275, 60276, n. 3 (Nov. 4, 1999) (Exhibit US-A24) and administrative determinations cited therein.

Agreement¹²⁷ or did not involve the use of a zeroing methodology. Each of these two categories of margins independently support the criteria that Commerce applied, i.e., that dumping continued at a level above *de minimis* after the imposition of the antidumping duty order.¹²⁸ On this basis, Commerce found the likelihood of continuation of dumping. Accordingly, the margins that the Appellate Body found inconsistent with the AD Agreement¹²⁹ are unnecessary to the overall validity of Commerce’s finding of the likelihood of dumping in the challenged sunset review. Because an independent WTO-consistent basis for the likelihood of continuance of dumping determination exists, it was unnecessary to modify the final results of the challenged sunset review.

76. In *US – Corrosion-Resistant Steel Sunset Review*, the panel observed that Article 11.3 does not provide for a particular methodology that applies to the substantive determinations to be made in sunset reviews.¹³⁰ Similarly, the Appellate Body endorsed the interpretation that “Article 11.3 does not expressly prescribe any specific methodology for investigating authorities to use in making a likelihood determination in a sunset review.”¹³¹ The Appellate Body further explained, “[n]or does Article 11.3 identify any particular factors that authorities must take into account in making such a determination. Thus, Article 11.3 neither explicitly requires authorities in a sunset review to calculate fresh dumping margins, nor prohibits them from relying on dumping margins calculated in the past.”¹³² Accordingly, as the Appellate Body explained in *US – Corrosion-Resistant Steel Sunset Review*, the United States is not required to calculate “fresh dumping margins” as a substitute for margins invalidated by the Appellate Body in this dispute, particularly where at least some (and in this case the majority of) margins calculated in the past are not WTO-inconsistent and independently demonstrate that dumping at above the *de minimis* level continued after the imposition of the order. Therefore, it was unnecessary to change the challenged sunset determination.

C. The United States has Complied with the DSB’s Recommendations and Rulings Concerning the “As Such” Inconsistency of the Zeroing Procedures

77. The DSB ruled that the U.S. zeroing procedures were “as such” inconsistent with various provisions of the AD Agreement and the GATT 1994.¹³³ For the reasons set forth below, the United States eliminated the single measure that was subject to the DSB’s recommendations and

¹²⁷ See, e.g., *US – Korea DRAMSs (Panel)*, para. 6.14; *Brazil - Desiccated Coconut (AB)*, para 19.

¹²⁸ With the exception of Honda, which was excluded from the antidumping duty order in 1995, virtually all of these margins demonstrate that dumping continued at above *de minimis* level.

¹²⁹ This statement refers to margins “as a whole,” a term not found anywhere in the AD Agreement, but which the Appellate Body concluded in this dispute to constitute the only permissible interpretation of the term “margin.” Compare AD Agreement with *US – Zeroing (Japan) (AB)*, para. 121.

¹³⁰ *US – Corrosion-Resistant Steel Sunset Review (Panel)*, para. 7.302.

¹³¹ *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 123.

¹³² *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 123.

¹³³ *US – Zeroing (Japan) (AB)*, paras. 190(b)-(d); *US – Zeroing (Japan)(Panel)*, para. 7.258(a).

rulings by the end of the RPT, and has therefore fully implemented the DSB’s recommendations and rulings with respect to the zeroing procedures. Therefore, the United States does not continue to act inconsistently with Articles 2.4, 2.4.2, 9.3, and 9.5 of the AD Agreement and Article VI:2 of the GATT 1994.¹³⁴

1. The “Zeroing Procedures” Are a Single Measure

78. In the original proceeding, Japan challenged, *inter alia*, the U.S. “zeroing procedures” as being “as such” inconsistent with various provisions of the AD Agreement and the GATT 1994.¹³⁵ Japan considered the zeroing procedures to be “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.”¹³⁶ The original panel and the Appellate Body agreed that the zeroing procedures are a single measure. According to the original panel, “we consider that what Japan terms ‘zeroing procedures’ is a *measure* which can be challenged as such.”¹³⁷ Likewise, the Appellate Body concluded 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*.”¹³⁸ Accordingly, the DSB’s recommendations and rulings applied to this single measure.

2. The United States Has Eliminated the Zeroing Procedures

79. As Japan correctly notes, Commerce announced on December 27, 2006 that it would no longer apply the zeroing procedures in W-to-W comparisons in original investigations.¹³⁹ The effective date of the final modification to the zeroing procedures was February 22, 2007, a month after the adoption of the recommendations and rulings in this dispute.¹⁴⁰ The United States thus eliminated the single measure that Japan had challenged and that was found to be “as such” inconsistent, well before the expiration of the RPT on December 24, 2007.

¹³⁴ Japan also claims that as to the zeroing procedures, the United States has acted inconsistently with Articles 17.14, 21.1, and 21.3 of the DSU. *See* Japan First Written Submission, para. 114. For the reasons discussed in Part V.A.3, *supra*, Japan’s claims under these articles must fail.

¹³⁵ Japan First Written Submission, May 9, 2005, para. 9

¹³⁶ Japan’s Opening Statement at the Third Meeting of the Panel, June 12, 2006, para. 4; *US – Zeroing (Japan)(Panel)*, para. 6.19.

¹³⁷ *US – Zeroing (Japan) (Panel)*, para. 7.56 (emphasis added).

¹³⁸ *US – Zeroing (Japan) (AB)*, para. 88 (emphasis added).

¹³⁹ Japan First Written Submission, para. 110 (citing *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77722 (Dec. 27, 2006) (Exhibit JPN-25)).

¹⁴⁰ *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Change in Effective Date of Final Modification*, 72 Fed. Reg. 3783 (Jan. 26, 2007) (Exhibit US-A8).

80. Japan tries to argue that the United States “has omitted to take any action to implement the DSB’s recommendations and rulings regarding the zeroing procedures in *original investigations under a T-to-T comparison, or under any comparison methodology in periodic and new shipper reviews*” and has therefore failed to comply fully with the DSB’s recommendations and rulings.¹⁴¹ Japan cannot have it both ways – it took the position in the original proceeding that the zeroing procedures were “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.” Japan would now like this Panel to ignore its own argument – and the findings of both the original panel and the Appellate Body – and treat the DSB’s recommendations and rulings as though they applied to more than one measure. However, the recommendations and rulings applied to the “zeroing procedures,” a single measure comprised of zeroing in W-to-W comparisons, T-to-T comparisons, and W-to-T comparisons, in any antidumping proceeding. Now that zeroing is no longer used in W-to-W comparisons in antidumping investigations, the single measure that was subject to the DSB’s recommendations and rulings has been withdrawn.¹⁴²

VII. CONCLUSION

81. For the foregoing reasons, the United States respectfully requests this 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.

¹⁴¹ Japan First Written Submission, para.108 (emphasis in original).

¹⁴² To the extent Japan is arguing that there is some new U.S. zeroing measure that replaced the original zeroing procedures, Japan has failed to make a *prima facie* case of the existence of this new measure. To make a *prima facie* case, it is generally for each party asserting a fact, whether complainant or respondent, to provide proof thereof. See *US - Wool Shirts and Blouses (AB)*, para. 337. In this regard, Japan has not submitted evidence which would prove the existence of zeroing as a rule or norm following the elimination of the zeroing procedures by Commerce.