

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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY JAPAN

WT/DS322

**COMMENTS OF THE UNITED STATES OF AMERICA TO JAPAN'S ANSWERS TO
QUESTIONS FROM THE PANEL TO THE PARTIES**

December 16, 2008

A. BURDEN OF PROOF

Q1. Japan, US: With regard to paras 23 - 27 of the United States' First Written Submission ("FWS"), please give your view as to whether Japan must establish a prima facie case that any zeroing in Reviews 4, 5, 6 and 9 is WTO-inconsistent? Please explain?

1. Japan correctly recognizes that it bears the burden of proof in establishing a *prima facie* case that the United States used zeroing in Review Nos. 4, 5, 6, and 9. The Panel also asked whether “Japan must establish a *prima facie* case that any zeroing in Reviews 4, 5, 6, and 9 is *WTO-inconsistent*.”¹

2. As the United States pointed out in its answer to this question, Japan must establish a *prima facie* case by presenting evidence and argument to establish the scope and meaning of the measure being challenged and establish the basis for the claimed inconsistency with a WTO provision.² To the extent that Japan claims that Review Nos. 4, 5, 6, and 9 make use of an allegedly WTO-inconsistent “zeroing” methodology,³ it is for Japan to not only to explain and prove, through evidence, what Japan means by “zeroing” in this context and that such “zeroing” in fact occurred in each review, but Japan must also explain and prove why that “zeroing” is (in its view) inconsistent with the WTO Agreement.

3. In this regard, we note that Japan has relied on the findings and conclusions made in previous disputes.⁴ Such a reference to findings and conclusions in prior reports does not satisfy Japan’s burden of proof.⁵ And although this Panel, operating under Article 21.5 of the DSU, should take account of the reasoning in the original proceedings on the same issues, that reasoning does not have binding effect,⁶ and the Panel is permitted to re-consider those issues.

B. DEFINITION OF "MEASURES TAKEN TO COMPLY"

Q5. US: At para. 24 of its SWS, Japan asserts that "under Articles 3.7 and 19.1, a measure may achieve compliance, even if that was not the measure's purpose, and

¹Emphasis added.

²*US – Woven Wool Shirts and Blouses from India (AB)*, pp. 12-13; *US – German Steel (AB)*, para. 157.

³The United States reiterates its preliminary objection that Review Nos. 4, 5, 6, and 9 are not measures taken to comply and are not properly within the scope of this proceeding. The U.S. answer is therefore without prejudice to its preliminary objection.

⁴See e.g., Japan First Written Submission, paras. 153-54.

⁵*Japan – Taxes on Alcoholic Beverages (AB)*, p. 14 (“Adopted panel reports ... should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute.”).

⁶*US – Softwood Lumber ITC Investigation (Article 21.5) (AB)*, para. 103.

even if the measure was taken before the adoption of the DSB's recommendations and rulings". Isn't Japan's position consistent with the United States' argument that it has achieved compliance with the DSB's recommendations and rulings in respect of Reviews 1, 2 and 3 by withdrawing the relevant cash-deposit rates prior to the adoption of the DSB's recommendations and rulings? If not, please explain.

4. We welcome Japan's confirmation once again that the United States could achieve compliance, even if that was not the measure's purpose, and even if it was taken before the adoption of the DSB's recommendations and rulings.

5. As we have explained,⁷ the United States removed the WTO-inconsistent cash-deposit rates for Review Nos. 1-3 when those rates were withdrawn through the incidental operation of the U.S. antidumping system. Likewise, the revocation of the orders for Review Nos. 7 and 8, which Japan cites in commenting on the Panel's question, occurred as a result of the five-year sunset review in the normal course of operation of the U.S. antidumping system, long before the DSB's recommendations and rulings in the underlying dispute.⁸ Finally, the removal of the zeroing procedures also took place prior to the DSB's recommendations and rulings.⁹ All of these actions, however, had the effect of bringing the United States into compliance.

6. The way in which the United States has come into compliance is no different than those instances where Members have demonstrated that compliance was achieved by the withdrawal of a WTO-inconsistent measure due to the passage of time, or otherwise through the incidental operation of law. In other words, it is the removal of the measure that brings about compliance. The fact that there is a different measure in place after the removal of the measure that was the subject of the DSB recommendations and rulings does not mean that the different measure is automatically a "measure taken to comply." For example, if a Member, prior to any DSB ruling, terminated a safeguard measure upon the government acquiring an equity share in the industry at issue would not mean that the equity share was a "measure taken to comply," even if the safeguard measure were ultimately found to have been in breach. There would not necessarily have been any link between the equity share and compliance where there had been no finding of any need for compliance.

⁷See, e.g., U.S. First Written Submission, Part V.A; U.S. Second Written Submission, Part III.A; U.S. Answer to Panel Questions 2-5.

⁸See, e.g., U.S. First Written Submission, Part V.A; U.S. Answers to Panel Questions 2-5.

⁹See, e.g., U.S. First Written Submission, para.79 (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)).

Q10. Japan, US: Please comment on Norway's assertion (at para. 21 of its third party submission) that "[t]he important point is not when a review (of one of the measures found to violate WTO rules in the original case) is initiated, but whether it was completed and/or continued to have effects after the end of the reasonable period of time".

a. To what extent did Reviews 4 and / or 5, which were completed before 24 December 2007, have "effects" after that date?

7. The United States recalls that its implementation obligations only exist with respect to entries occurring after the conclusion of the RPT (i.e., December 24, 2007).¹⁰ Review Nos. 4 and 5 did not involve entries occurring after the conclusion of the RPT because Review No. 4 covered entries made during 2003-04 and Review No. 5 covered entries made during 2004-05.¹¹

8. Japan's answer posits that the liquidation of duties is the pertinent final action with which this dispute is concerned. However, the DSB's recommendations and rulings in this dispute pertain to the determination of final liability under Article 9.3 of the AD Agreement, not the ministerial collection of duties through liquidation.

9. Separately, we also note that Japan has asserted but has failed to demonstrate that "all entries made by Asahi, JTEKT, NSK, NPB, and NTN covered by reviews 4, 5, and 6" remained unliquidated at the conclusion of the RPT.¹² The only evidence Japan relies on is the existence of preliminary injunctions. The United States recalls that the U.S. Department of Commerce's ("Commerce") practice is to issue liquidation instructions 15 days after the publication of final results and liquidation can occur any time thereafter.¹³ Thus, only if a preliminary injunction is in place prior to 15 days after publication of the final results would the injunction necessarily cover all reviewed entries. However, the time periods between publication of final results and the effective dates of preliminary injunctions in Review Nos. 4, 5 and 6 were as long as 71,¹⁴

¹⁰See, e.g., U.S. Second Written Submission, paras. 39-46.

¹¹Request for the Establishment of a Panel, *United States – Measures Related to Zeroing and Sunset Reviews; Recourse to Article 21.5 of the DSU by Japan*, Annex I, WT/DS322/27 (Apr. 8, 2008) ("Japan Art. 21.5 Panel Request").

¹²Japan's Answers to Panel Questions, para. 8.

¹³U.S. Answers to Panel Questions, para. 32.

¹⁴The Review No. 4 final results for Nippon Pillow Block were amended and published on November 15, 2005, which started the 15-day time period for issuing liquidation instructions. (Exhibit US-59). Nippon Pillow Block served Commerce with a preliminary injunction on January 18, 2006, and the injunction was effective five business days later, on January 25, 2006. (Exhibit US-A60).

61,¹⁵ and 53,¹⁶ days respectively. Accordingly, it is possible that some entries were liquidated prior to the effective dates of the preliminary injunction.

b. Would Reviews 4 and / or 5 constitute "measures taken to comply" if all entries covered by those measures had been liquidated by the end of the RPT?

10. Japan maintains that Review Nos. 4 and 5 are “measures taken to comply” that continue to have effects after the expiration of the RPT. However, as the United States has already explained,¹⁷ these reviews are not measures taken to comply within the meaning of Article 21.5 of the DSU, and are not properly before the Panel.

11. In any event, even were the subsequent reviews considered measures taken to comply, the border measures associated with these reviews were already removed by the time of the expiry of the RPT and no longer apply to entries of the subject merchandise.¹⁸ As a result, these reviews did not have any “legal effect” for purposes of this proceeding after December 24, 2007.

12. Japan focuses in its answer on the alleged fact that liquidation for entries related to Review Nos. 4 and 5 had not occurred at the time of the expiry of the RPT. The date of liquidation, however, is the date on which the ministerial act occurs, whereby U.S. Customs and Border Patrol (“USCBP”) collects, *inter alia*, the antidumping duties determined by Commerce in antidumping administrative reviews.¹⁹ The relevant consideration for determining compliance in a WTO antidumping dispute is whether the Member has ensured that the WTO-inconsistent measure is not applied to entries occurring after the conclusion of the RPT, which has occurred here.²⁰

¹⁵The Review No. 5 final results were published on July 14, 2006. *See* Japan Art. 21.5 Panel Request at Annex I. Koyo served Commerce with a preliminary injunction on September 11, 2006 and the injunction was effective two business days later, on September 13, 2006. (Exhibit US-A61).

¹⁶The Review No. 6 final results for Asahi Seiko were published on October 12, 2007. *See* Japan Art. 21.5 Panel Request at Annex I. Asahi Seiko served Commerce with a preliminary injunction on November 27, 2007, and the injunction was effective five business days later on December 4, 2007. (Exhibit US-A62).

¹⁷*See, e.g.*, U.S. First Written Submission, Part IV.A; U.S. Second Written Submission, Part II.A.

¹⁸For further comments related to legal effects after the expiration of the RPT, see the U.S. Comments on Japan’s Answer to Panel Question 11.

¹⁹*See, e.g.*, U.S. Second Written Submission, para. 50; *see also* U.S. Answer to Panel Question 26.

²⁰*See, e.g.*, U.S. Second Written Submission, para. 63.

Q11. Japan, US: The Panel notes the parties' arguments regarding the so-called "nexus-based" test applied in US - Softwood Lumber IV (21.5). The Panel further notes that, in that case, the First Assessment Review was adopted shortly after the expiry of the RPT, and had legal effects beyond the expiry of the RPT. (The First Assessment Review was adopted on 20 December 2004, while the RPT expired on 17 December 2004). Since the acts of a Member need only comply with the recommendations and rulings of the DSB as of the end of the RPT, should Article 21.5 proceedings cover measures that have no legal effect after the end of the RPT? In determining whether or not a measure is "taken to comply" in the meaning of Article 21.5 of the DSU, is the issue of whether or not that measure has legal effects after the expiry of the RPT relevant? Please explain.

13. As an initial matter, the United States disputes Japan's claim that Review Nos. 1, 2, 3, 4, 5, 6, 7, 8, and 9 "continue to produce legal effects" after the expiry of the RPT. The United States has demonstrated that the WTO-inconsistent border measures for Review Nos. 1, 2, 3, 7, and 8 were removed through the incidental operation of the U.S. antidumping system prior to the expiry of the RPT. In addition, Review Nos. 4, 5, 6, and 9 are not measures taken to comply and are outside the scope of this proceeding.

14. We agree with Japan that this question is hypothetical. Unfortunately, Japan's attempt to address that hypothetical (in paragraphs 12 and 13 of its answers) is not entirely accurate. As we indicated in our Answer to Panel Question 11, proceedings under DSU Article 21.5 pertain exclusively to disagreements over the existence or consistency with the covered agreements of a measure taken to comply with the DSB's recommendations and rulings. We agree with Japan that the fact that a measure may no longer have legal effects does not mean that it cannot be considered a "measure taken to comply." In particular, the withdrawal of a WTO-inconsistent measure would be a "measure taken to comply" that could be reviewed by a compliance panel, even though once withdrawn, one might not consider that withdrawal to have "ongoing" legal effects. This is because it would be a "useless act" to expect a Member to withdraw a measure twice – once before the DSB adopts recommendations and rulings and once after. However, this is different from the situation addressed by Japan. As we explained in our answer to this question, Japan is incorrect to assert that an Article 21.5 proceeding commenced after the measure's effects have ended would have a basis to consider the consistency of the measure with the covered agreements. Instead, a compliance panel may only examine whether that measure establishes that a measure to comply *existed* which brought the Member into compliance with the DSB's recommendations and rulings.

15. For example, the WTO-inconsistent cash deposit rates for Review Nos. 1-3 were removed prior to the expiry of the RPT, and the Panel may examine this removal through the incidental operation of U.S. antidumping law and find that the United States complied with the DSB's recommendations and rulings by virtue of this removal.

16. In addition, with respect to the first sentence of paragraph 12, Articles 17.14, 19.1, 21.1 and 21.3 of the DSU are irrelevant to the question posed by the Panel. Moreover, as we have explained in our written submissions, Japan's claims under these provisions are unfounded and should be rejected.²¹

C. LEGAL EFFECTS / UNLIQUIDATED ENTRIES

Q13. US: Please indicate the number and percentage of entries covered by Reviews 1, 2, 7 and 8 that were not liquidated by the end of the RPT on 24 December 2007. If possible, please provide an indication of the value of these entries.

17. Similar to Japan's unsupported assertions in answer to Panel Question 10(a) – pertaining to Review Nos. 4, 5, and 6 – Japan makes unsupported claims that *none* of the relevant entries for Review Nos. 1, 2, 3, 7, and 8 were liquidated prior to the conclusion of the RPT.²² Japan again bases its claim on the existence of domestic litigation covering each of these reviews.²³ However, domestic litigation results in a delay in liquidation only once preliminary injunctions are issued. Preliminary injunctions in these reviews were issued many days after the publication of the final results, and, as a result, it is possible that some of the relevant entries were liquidated prior to the issuance of the preliminary injunction. Specifically, the time periods between publication of the final results and the effective dates of preliminary injunctions in Review Nos. 1, 2, 3, 7, and 8 were as long as 104,²⁴ 99,²⁵ 105,²⁶ 104,²⁷ and 104²⁸ days, respectively.

²¹See, e.g., U.S. First Written Submission, paras. 70-72; U.S. Second Written Submission, paras. 71-74.

²²Japan's Answers to Panel Questions, para. 15.

²³Japan's Answers to Panel Question, para. 17.

²⁴The Review No. 1 final results were published on July 12, 2001. See Japan Art. 21.5 Panel Request at Annex I. Domestic petitioners served Commerce with a preliminary injunction covering Koyo and NTN on October 23, 2001, and the injunction was effective the next business day, on October 24, 2001. (Exhibit US-A63).

²⁵The Review No. 2 final results for NTN were amended and published on October 15, 2002, which started the fifteen day time period for issuing liquidation instructions. (Exhibit US-A64). NTN served Commerce with a preliminary injunction on January 21, 2003, and the injunction was effective the next day, on January 22, 2003. (Exhibit US-A65).

²⁶The Review No. 3 final results were published on September 15, 2004. See Japan Art. 21.5 Panel Request at Annex I. Domestic petitioners served Commerce with a preliminary injunction covering NTN on December 28, 2004, and the injunction was effective the next business day, on December 29, 2004. (Exhibit US-A66).

²⁷The Review No. 7 final results were published on July 12, 2001. See Japan Art. 21.5 Panel Request at Annex I. Domestic petitioners served Commerce with a preliminary injunction covering Koyo and NTN on October

18. Japan also asserts that for a given exporter, Commerce only issues one set of liquidation instructions and, because Commerce issued liquidation instructions in Review Nos. 1, 2, 3, 7, and 8 after the conclusion of the RPT, “*a fortiori*, no duties had been collected on these entries before the end of the RPT.”²⁹ Japan is incorrect because Commerce may send more than one set of liquidation instructions for a given exporter if a court issues a preliminary injunction after Commerce sends out liquidation instructions (e.g., instructions ordering liquidation, instructions ordering the suspension of liquidation during the pendency of domestic litigation, and instructions ordering liquidation after the conclusion of domestic liquidation). Because the time period between the publication of final results and the issuance of preliminary injunctions for Review Nos. 1, 2, 3, 7, and 8 was longer than fifteen days, it is likely that entries were liquidated prior to the issuance of preliminary injunctions.

Q19. Japan: The Panel understands Japan to claim that, by issuing liquidation instructions after the end of the RPT on the basis of importer-specific assessment rates determined in Reviews 1, 2, 7 and 8, the United States violated Articles II:1(a) and (b) of the GATT 1994. The Panel understands Japan to argue that, because importer-specific assessment rates determined in Reviews 1, 2, 7 and 8 were found to be WTO-inconsistent in the original proceeding, and because the United States has taken no implementation action in respect thereof, any anti-dumping duty resulting from those rates would not be "applied consistently with the provisions of Article VI", such that the safe harbour provided for in Article II:2(b) of the GATT would not apply. The Panel understands Japan to argue that this claim is valid for all (unliquidated) importer-specific assessment rates determined in Reviews 1, 2, 7 and 8, regardless of whether zeroing was actually used in determining a particular importer-specific assessment rate.

- a. Is this a correct understanding of Japan's claims? If not, please explain.***
- b. If this is a correct understanding, please explain why para. 138 of Japan's FWS refer to importer-specific assessment rates that have been "inflated as a result of zeroing".***

23, 2001, and the injunction was effective the next business day, on October 24, 2001. (Exhibit US-A63).

²⁸The Review No. 8 final results were published on July 12, 2001. See Japan Art. 21.5 Panel Request at Annex I. Domestic petitioners served Commerce with a preliminary injunction covering NTN on October 23, 2001, and the injunction was effective the next business day, on October 24, 2001. (Exhibit US-A63).

²⁹Japan's Answers to Panel Questions, para. 16.

- c. ***What is the basis for Japan's assertion that the rates have been "inflated"?***
- d. ***What is the basis for asserting, at para. 139 of Japan's FWS, that "the importer-specific assessment rates would have been zero in each case" if the United States had properly implemented the recommendations and rulings of the DSB?***

19. In answering this question, Japan mischaracterizes the manner in which Commerce reexamined the final results in Review Nos. 1, 2, and 3. Japan also incorrectly focuses on the effects of these reexaminations. In addition, Japan improperly relies on certain new programs that it created for this compliance proceeding purportedly to demonstrate that importer-specific assessment rates were affected by zeroing. Finally, Japan makes improper and unnecessary requests for copies of electronic programs under Article 13.1 of the DSU and mischaracterizes the events surrounding recent requests for copies of such programs made to Commerce.

Mischaracterization of Reexaminations Final Results

20. Japan misunderstands the manner in which Commerce amended the final results in Review Nos. 1, 2, and 3. As the United States explained in its answers, a U.S. court ordered reexaminations in those reviews, but for limited circumstances that were unrelated to the DSB's recommendations and rulings in this dispute.³⁰ Contrary to Japan's suggestion, Commerce did not conduct these reexaminations to employ the zeroing procedures.³¹ Rather, a U.S. court ordered these reexaminations to: exclude a small amount of merchandise that was out of the scope of the antidumping order (Review No. 1); correct a clerical error (Review No. 2); and eliminate certain billing adjustments (Review No. 3). Any results of the zeroing procedures employed in Review Nos. 1, 2 and 3 were not altered through the court-ordered reexaminations.

Effects of Reexaminations Are Irrelevant to this Dispute

21. Japan also incorrectly argues that these court-ordered reexaminations demonstrate that Review Nos. 1, 2, and 3 had legal effects after the end of the RPT.³² Implementation obligations only exist with respect to entries occurring after the conclusion of the RPT.³³ None of the reexaminations applied to entries occurring after the conclusion of the RPT. The reexamination

³⁰See, e.g., U.S. Answers to Panel Questions, para. 29.

³¹Japan's Answers to Panel Questions, para. 38.

³²Japan's Answers to Panel Questions, para. 37.

³³See, e.g., U.S. Second Written Submission, paras. 39-46.

in Review No. 1 applied to entries occurring in 1999-2000,³⁴ the reexamination in Review No. 2 applied to entries occurring in 2000-01,³⁵ and the reexamination in Review No. 3 applied to entries occurring in 2002-03.³⁶ Thus, these reexaminations are irrelevant to this dispute.

Japan's New Programs Created for this Dispute

22. In response to this Panel's request for evidence that the individual importer-specific assessment rates ("ISARs") were affected by zeroing procedures, Japan has improperly relied on revised dumping programs that Japan argues are the same as the programs used in the challenged reviews, but with specific programming language eliminated to "switch off" the zeroing procedures.³⁷ These revised programs were created by Japan for this compliance proceeding, and Commerce has never employed these programs.³⁸ In any event, the alleged effects of zeroing in the reviews at issue are irrelevant for purposes of this dispute, as the United States complied by withdrawing the cash deposit rates that were subject to the DSB's recommendations and rulings.

Improper and Unnecessary Requests under Article 13.1 of the DSU

23. In paragraph 55 of its Answers to Panel Questions, Japan requests that the United States provide it with certain electronic programs that were used in the Reviews 4, 5, and 6. In its letter to the Panel dated December 5, 2008, the United States explained that this request was improper because under Article 13.1, it is the Panel, and not Japan, that decides whether it is necessary and appropriate for the Panel's appreciation of the evidence and argument presented to seek information and technical advice. In addition, consistent with Article 6.5 of the AD Agreement, these electronic programs are confidential because they contain business confidential information. Thus, the United States may not disclose this information without permission, and the United States cannot provide Japan directly with copies of these programs. However, shortly after the companies to which the requested electronic programs applied asked for electronic copies of their programs, Commerce provided copies to all of these companies. Japan may seek copies of these electronic programs from these Japanese companies, which are, of course, free to share their own business confidential information.

³⁴Review No. 1 Amended Final (Exhibit JPN-39).

³⁵Review No. 2 Amended Final (Exhibit JPN-40).

³⁶Review No. 3 Amended Final (Exhibit JPN-114).

³⁷See, e.g., Japan's Answers to Panel Questions, para. 59.

³⁸As such, 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.

24. In addition, the programming language (as compared to the electronic program) is contained on the administrative record to which the Japanese companies enjoyed full access throughout this dispute. This programming language could have been used to recreate the requested electronic programs at any time.

25. Japan also incorrectly states that it is Commerce's position that the electronic programs cannot be released because of on-going litigation.³⁹ As discussed above, these programs have been released to the parties to which the electronic programs applied, irrespective of any on-going litigation.

26. Finally, Japan suggests that Commerce was dilatory in providing these programs.⁴⁰ This is also incorrect. When a counsel for a Japanese company contacted the Office of the Chief Counsel for Import Administration, the contacting counsel was instructed to submit his request in writing. This request was received on Friday November 21, 2008 (seven months after the initiation of this proceeding).⁴¹ Commerce responded to this request on Tuesday November 25, 2008, less than two business days after receiving the request.⁴² At that time, Commerce explained that release of other parties' business proprietary information submitted under an Administrative Protective Order is limited to explicit circumstances and Commerce could not consider the request until an explanation of the circumstances for which this counsel required the information was provided. To date, no further explanation has been provided by this counsel. Furthermore, as detailed above, all of the companies which have requested their own electronic programs received these programs approximately a week after their requests. Thus, Commerce has responded to these requests in a most expeditious manner.⁴³

Q20. Japan: At para. 104 of its SWS, Japan claims that the United States failed to revise the importer-specific assessment rates determined in the original reviews, such that the United States omitted to take compliance action. At para. 108 of its oral statement, Japan asserts that "[t]he liquidation measures at issue nullify and impair Japan's benefits under Article II" of the GATT 1994.

³⁹Japan's Answers to Panel Questions, para. 48.

⁴⁰Japan's Answers to Panel Questions, paras. 47-55.

⁴¹Letter from Sidley Austin LLP (Nov. 21, 2008) (Exhibit US-A67).

⁴²See, e.g., Letter from U.S. Department of Commerce (Nov. 25, 2008) (Exhibit US-A68).

⁴³In paragraph 64 of its Answers to Panel Questions, Japan also makes a request pursuant to Article 13.1 of the DSU that the United States determine whether Japan's calculations of the exporters' margins and ISARs with and without zeroing contain any inaccuracies. As discussed in the U.S. letter dated December 5, 2008, this request goes beyond a request for "information or technical advice" under Article 13.1 of the DSU and instead asks that the United States identify and correct errors in Japan's calculations.

a. Does the United States' failure to implement in respect of the importer-specific assessment rates necessarily result in nullification or impairment under Article II? Please explain.

27. The United States first reiterates its general objection to Japan's Article II claims. As indicated in the U.S. first written submission,⁴⁴ these Article II claims are entirely derivative, and the Panel is not required to address them to resolve the matter before it.⁴⁵ Japan also failed to request findings from the Panel under these Article II claims.⁴⁶ For these reasons, the Panel should refrain from making any findings on Japan's claims under Article II of the GATT 1994.

28. Even were the Panel to address Japan's claims under Article II of the GATT 1994, the United States notes that the liability for antidumping duties that Japan claims resulted in the collection of duties allegedly "in excess of the bound rates" was incurred prior to the expiration of the RPT, when the subject merchandise entered the United States and a cash deposit was paid. In addition, when 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. 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 AD Agreement.

29. The United States also notes that Japan makes no claim with respect to duties that do not exceed bound rates, even where the antidumping duties portion of the total duties was calculated inconsistently with Article VI.

b. Were the importer-specific assessment rates identified in Exhibit JPN-90 determined using zeroing?

30. Japan erroneously argues that the programming language for the ISARs in Review Nos. 1, 2, 7, and 8 demonstrate that these ISARs were determined using zeroing because this programming language includes a specific line of computer code that Japan purports executes zeroing procedures.⁴⁷ However, the presence of this computer code does not demonstrate that ISARs were determined using zeroing. If a given importer had no sales with "negative margins,"

⁴⁴U.S. First Written Submission, para. 170, n. 116.

⁴⁵*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).

⁴⁶Japan First Written Submission, para. 159.

⁴⁷Japan's Answers to Panel Questions, para. 69-70.

zeroing would not be employed in that importer's assessment rate, irrespective of the presence of programming language to execute zeroing.⁴⁸

c. Does Japan's Article II claim depend on the Exhibit JPN-90 importer-specific assessment rates being determined on the basis of zeroing?

31. Japan's claim depends on an assertion that the U.S. importer-specific assessment rates were calculated in a manner inconsistent with Article VI of the AD Agreement. For an explanation of the problems with Japan's evidence in this regard, see the U.S. response to Japan's Answer to Question 20(b).

Q21. Japan: The Panel understands Japan to claim 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 revise the importer-specific assessment rates determined in Reviews 1, 2, 3, 7 and 8. In particular, the Panel understands Japan to claim that the original proceeding established the WTO-inconsistency of these importer-specific assessment rates, and that liquidation on the basis of such WTO-inconsistent importer-specific assessment rates will necessarily result in the collection of excessive anti-dumping duties. Is this a correct understanding of Japan's claims? If not, please explain.

32. Japan relies principally on two pieces of evidence allegedly to demonstrate that the ISARs resulted in a collection of excessive antidumping duties. First, Japan relies on the presence of computer code that Japan argues executes zeroing procedures.⁴⁹ As discussed above, in response to Japan's Answer to Panel Question 20(b), the presence of this computer code does not establish that an ISAR results in a collection of excessive antidumping duties. Japan also relies on revised programs that Japan created in which it purported to "switch off" zeroing procedures.⁵⁰ As discussed above, in response to Japan's Answer to Panel Question 19, the United States does not concede the accuracy of Japan's results.

Q22. Japan: Were all importer-specific assessment rates determined in the measures at issue in the original proceeding WTO-inconsistent? Please explain.

⁴⁸In paragraph 73 of its Answers to Panel Questions, Japan also makes a request pursuant to Article 13.1 of the DSU that the United States confirm whether zeroing was employed in amending the final results of Review Nos. 1, 2, and 3. As discussed further in the U.S. letter dated December 5, 2008, this request is improper because Japan bears the burden of establishing a *prima facie* case that the United States employed the zeroing procedures in the challenged determinations.

⁴⁹Japan's Answers to Panel Questions, para. 76.

⁵⁰Japan's Answers to Panel Questions, para. 83.

33. Japan relies principally on the presence of computer code that Japan argues executes the zeroing procedures to argue that the ISARs were WTO-inconsistent.⁵¹ As discussed above, in response to Japan's Answer to Panel Question 20(b), the presence of this computer code does not establish a particular ISAR is WTO-inconsistent because that ISAR results in a collection of excessive antidumping duties.

Q23. Japan: At para. 71 of its oral statement, Japan asserts that the United States violated Article 9.3 of the AD Agreement "by collecting excessive duties" after the end of the RPT. The Panel notes in this regard that, at para. 55 of its report in DS 294, the Appellate Body found that "the [zeroing] applied by the USDOC in the administrative reviews at issue resulted in amounts of assessed anti-dumping duties that exceeded the foreign producers' or exporters' margins of dumping with which the anti-dumping duties had to be compared under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994." The Appellate Body further found (at para. 130 of the same report) that "the margin of dumping established for an exporter or foreign producer operates as a ceiling for the total amount of anti-dumping duties that can be levied on the entries of the subject product (from that exporter) covered by the duty assessment proceeding". Since the ceiling is determined per exporter, rather than per importer, the Panel is interested in understanding how the United States might ensure that importer-specific assessment rates that, according to Japan, continue to produce legal effects after the expiry of the RPT, do not result in the collection of "excessive" anti-dumping duties.

- a. Please explain the factual basis for the assertion that the United States has collected "excessive" duties.***
- b. What amount of duties collected after the end of the RPT would not be "excessive"?***
- c. Does Japan's assertion that those duties are "excessive" depend on the relevant importer-specific assessment rates having been determined on the basis of zeroing? In other words, would the duties only be "excessive" in cases where the USDOC had zeroed individual transactions where the export price exceeded normal value, and would the revision of the relevant importer-specific assessment rates without the use of zeroing necessarily ensure that duties collected after the end of the RPT would not be "excessive"? Please explain.***
- d. Might there be cases in which, because the amount of anti-dumping duties collected before the end of the RPT exceeded the foreign***

⁵¹Japan's Answers to Panel Questions, para. 85.

producers' or exporters' margins of dumping, the collection of any additional anti-dumping duties after the end of the RPT would be precluded by Article 9.3, even if the individual importer-specific assessment rates relating to entries still to be liquidated after the end of the RPT did not result from zeroing (because, for those individual transactions, the export price was always less than normal value)?

e. If such cases might exist, would this mean that one importer had effectively paid another importer's anti-dumping duties?

34. With respect to Japan's reliance on the presence of computer code, please refer to the U.S. response to Japan's Answer to Panel Questions 20(b). With respect to Japan's reliance on revised computer programs, please refer to the U.S. response to Japan's Answer to Panel Question 19. With respect to Japan's assertion that no entries in Review Nos. 1, 2, 3, 7, and 8 were liquidated before the end of the RPT, please refer to the U.S. response to Japan's Answer to Panel Question 13.

Q24. Japan, US: The Panel notes that duty collection on the basis of importer-specific assessment rates determined in measures subject to the original proceeding was delayed in certain cases as a result of domestic legal proceedings. Is the final assessment of duty liability also delayed in such cases? Please explain.

35. The United States does not disagree with Japan that, as a general matter, USCBP liquidation of entries is not delayed automatically as a result of domestic legal proceedings, but could be delayed if a party obtains a court injunction against liquidation.⁵² Such a delay occurs when an interested party sues the United States in court, obtains a preliminary injunction, and serves it upon both Commerce, the agency that issues liquidation instructions, and USCBP, the agency that liquidates entries. However, liquidation is the ministerial act whereby USCBP collects the antidumping duties based upon Commerce's determination of the final liability in an administrative review.⁵³ USCBP collects the antidumping duties based on Commerce's determination and USCBP does not have the authority to recalculate or otherwise revise these duties.⁵⁴ Implementation obligations under Article 9.3.1 of the AD Agreement relate to the

⁵²Japan's Answer to Panel Questions, para. 103.

⁵³See, e.g., U.S. Second Written Submission, para. 50.

⁵⁴See U.S. Answers to Panel Questions, paras. 36-40 (for further discussion of the ministerial nature of liquidation, including examples of court cases recognizing this ministerial nature).

determination of final liability that occurs in a periodic review⁵⁵ rather than a ministerial action of “liquidation,” a term that is conspicuously absent from the AD Agreement.⁵⁶

36. The United States disagrees with Japan’s claim that “any delay in the collection of duties under the original reviews is attributable to the United States.”⁵⁷ The reality is that the Japanese companies and domestic producers requested the delay. These companies sued the United States, obtained and served injunctions against liquidation upon Commerce and USCBP. Thus, the delay in liquidation is not attributable to the United States.

37. If, and to the extent that, Japan suggests that Commerce’s determination of final liability is delayed by an injunction against liquidation,⁵⁸ Japan misunderstands U.S. law. Pursuant to the U.S. antidumping system, the determination of final liability pursuant to Article 9.3.1 of the AD Agreement, including the determination of importer-specific assessment rates, occurs in administrative reviews, or if no review is requested, then pursuant to the original investigation.

38. The United States provides for judicial review of antidumping duty determinations, including judicial review of the determination of final liability for antidumping duties in an administrative review.⁵⁹ However, actions taken in response to orders from domestic courts are not – and, in this case, were not – based on the recommendations and rulings of the DSB. As we explained in our answer to this question, court-ordered reexaminations are not an opportunity for Commerce to revise any or all aspects of a final determination. Instead, once Commerce makes its final determination, its ability to revise any particular aspect of that final determination is dependent on a party raising the issue before the court pursuant to domestic law and the court agreeing that it is necessary or appropriate for Commerce to reexamine the issue.

39. Domestic court challenges caused Commerce to change discrete aspects of its determinations with respect to Review Nos. 1 and 2 - a clerical error and exclusion of a small

⁵⁵The United States notes Japan’s statement in paragraph 119 of Japan’s Answers to Panel Questions that “[a] periodic review may occur under either system, and that review determines the definitive amount of duties due.” See Japan’s Answers to Panel Questions, para 119.

⁵⁶See, e.g., U.S. Answers to Panel Questions, para. 24.

⁵⁷Japan’s Answers to Panel Questions, para. 104, n. 52.

⁵⁸Japan Answer to Panel Questions, paras. 103-04.

⁵⁹See, e.g., 19 U.S.C. § 1516a (establishing judicial review of antidumping proceedings, including antidumping administrative reviews) (Exhibit US-A27).

amount of out-of-scope merchandise, respectively.⁶⁰ With respect to Review No. 3, again pursuant to a court order, Commerce eliminated certain billing adjustments for one respondent.⁶¹ In each case, however, Commerce's actions in response to the domestic court orders were not taken in view of the recommendations and rulings of the DSB.

40. Japan asserts that “because injunctions were issued for all five original periodic reviews, the *USDOC's determinations did not become final for the companies at issue until after adoption of the DSB's recommendations and rulings* and, in four of these five reviews, *until after the end of the RPT, when litigation ended.*”⁶² If Japan's statement was correct, then the determination of final liability under Article 9.3.1 of the AD Agreement would also only be “final” within the meaning of Article 17.4 of the AD Agreement at the time when domestic litigation ends. However, Japan initiated this dispute based on the conclusion of the administrative reviews and despite the fact that domestic litigation pertaining to these administrative reviews had not concluded. As a result, Japan cannot now claim that the action which is the subject of this dispute only became final at the conclusion of domestic litigation. In other words, Japan would be precluded from challenging, and it would be outside the terms of reference of a WTO panel to review, the antidumping duties involved until after liquidation occurred.

Q25 Japan, US: Please comment on the European Communities' reliance on the finding by the panel in Brazil - Aircraft (21.5) that "the obligation to cease performing illegal acts in the future is a fundamentally prospective remedy" (see para. 48 of the European Communities' third party submission).

41. Implementation of the DSB's recommendation and rulings is fundamentally prospective in nature. The proper understanding of “prospective remedy” for purposes of WTO antidumping disputes is that Members should implement the DSB's recommendations and rulings with respect to future entries. Here, all WTO-inconsistent border measures were removed prior to the expiry of the RPT, and thus these measures no longer apply to future entries, i.e., entries occurring after the completion of the RPT.

42. Requiring Commerce to recalculate final liability and the corresponding importer-specific assessment rates for these entries – as Japan advocates – cannot be viewed as a prospective

⁶⁰Remand Redetermination, *NSK Ltd. and NSK Corp., et al., v. United States*, Consol. Court No. 02-00627, Slip. Op. 04-105 (Oct. 8, 2004) (“Review No. 2 Reexamination”) (Exhibit US-A28); Remand Redetermination, *SNR Roulements, et al. v. United States*, Consol. Court No. 01-00686, Slip. Op. 04-100 (Oct. 29, 2004) (“Review No. 1 Reexamination”) (Exhibit US-A29).

⁶¹Exhibit JPN-114, at 1-2.

⁶²Japan's Answers to Panel Questions, para. 107 (emphasis added).

remedy because it requires an undoing of past acts.⁶³ As we explained in our answer to Panel Question 25, for each of the challenged administrative reviews, Commerce already determined final liability, including the determination of importer-specific assessment rates, with respect to the entries covered by each administrative review. And nothing in the DSU requires Commerce to go back and recalculate final liability for entries that were unliquidated as of the expiry of the RPT.

43. Japan cites to several dispute settlement reports in support of its theory of implementation. These reports confirm that implementation is prospective in nature, contrary to the position that Japan is taking in this dispute, and do nothing to advance Japan's argument.

44. In *EC – Commercial Vessels*, the WTO-inconsistent measure had expired prior to the panel's findings and recommendations. The panel noted that certain subsidies *could continue to be provided* pursuant to applications that were made prior to the expiration of those schemes and concluded that its recommendations would apply to the extent the schemes were still operational.⁶⁴ The main point is that implementation would be prospective, given that the improper subsidies might be provided to past applicants in future disbursements.⁶⁵

45. In *Brazil – Aircraft (Article 21.5)*, the Appellate Body found that implementation obligations applied to the disbursement of WTO-inconsistent subsidies after the expiry of the RPT, even though the disbursements were made pursuant to letters of commitment entered into before the end of the RPT.⁶⁶ The Appellate Body found that Brazil had not withdrawn the prohibited subsidies because it *continued to disburse* the same subsidies pursuant to the letters of commitment after the RPT. Once again, the focus was on prospective implementation.

46. Finally, Japan cites to *India – Autos*. In that dispute, India had concluded Memoranda of Understanding ("MOUs") with Indian automakers which imposed certain indigenization and trade balancing requirements.⁶⁷ The panel found that even though the government measure giving rise to the MOUs had been eliminated, the MOUs concluded in the past were still binding on the automakers, and the requirements that they contained were inconsistent with GATT

⁶³See, e.g., U.S. Second Written Submission, paras. 47-50.

⁶⁴*EC – Commercial Vessels (Panel)*, para. 8.4.

⁶⁵*EC – Commercial Vessels* was not a dispute under DSU Article 21.5, as Japan implies in its response to this question.

⁶⁶*Brazil – Aircraft (Article 21.5) (AB)*, paras. 44-45.

⁶⁷Once again, we note that this dispute is not one under Article 21.5 of the DSU.

rules.⁶⁸ The panel therefore recommended that India bring these measures into conformity with its WTO obligations. This finding is not surprising, as the MOUs would still require automakers to meet indigenization and trade balancing requirements going forward, despite the expiry of the underlying measure.

47. In *EC – Commercial Vessels*, *Brazil – Aircraft (Article 21.5)*, and *India – Autos*, WTO-inconsistent programs were not removed in their entirety because of the continuing existence of commitments made under (or imposed by) those programs, and the responding Members thus had a (prospective) obligation to remove them. By contrast, in this dispute involving antidumping measures, the United States removed the border measures which were found to be WTO-inconsistent, so that future entries of merchandise were no longer subject to WTO-inconsistent measures after the expiry of the RPT. This is all that was required for the United States to come into compliance and is consistent with the prospective obligations reflected in the disputes cited by Japan.

Q26. Japan, US: Regarding para. 43 of the European Communities' third party submission:

- a. Please comment on the European Communities' assertion that "the final liability for the importer is established" only after protests against liquidation have been heard.***
- b. Please describe the extent to which USDOC's use of zeroing to determine an importer-specific assessment rate might be challenged under municipal law.***

48. In the first sentence of its response to this question, Japan agrees with the EC's conclusion that the final liability for an importer is established after a protest against liquidation has been heard. However, the remainder of Japan's response, particularly Japan's acknowledgment that "USCBP, the agency to which protests are addressed, has no authority to reconsider USDOC's antidumping determinations",⁶⁹ does not support Japan's conclusion that the final liability for an importer is established after USCBP completes protest proceedings.

Q.27 Japan, US: Please comment on the European Communities' argument (at para. 51 of its third party submission) that if, "in the case of a prospective system, the result of a refund investigation, following a request from an importer, is still pending [after the expiry of the reasonable period of time], the Member concerned should bring the measure into conformity by recalculating the new rates in a WTO-consistent

⁶⁸*India – Autos (Panel)*, paras. 8.44-8.47; 8.58.

⁶⁹Japan's Answers to Panel Questions, para. 114.

manner and applying them to "any unliquidated entries covered by that refund investigation.

49. Neither Japan nor the EC provided any evidence that Members operating prospective systems implement the DSB's recommendations and rulings in refund proceedings in the manner that the EC has described. As the United States has explained,⁷⁰ the operation of the EC's prospective system directly contradicts the EC's argument. The EC maintains a regulation that prescribes how the recommendations and rulings of the DSB in antidumping disputes shall be implemented into EC law.⁷¹ Under this regulation, any measure taken to comply cannot serve as a basis for reimbursement of antidumping duties collected prior to the date of implementation "unless otherwise provided for."⁷² Notably, the EC did not provide the Panel with any of its laws or regulations in which the EC "otherwise provided for" reimbursement of antidumping duties collected prior to the date of implementation. Thus, the EC's own regulatory regime contradicts its argument and demonstrates that a Member operating a prospective system has correctly understood that it is not required to implement its WTO obligations as to prior entries through a refund proceeding. Furthermore, Japan has not provided any evidence from its own system that Japan previously recalculated duties in a WTO-consistent manner and applied such recalculated duties to entries that occurred prior to the date of implementation.

50. The EC contends that it "has refunded duties on entries made before the end of the RPT applying the new WTO-consistent methodology as a result of the *EC – DRAMS* case."⁷³ The EC, however, provided no support for this statement. Indeed, the only concrete example before this Panel of whether the EC refunds duties collected prior to the end of the RPT based on a finding of WTO-inconsistency is the *Ikea* case. The *Ikea* case does not stand for the principle that the EC will provide such refunds based on the DSB's recommendations and rulings.⁷⁴ To the contrary, in *Ikea*, the European Court of Justice specifically declined to provide refunds on that

⁷⁰U.S. First Written Submission, paras. 55-57; U.S. Answer to Panel Questions, para 41.

⁷¹U.S. First Written Submission, para. 56 & n. 103 (citing to Council Regulation No. 1515/2001, *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. (L201) 10 (July 23, 2001) ("EC WTO Regulation") (Exhibit US-A35)).

⁷²EC WTO Regulation at Article 3 (Exhibit US-A35).

⁷³EC Answers to Panel Questions, para. 10.

⁷⁴The United States notes that the EC argued at the panel meeting that it had provided refunds to importers in response to the DSB's recommendations and rulings in the *EC – Bed Linen* dispute, which found the EC's use of zeroing WTO-inconsistent. As the United States explained at the meeting and its responses to the Panel's questions, the refunds to which the EC referred were provided pursuant to a judicial proceeding under the EC's municipal law. See U.S. Answers to Panel Questions, paras. 41-42.

basis. While the Court found that refunds were in order, that finding was based on an application of EC municipal law, not the DSB's recommendations and rulings.⁷⁵

51. In fact, the European Commission's own legal analysis of the *Ikea* decision belies any argument that, in the *Ikea* case, the EC provided refunds based on the DSB's recommendations and rulings. The analytical summary of the *Ikea* case provided by the legal service of the European Commission explains that "*the Court of Justice rejected all arguments based on an infringement of the Antidumping Agreement concluded in the context of the WTO*, but admitted the claim concerning the infringement of Regulation (EC) No. 384/96, noting that there was a manifest error of assessment in calculating the prices of export transactions."⁷⁶ The European Commission further explained that based upon the *Ikea* decision (1) WTO Agreements have no effect on the EC law except to the extent a particular WTO obligation has been implemented by the EC and (2) pursuant to the EC's implementing regulation recommendations in a WTO DSB report can only have prospective effect:

The Court recalled settled case-law, according to which, given their nature and structure, the WTO agreements are not in principle among the rules in light of which the Court is to review the legality of measures adopted by the Community institutions, except where the Community has intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions of the WTO agreements. Given this, the Court noted that *the Community legislator had adopted specific rules in Regulation (EC) No 1515/2001 to give effect to the reports adopted by the WTO's DSB and that it was clear from this Regulation that the recommendations set down in these reports only have prospective effects* and must be implemented by means of specific measures adopted by the Community institutions. The Court concluded that the legality of Regulation No 2389/97 cannot be reviewed in the light of the Anti-Dumping Agreement, as subsequently interpreted by the DSB's recommendations, since it is clear from the subsequent regulations that the Community, by excluding repayment of rights paid under Regulation No 2398/97, did not in any way intend to give effect to a specific obligation assumed in the context of the WTO.⁷⁷

⁷⁵*Ikea*, para. 11, 13, 35, 56, 67, and 69 (Exhibit US-A36).

⁷⁶European Commission, Legal Service; *Summaries of Important Judgments, C-351/04 Ikea Wholesale Ltd v. Commissioners of Customs & Excise judgment of 27 September 2007* (Exhibit US-A69) (emphasis added), available at http://ec.europa.eu/dgs/legal_service/arrets/04c351_en.pdf.

⁷⁷European Commission, Legal Service; *Summaries of Important Judgments, C-351/04 Ikea Wholesale Ltd v. Commissioners of Customs & Excise judgment of 27 September 2007* (Exhibit US-A69)(emphasis added), available at http://ec.europa.eu/dgs/legal_service/arrets/04c351_en.pdf.

52. In short, the reality of how Members operating prospective systems implement the DSB's recommendations and rulings is in stark contrast with how the EC and Japan have portrayed it.

E. AS SUCH

Q.33 Japan: If the Panel were to uphold Japan's "as such" claims, to what extent would it be necessary for the Panel to rule on Japan's claims that the United States failed to implement the recommendations and rulings of the DSB in respect of Reviews 4, 5, 6 and 9? In other words, to what extent would any failure to implement in respect of Reviews 4, 5, 6 and 9 not be covered by a finding that the United States violates Articles 2.4 and 9.3 of the AD Agreement, and Article VI:2 of the GATT 1994, by continuing to maintain zeroing procedures in periodic reviews?

53. The United States recalls its position that Review Nos. 4, 5, 6, and 9 are not measures taken to comply, and are not within the scope of this proceeding.

F. RELEVANCE OF COTTON (21.5)

Q.35 Japan: Regarding the disagreement between the parties as to relevance of the panel and Appellate Body findings in US - Upland Cotton (21.5) to this proceeding, please comment on the United States' assertion that "[t]he Appellate Body then examined whether the adverse effects of the payments were removed, and determined that they were not, meaning the United States had not taken a measure to comply, and that it was acting inconsistently with the SCM Agreement".

54. Japan continues to maintain that the support payments subject to the DSB's recommendations and rulings in *US – Upland Cotton (Article 21.5)* were “measures taken to comply.” What Japan still fails to recognize is that in *Upland Cotton*, the Appellate Body, in affirming the compliance panel, was considering the issue of the *existence* of measures taken to comply with the DSB's recommendations and rulings on serious prejudice. The Appellate Body's findings are completely consistent with this interpretation.

55. In *US – Upland Cotton (Article 21.5)*, the Appellate Body found that to the extent that U.S. agricultural support payments were being made according to the same conditions and criteria as the original payments subject to the DSB's recommendations and rulings, those payments were subject to the particular, specific obligation under Article 7.8 of the *Agreement on Subsidies and Countervailing Measures* (“SCM Agreement”) to withdraw the subsidy or remove its adverse effects.⁷⁸ Japan is uncertain as to the jurisdictional basis on which the Appellate Body found that the new payments were WTO-inconsistent if the Appellate Body did not consider

⁷⁸*US – Upland Cotton (Article 21.5) (AB)*, paras. 248-49.

those payments to be “measures taken to comply.”⁷⁹ Japan, however, misreads the Appellate Body’s analysis. The Appellate Body found that because the United States had not removed the adverse effects of the payments, as required by Article 7.8 of the SCM Agreement, there was no measure taken to comply, and hence, the United States continued to act inconsistently with certain provisions of the SCM Agreement.

56. Japan, in response to the Panel’s question, repeats its worries that if the Panel excludes subsequent reviews, then Members could never obtain relief against administrative reviews.⁸⁰ 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.

⁷⁹Japan’s Answers to Panel Questions, para. 126.

⁸⁰Japan’s Answers to Panel Questions, paras. 129-31.