

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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY JAPAN

WT/DS322

**ANSWERS OF THE UNITED STATES TO THE QUESTIONS
FROM THE PANEL TO THE PARTIES**

November 26, 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. In accordance with Article 11 of the DSU, 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.¹ To the extent that Japan claims that Review Nos. 4, 5, 6, and 9 make use of an allegedly WTO-inconsistent “zeroing,”² it is for Japan to explain and prove, through evidence, what Japan means by “zeroing” in this context; that such “zeroing” in fact occurred in each review; and why that “zeroing” is (in its view) inconsistent with the WTO Agreement.

2. We note that Japan has drawn attention to the findings and conclusions made in previous disputes.³ A naked reference to findings and conclusions in prior reports does not satisfy Japan’s burden of proof.⁴ And while the United States recognizes that this Panel, operating under Article 21.5 of the DSU, should take account of the reasoning in the original proceedings (to the extent that that reasoning is relevant to one of the questions identified in the final sentence of the previous paragraph), that reasoning does not have binding effect,⁵ and the Panel is permitted to re-consider those issues.

B. DEFINITION OF “MEASURES TAKEN TO COMPLY”

Q2. US: The Panel understands the United States to argue that it has complied with the recommendations and rulings of the DSB in respect of Reviews 1, 2 and 3 by replacing the cash deposit rates from those Reviews with new cash deposit rates determined in "subsequent administrative reviews" (para. 67, US FWS). The Panel understands this to be a reference to Reviews 4, 5 and 6. At para. 9 of its oral statement, however, the United States asserts that Review 6 is not a "measure taken to comply" because that determination was made "long after the cash deposit rates from

¹ *US – Woven Wool Shirts and Blouses from India (AB)*, pp. 12-13; *US – German Steel (AB)*, para. 157.

² The 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.

³ See e.g., Japan First Written Submission, paras. 153-54.

⁴ *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.”).

⁵ *US – Softwood Lumber ITC Investigation (Article 21.5) (AB)*, para. 103.

the administrative reviews subject to the DSB's recommendations and rulings had been withdrawn".

a. Through which measures were the WTO-inconsistent cash deposit rates removed "on or after the date of implementation"?

3. The United States came into compliance with the recommendations and rulings of the Dispute Settlement Body ("DSB") with respect to the *Ball Bearings* reviews (Review Nos. 1-3) when the cash deposit rates that had been found to be WTO-inconsistent were removed through incidental effects of the operation of the U.S. antidumping system. The last such incidental removal occurred in 2005, following the 2003-04 administrative review of *Ball Bearings* (Review No. 4).⁶ This took place long before the expiry of the reasonable period of time ("RPT") on December 24, 2007.

b. Was Review 6 relevant in this regard?

4. Review No. 6 is not relevant in this regard, for the reasons discussed in the U.S. written submissions and oral statements.⁷

c. Was Review 5 relevant in this regard?

5. Review No. 5 is not relevant in this regard, for the reasons discussed in the U.S. written submissions and oral statements.⁸

d. Was Review 9 relevant in this regard?

6. Review No. 9 is not relevant in this regard, for the reasons discussed in the U.S. written submissions and oral statements.⁹

e. At what time were "the administrative reviews subject to the DSB's recommendations and rulings [] withdrawn"?

7. The United States withdrew the administrative reviews subject to the DSB's recommendations and rulings in the following manner:

⁶ See Exhibit JPN-42, JPN-42.A, JPN-32.B.

⁷ See, e.g., U.S. First Written Submission, paras. 35-49; U.S. Second Written Submission, paras. 7-28; U.S. Opening Statement, paras. 3-12.

⁸ See, e.g., U.S. First Written Submission, paras. 33-49; U.S. Second Written Submission, paras. 7-28; U.S. Opening Statement, paras. 3-12.

⁹ See, e.g., U.S. Response to Japan's Supplemental Submission, paras. 2-7; U.S. Opening Statement, para. 14. Moreover, this measure was not in existence at the time of Japan's panel request, and is not properly before this Panel under Article 6.2 of the DSU. See U.S. Response to Japan's Supplemental Submission, paras. 8-16.

8. The WTO-inconsistent cash deposit rates for Review Nos. 1, 2 and 3 were removed by the time that the cash deposit rate for Review No. 4 was put in place.

9. 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 revoked the antidumping duty orders on these products well before the adoption of the Appellate Body and panel reports in the original proceeding.

Q3. US: At para. 51 of its FWS, the United States further asserts that "the United States has taken measures to comply with [the DSB's] recommendations and rulings" with respect to the five administrative reviews challenged by Japan in this proceeding. At para. 26 of its SWS, the United States asserts that "Japan has obtained relief... in the form of the removal of the specific cash deposit rates that were imposed by the United States and that Japan challenged". In light of these assertions, please explain what, if anything, would prevent the Panel from finding that, in adopting a measure that removed the specific cash deposit rates at issue in the original proceeding, the United States "adopted a measure taken to comply" (US Second Written Submission ("SWS"), para. 25).

10. The United States came into compliance with the DSB's recommendations and rulings when the WTO-inconsistent cash deposit rates were removed through incidental effects of the operation of the U.S. antidumping system. The measure bringing the United States into compliance in each instance was the act of removing the WTO-inconsistent border measure, and it is this act which can be considered the measure taken to comply, or in the words of the Panel, "the measure that removed the specific cash deposit rates at issue in the original proceeding." The United States did not, however, adopt a *separate* measure (such as the results of another administrative review) that removed those specific cash deposit rates; rather, the removal of those cash deposit rates occurred by operation of U.S. law following those subsequent administrative reviews.¹⁰

11. The United States recalls that it is not unusual for a Member to come into compliance with the DSB's recommendations and rulings when a WTO-inconsistent measure is removed

¹⁰ The U.S. answer concerns compliance with respect to the three administrative reviews of *Ball Bearings from Japan* (Review Nos. 1-3) that were subject to the DSB's recommendations and rulings. Japan alleges that the subsequent reviews of *Ball Bearings* (Review Nos. 4-6, 9) are measures taken to comply, and the Panel's question appears directed at this argument. As to Review Nos. 7 and 8, the United States notes that it is no longer collecting cash deposit rates pursuant to these reviews because the underlying antidumping duty order was revoked in 2000. See U.S. First Written Submission, para. 66. It is the act of revocation that brought the United States into compliance concerning these two reviews.

through its expiration over time, or otherwise through the operation of law.¹¹ Nothing precludes an Article 21.5 panel from finding that a Member has come into compliance in the fashion we have described, and as the United States has done in this dispute.

Q4. US: The United States asserts at para. 17 of its SWS that "[e]ither the United States has taken measures to comply, or it has not". Has the United States taken measures to comply? If so, what are they?

12. The United States has taken measures to comply. As to Review Nos. 1-3, the United States withdrew the WTO-inconsistent cash deposit rates through the incidental effects of the operation of the U.S. antidumping system. As to Review Nos. 7-8, the United States revoked the underlying antidumping duty order in 2000 and is no longer collecting cash deposits pursuant to these reviews.

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 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

13. The United States welcomes Japan's acknowledgment that a measure may 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. As we have explained above, the removal of the WTO-inconsistent cash deposit rates on ball bearings from Japan was achieved as an incidental consequence of the U.S. antidumping system. It was the act of removing the cash deposit rate, long before there were any DSB recommendations and rulings with which to comply, that brought the United States into compliance in this dispute. This situation is no different than other 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.

Q6. US: At para. 20 of its FWS, under the section heading "Implementation of the DSB's Recommendations and Rulings", the United States refers to the revocation of certain administrative reviews "prior to the adoption of the Appellate Body and panel reports".

¹¹ See, e.g., Minutes of the DSB Meeting on 23 May 1997, WT/DSB/M/33, Consideration of Appellate Body and Panel Reports in *US – Woven Wool Shirts and Blouses from India*, p. 11; Minutes of the DSB Meeting on 12 December 2000, WT/DSB/M/94, Implementation of the Recommendations of the DSB in *Guatemala – Definitive Antidumping Measures on Grey Portland Cement from Mexico*, paras. 42-43.

a. Does the United States contend that such revocation constitutes a "measure taken to comply" in the meaning of Article 21.5 of the DSU?

14. 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 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, 2000.¹² The revocation of both of these orders, which occurred as a result of a five-year sunset review in the normal course of operation of the U.S. antidumping system and long before the DSB's recommendations and rulings, brought the United States into compliance. Although such revocations are not measures taken to comply as that term is commonly used in Article 21.5 (i.e., by virtue of predating the DSB's recommendations and rulings they were not taken "to" comply), Article 21.5 must also be read in the context of provisions such as DSU Article 22.8 ("...until such time as the measure found to be inconsistent with a covered agreement has been removed...") and DSU Article 3.7 ("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"). Accordingly, in ascertaining whether a "measure taken to comply" exists, an Article 21.5 panel needs also to consider whether the WTO-inconsistent measure has been removed or withdrawn, including whether it has been removed or withdrawn even before adoption of the DSB's rulings and recommendations, as occurred in this case.

b. If so, please reconcile this with the United States' assertion (at para. 33 of its FWS) that "[m]easures taken by a Member prior to adoption of a dispute settlement report typically are not taken for the purpose of achieving compliance and would not be within the scope of an Article 21.5 proceeding".

15. As the United States noted in its first written submission, "[m]easures 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."¹³ However, the United States has not expressed the view that measures adopted prior to the DSB's recommendations and rulings can never be within the scope of a compliance proceeding. Please also refer to paragraph 11 above.

¹² *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).

¹³ U.S. First Written Submission, para. 33 (emphasis added).

Q7. US: At para. 25 of its SWS, the United States asserts that an Article 21.5 proceeding examines "whether the Member concerned has adopted a measure taken to comply, and if so, whether that measure is consistent with the covered agreements" (US SWS, para. 25)".

a. Regarding Reviews 1, 2 and 3, did the United States adopt any "measures taken to comply"? If so, what were they? If not, what is the panel supposed to examine in the present Article 21.5 proceeding?

16. As the United States has explained, as to each of the WTO-inconsistent administrative reviews of *Ball Bearings from Japan* (Review Nos. 1-3), the United States removed the WTO-inconsistent cash deposit rate through the incidental effects of the operation of the U.S. antidumping system. The Panel, in examining the question of the existence of a measure taken to comply, should find that the act of removing the WTO-inconsistent cash deposit rate brought the United States into compliance.

b. If the Panel were to accept the US argument that the four subsequent reviews identified by Japan (i.e., Reviews 4, 5, 6 and 9) are not "measures taken to comply", what would prevent a finding by the Panel that the United States has failed to adopt a measure taken to comply?

17. For all the reasons explained in the U.S. written submissions, and at the panel meeting, Review Nos. 4, 5, 6, and 9 are not measures taken to comply with the recommendations and rulings of the DSB in this dispute. However, the United States has complied with the DSB's recommendations and rulings with respect to the three *Ball Bearings* reviews (Review Nos. 1-3) through the removal of the WTO-inconsistent cash deposit rates. As to the question of the existence of a measure taken to comply, it is the act of removing the WTO-inconsistent measure – an incidental consequence of the U.S. antidumping system – that brought the United States into compliance. And the Panel need not consider the four subsequent reviews of *Ball Bearings* as measures taken to comply in order to find that the United States has taken a measure to comply; please also refer to paragraph 11 above and to the final sentence of paragraph 14 above.

Q8. US: At the oral hearing, in response to questioning regarding whether the revocation of certain administrative reviews prior to the adoption of the DSB's recommendation could constitute measures taken to comply, the United States referred to US - Measures Affecting Imports of Shirts and Blouses. The United States argued that the revocation of the impugned measure in Shirts and Blouses, prior to the adoption of the DSB's recommendations and rulings constituted a measure to comply, albeit "not in the usual sense". According to the Appellate Body report in Shirts and Blouses, the revocation of the measure was due to "a steady decline in imports of woven wool and blouses from India", in other words, as an incidental consequence of the operation of the United States safeguards system. If the US views this as a measure

taken to comply, how is this different from the revocation of the administrative reviews as an incidental consequence of the operation of the US anti-dumping system?

18. The expiration of the safeguard measure in *US – Wool Shirts and Blouses* is analogous to the withdrawal of the WTO-inconsistent cash deposit rates in this dispute through the incidental operation of the U.S. antidumping system. In fact, the United States cited that dispute at the panel meeting precisely to demonstrate that it is not unusual for a Member to come into compliance with the DSB's recommendations and rulings when a WTO-inconsistent measure is removed through its expiration over time, or otherwise through the operation of law.¹⁴

Q9. US: At para. 44 of its FWS, the United States asserts that "the measures subject to the DSB's recommendations and rulings were eliminated".

a. Does the United States consider that importer-specific assessment rates determined in Reviews 1, 2 and 3 are covered by the term "measures"?

19. The measures at issue in the original proceeding included the determination of final antidumping liability in Review Nos. 1, 2, and 3; and as part of the determinations of final liability in those reviews, Commerce determined importer-specific assessment rates. The United States does not consider that the rates are separate "measures" from the determinations of final liability.

b. If so, how were those importer-specific assessment rates eliminated?

20. As the United States has explained, the implementation obligations from the DSB's recommendations and rulings in this dispute only apply to future entries. Otherwise, Members operating retrospective systems would be improperly subject to greater implementation obligations than Members operating prospective systems.¹⁵ In this regard, the measures pertaining to Review Nos. 1, 2 and 3 were withdrawn, within the meaning of Article 3.7 of the DSU (or "removed" in the terminology of Article 22.8), because the United States no longer applies these measures to future entries. As a result, the final liability determined in Review Nos. 1, 2, and 3 no longer serve as the basis for antidumping liability on entries occurring after the RPT.¹⁶ This withdrawal was accomplished as an incidental consequence of the U.S. antidumping system, as described in the answers to Questions 2 and 3 above.

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

¹⁴ U.S. Closing Statement, para. 4.

¹⁵ See, e.g., U.S. Second Written Submission, paras. 39-46.

¹⁶ See, e.g., U.S. First Written Submission, paras. 66-67.

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?

21. The United States recalls that the United States has implementation obligations in this dispute only with respect to entries after the conclusion of the RPT (December 24, 2007). Review Nos. 4 and 5 applied to entries occurring from May 2003 to April 2004 and May 2004 to April 2005, respectively and the cash deposits established in these reviews for the challenged companies (i.e., JTEKT/Koyo, NSK and NTN) were withdrawn as an incidental consequence of subsequent reviews before the expiration of the RPT. As a result, these reviews did not have any “effect” for purposes of this proceeding after December 24, 2007.¹⁷

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?

22. The date of liquidation is not relevant for determining whether a measure constitutes a “measure taken to comply.” Liquidation is the ministerial act whereby U.S. Customs and Border Protection (“CBP”) collects, *inter alia*, the antidumping duties determined by Commerce in antidumping administrative reviews.¹⁸ 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.¹⁹

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.

¹⁷ The United States also recalls its position that Review Nos. 4 and 5 are not within the scope of this compliance proceeding. *See, e.g.*, U.S. Second Written Submission, paras. 21-28.

¹⁸ *See, e.g.*, U.S. Second Written Submission, para. 50; *see also* answer to Question 26, *infra*.

¹⁹ *See, e.g.*, U.S. Second Written Submission, para. 63.

23. It is difficult to respond to this question in the abstract. As a general matter, the United States notes that 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. The fact that a measure may no longer have legal effects does not mean that it cannot be a measure taken to comply. As long as that measure implemented the DSB's recommendations and rulings, it can be a measure taken to comply. We would further note, however, that an Article 21.5 proceeding commenced after the measure's effects have ended would have no basis to consider the consistency of the measure with the covered agreements, though it may consider whether that measure establishes that a measure to comply existed.

C. LEGAL EFFECTS / UNLIQUIDATED ENTRIES

Q12. US: The Panel notes that, on occasion, the parties and third parties use slightly different terminology to describe the procedures by which the United States assesses and collects final anti-dumping duties. Does the United States agree with the description of the procedures set forth at paras 35 to 47 of Japan's FWS, and paras 39 to 43 of the European Communities' third party submission? If not, please explain.

24. The cited descriptions contain numerous errors. For example, these descriptions assume that Commerce always calculates an importer-specific assessment rate. However, Commerce is sometimes unable to calculate an importer-specific assessment rate because of a lack of information (e.g., a respondent is unable or unwilling to provide the necessary information). These descriptions also assume positions with which the United States cannot agree. For example, Japan argues that an importer-specific assessment rate "continues to operate until liquidation of each entry covered by that rate is complete, and the definitive amount of duties due on those entries is assessed."²⁰ Similarly, the EC argues that final liability is only established at the time liquidation becomes final and conclusive.²¹ As the United States has explained, final liability is established in the final results of an antidumping administrative review. Liquidation is the ministerial act whereby CBP collects the final antidumping liability determined by Commerce in antidumping administrative reviews.²²

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.

25. The United States provides the following chart which explains when liquidations instructions pertaining to the challenged reviews and the challenged companies were sent to CBP.

²⁰ Japan First Written Submission, para. 43.

²¹ EC Third Party Submission, para. 43.

²² See, e.g., U.S. Second Written Submission, para. 50; see also answer to Question 26, *infra*.

Review No.	Company	Date Liquidation Instructions Sent to CBP
1	JTEKT/Koyo	Feb. 14, 2008
1	NTN	Jan. 14, 2008
2	NTN	April 17, 2008
7	JTEKT/Koyo	Feb. 14, 2008
7	NTN	Jan. 14, 2008
8	NTN	Jan. 14, 2008

26. This, however, represents the extent of the data that the United States is in a position to provide to the Panel in the time permitted. The challenged reviews all relate to ball bearings and the nature of the bearings trade is that there are thousands, perhaps tens of thousands, of products, transactions, and entries covered by each of the administrative reviews. Because of the large number of data points, there is no one source from which the United States is able to isolate the information requested by the Panel. For example, it is not uncommon for the liquidation of an entry to be delayed because the paperwork indicates that a manufacturer of the imported good is a company that is participating in an administrative review. It may only be through the process of conducting that review that it becomes clear that the exporter of the good is a company distinct from the manufacturer, subject to a different antidumping duty rate. This is just one of several issues (e.g., importations that include subject and non-subject bearings in the same transaction is another) that prevent, as a practical matter, the United States from providing the information requested by the Panel.

Q14. US: Once USDOC determines importer-specific assessment rates in administrative reviews, do those rates remain valid until liquidation of the relevant entries occurs? In other words, do those rates apply to those entries, no matter when liquidation occurs? Are there any domestic administrative or judicial procedures which could lead to a change in those importer-specific assessment rates? If so, please provide details of those procedures.

27. 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. Liquidation is the ministerial act whereby CBP finally collects the antidumping duties based upon Commerce’s determination of the antidumping liability in an administrative review.²³ Liquidation is considered “ministerial” because CBP

²³ See, e.g., U.S. Second Written Submission, para. 50.

collects the antidumping duties based on Commerce’s determination and CBP does not have the authority to recalculate or otherwise revise these duties.²⁴

28. 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.²⁵ 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. Specifically, 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 is necessary or appropriate for Commerce to reexamine the issue.

29. Domestic court challenges caused Commerce to change discrete aspects of its determinations with respect to Review Nos. 1 and 2. Pursuant to an order from the domestic court with regard to Review No. 2,²⁶ Commerce corrected a clerical error. Pursuant to the order of the domestic court with regard to Review No. 1,²⁷ Commerce excluded a small amount of merchandise from Review No. 1 because it was determined to be outside the scope of the antidumping order. However, Commerce’s actions taken in response to the domestic court orders were not taken in view of the recommendations and rulings of the DSB.

Q.15. US: With regard to para. 50 of the United States’ SWS, should the Panel understand the United States to argue that all determinations of final liability for anti-dumping duties in respect of entries covered by each of the five reviews challenged by Japan were completed before the end of the RPT (even if liquidation only occurred at some later date)? If not, please explain.

30. As discussed in the answer to Question 14, *supra*, the determinations of final liability under Article 9.3.1 of the AD Agreement that are the subject of this dispute were made at the conclusion of each of the challenged administrative reviews well before the end of the RPT. The determinations for Review Nos. 1, 7 and 8 were made in 2001, the determination for Review 2 was made in 2002, the determination for Review 3 was made in 2004.

²⁴ See answer to Question 26, *infra* (for further discussion of the ministerial nature of liquidation, including examples of court cases recognizing this ministerial nature).

²⁵ See, e.g., 19 U.S.C. § 1516a (establishing judicial review of antidumping proceedings, including antidumping administrative reviews) (Exhibit US-A27).

²⁶ Remand Redetermination, *NSK Ltd. and NSK Corp., et al., v. United States*, Consol. Court No. 02-00627, Slip. Op. 04-105 (Oct. 8, 2004) (“Review 2 Reexamination”) (Exhibit US-28).

²⁷ Remand Redetermination, *SNR Roulements, et al. v. United States*, Consol. Court No. 01-00686, Slip. Op. 04-100 (Oct. 29, 2004) (“Review 1 Reexamination”) (Exhibit US-A29).

Q16. US: The Panel notes Japan's argument (at para. 107 of its SWS) that "[t]he United States' argument that it has implemented the DSB's recommendations and rulings by withdrawing the cash deposit rates in the five original reviews overlooks that those recommendations and rulings also apply to the importer-specific assessment rates" (underline emphasis supplied).

- a. **Does the United States agree that the recommendations and rulings of the DSB also covered the importer-specific assessment rates? Please explain.**
- b. **The Panel notes that, at para. 22 of its oral statement, the United States asserted that it "withdrew each of the challenged measures". Were the relevant importer-specific assessment rates "withdrawn"? Please explain.**
- c. **Was any implementation action taken in respect of the importer-specific assessment rates resulting from Reviews 1, 2 or 3? Please explain.**

31. As to Question 16(a)-(c), please see the U.S. answer to Question 9.

Q17. US: Japan asserts in paras 138 and 139, and note 141, of its FWS that liquidation instructions from USDOC to USCBP were delayed in respect of some of the entries covered by a measure at issue in the original proceeding as a result of domestic litigation. At para. 47 of its FWS, Japan refers to USDOC issuing instructions to USCBP after the completion of domestic litigation. The United States has not contested the factual accuracy of Japan's assertions.

- a. **Does the United States agree that USDOC's liquidation instructions to USCBP are delayed in cases where liquidation is suspended through injunctions pending domestic litigation against the assessments made by USDOC in administrative reviews?**
- b. **If USDOC's liquidation instructions to USCBP are delayed in such cases, when does USDOC make the final assessment of anti-dumping duties in respect of such entries?**

32. Commerce's established practice is to send liquidation instructions to CBP within 15 days of publication of the final results of antidumping administrative reviews. If domestic litigation is subsequently initiated, and the U.S. Court of International Trade enjoins liquidation,²⁸ Commerce will issue instructions to CBP requiring CBP to cease liquidation of the

²⁸ 19 U.S.C. § 1516a(c)(2) (Exhibit US-A27).

entries during the pendency of the domestic litigation. In the alternative, if the injunction is issued prior to Commerce issuing liquidation instructions, Commerce sends CBP instructions notifying CBP of the injunction and ordering CBP not to liquidate until the conclusion of the litigation. After the conclusion of the domestic litigation, Commerce sends instructions to CBP ordering the liquidation of the entries which were the subject of the domestic litigation. The determination of final liability under Article 9.3.1 of the AD Agreement occurs as part of an antidumping administrative review. This determination of final liability is separate and distinct from liquidation.

Q18. US: The Panel understands that the United States has not commented on the substance of Japan's Article 9.3 claim regarding Reviews 1, 2, 3, 7 and 8 because of the United States' position that it has no implementation obligations in respect of import entries occurring before the end of the RPT. Assuming for the purpose of this question that the United States did have implementation obligations in respect of import entries occurring before the end of the RPT, please comment on Japan's argument that importer-specific assessment rates resulting from those Reviews, and which continue to produce legal effects after the end of the RPT, result in the collection of "excessive" anti-dumping duties (see para. 71 of Japan's opening statement).

33. As an initial matter, this question correctly notes that it requires the United States to assume a position with which it fundamentally disagrees. The assumption that implementation obligations exist with respect to prior unliquidated entries would fundamentally alter the obligations of Members under the covered agreements. Such an assumption would signify that the determination of final liability under Article 9.3.1 of the AD Agreement is concluded at the time of liquidation, rather than at the conclusion of antidumping administrative reviews. However, for all the reasons we have explained in our submissions to date, and in these answers, that would not be the correct interpretation.

[Questions 19-23 are for Japan]

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.

34. Please see the U.S. answer to Question 17.

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).

35. A prospective remedy does not require the undoing of past acts. For each of the challenged administrative reviews, Commerce has already determined final liability, including the determination of importer-specific assessment rates, with respect to the entries covered by each administrative review. Thus, requiring Commerce to recalculate this final liability and the corresponding importer-specific assessment rates for these entries cannot be viewed as a prospective remedy because it requires an undoing of past acts.²⁹ 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. Such an understanding would not require the undoing of past acts, it would not favor prospective systems over retrospective systems, and it would ensure that retrospective systems are not placed at a disadvantage as compared to prospective systems.

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***

36. As an initial matter, the United States notes that “protest against liquidation” is not a term that appears in the AD Agreement. Article 9.3.1 refers to final liability and the final assessment of duties. Article 9.3.2 only refers to the assessment of duties. Determining whether a Member has implemented with respect to any particular import by the date of *entry* of that import maintains equality among the retrospective and prospective systems and is not dependent upon municipal law labels such as “liquidation” or “protest.”

37. Second, the EC’s assertion concerning “protests against liquidation” is premised upon a fundamental misunderstanding of U.S. customs law. Liquidation by CBP is “final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed”³⁰ As discussed below, the scope of a protest is limited to challenging decisions made by CBP.³¹ In this regard, CBP plays only a ministerial role in the liquidation of antidumping duties as directed by Commerce.³² Accordingly, determinations regarding the final

²⁹ See, e.g., U.S. Second Written Submission, paras. 47-50.

³⁰ 19 U.S.C. § 1514(a) (Exhibit US-A30).

³¹ 19 C.F.R. § 174.11 (Exhibit US-A31).

³² See *Koyo Corp. v. United States*, 497 F.3d 1231, 1242 (Fed. Cir. 2007) (Exhibit US-A32); *Mitsubishi Elec. Am. v. United States*, 44 F.3d 973, 977 (Fed. Cir. 1994) (Exhibit US-A33).

liability and the amount to be assessed as antidumping duties are not decisions by CBP and are not protestable.

38. The U.S. statute that authorizes customs protests and CBP's corresponding regulations are clear on this point. The statute expressly provides that customs protests are limited to decisions and actions made by CBP.³³ Accordingly, Commerce's determinations of final liability – including determination of importer-specific assessment rates – do not fall within the category of decisions or actions that may be challenged in a customs protest.³⁴

39. Likewise, 19 C.F.R. § 174.11, the corresponding CBP regulation, provides that an importer may only protest certain decisions by the port director, an official of CBP:

The following *decisions of the port director*, including the legality of all orders and findings entering into the same, may be protested under the provisions of section 514, Tariff Act of 1930, as amended (19 U.S.C. § 1514):

- (a) The appraised value of merchandise;
- (b) The classification and rate and amount of duties chargeable;
- (c) All charges or exactions of whatever character including the accrual of interest within the jurisdiction of the Secretary of the Treasury;
- (d) The exclusion of merchandise from entry or delivery under any provision of the Customs laws;
- (e) The liquidation or reliquidation of an entry, or any modification thereof;
- (f) The refusal to pay a claim for drawback; and
- (g) The refusal to reliquidate an entry under section 520(c), Tariff Act of 1930, as amended (19 U.S.C. § 1520(c)).³⁵

This regulation demonstrates that only decisions made by CBP (and *not* Commerce) may be protested.

³³ 19 U.S.C. § 1514(a) (Exhibit US-A30); *see also* Japan First Written Submission, para. 45 stating that Commerce's determination of dumping liability cannot be challenged in a customs protest.

³⁴ *Mitsubishi Elec. Am. v. United States*, 44 F.3d 973, 977 (Fed. Cir. 1994) (holding that antidumping decisions are not decisions by Customs and may not be protested) (Exhibit US-33); *Torrington Co. v. United States*, 903 F. Supp. 79, 83 (Ct. Int'l Trade 1995) ("Customs merely follows Commerce's instructions in assessing and collecting duties. Customs does not determine the 'rate and amount' of antidumping duties . . . Customs only applies antidumping rates determined by Commerce. Further, Customs has merely a ministerial role in liquidating antidumping duties under 19 U.S.C. § 1514(a)(5). In sum, title 19 makes clear that Customs does not make any section 1514 antidumping 'decisions.'") (citations omitted) (Exhibit US-A34).

³⁵ 19 C.F.R. § 174.11 (Exhibit US-A31).

40. If an importer wants to challenge an importer-specific assessment rate, it must challenge the final results of the antidumping administrative review in which Commerce determined the importer-specific assessment rate. This challenge is brought under a separate legal provision that is distinct from a customs protest.³⁶

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

41. The EC provides no evidence that Members operating prospective systems implement the DSB's recommendations and rulings in refund proceedings in the manner that the EC has described. (Indeed, we note that the EC says only that such Members "should" – not "shall" or "must" – do so.) Even if Members did so, it would not be pursuant to their WTO obligations, because such obligations only exist with respect to entries occurring after the expiry of the RPT. Furthermore, as the United States has explained,³⁷ 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.³⁸ 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.³⁹ Thus, the EC's own regulation 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.

42. The 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 Linens* dispute, which found the EC's use of zeroing WTO-inconsistent. As the United States explained at the hearing, the refunds to which the EC referred were provided pursuant to a judicial proceeding under the EC's municipal law. That is, the court ruled that the use of zeroing was a "manifest error of assessment with regard to Community law."⁴⁰ In making its ruling, the

³⁶ 19 U.S.C. § 1516a (Exhibit US-A27).

³⁷ U.S. First Written Submission, paras. 55-57.

³⁸ See U.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).

³⁹ See, EC WTO Regulation at Article 3 (Exhibit US-A35).

⁴⁰ *Ikea Wholesale Ltd. v. Commissioners of Customs and Excise*, Case C-351/04, para. 56 (Judgment of the Court, Second Chamber, Sept. 27, 2007) ("*Ikea*") (Exhibit US-A36).

EC court noted that measures adopted pursuant to the EC's WTO Regulation could not serve as the basis for the reimbursement of duties collected prior to date of the implementation.⁴¹ Moreover, when the EC originally adopted measures in response to the DSB's recommendations and rulings in *EC – Bed Linens* (prior to the court ordering reimbursement), the EC did not provide for the reimbursement of duties.⁴²

D. SUNSET REVIEWS

Q.28 US: At para. 13 of its Closing Statement, the United States asserts that "Commerce made a reasoned and adequate conclusion that dumping would continue if the antidumping order were revoked".

- a. Please provide a copy of the "conclusion", and any documentation pertaining thereto.***
- b. When was the "conclusion" reached?***
- c. Under what procedure was the "conclusion" reached?***
- d. Does the "conclusion" have the same legal status as the original November 1999 determination?***
- e. The United States asserts at para. 22 of its oral statement that a Member must withdraw or revise a measure found to be WTO-inconsistent. Was the November 1999 sunset review either withdrawn or revised by the "conclusion"? Please explain.***

43. As indicated by the first sentence of paragraph 13 of the U.S. Closing Statement, the paragraph refers to the "original sunset determination." Thus, the term "conclusion" also refers to the conclusion regarding the likelihood of dumping in the November 4, 1999 sunset determination. The United States provided a copy of this determination as Exhibit US-A24.

44. It is clear from the original sunset determination that Commerce considered all dumping margins from nine prior reviews which were conducted after the imposition of the antidumping duty order.⁴³ Consistent with the Panel's request, we are submitting copies of determinations listed in footnote 3 of Exhibit US-A24 that pertain to the conclusion that the dumping continued after antidumping duties were imposed; they contain the dumping margins determined in the first

⁴¹ *Ikea*, para. 11 (Exhibit US-36).

⁴² *Ikea*, para. 13 (Exhibit US-36).

⁴³ See Exhibit US-A24, n.3.

nine reviews of this antidumping duty order.⁴⁴ Exhibit US-A26 (BCI) demonstrates that some of these margins were determined without zeroing.

45. It is apparent that the first, second, and fifth administrative reviews contained margins calculated without zeroing and these margins independently satisfy the criterion that Commerce used in the original likelihood of dumping determination, namely that dumping continued at any level above *de minimis*.⁴⁵ In addition, margins in the first six periodic reviews of the antidumping duty order on bearings from Japan cannot be considered inconsistent with the AD Agreement, because these margins predated the AD Agreement. All these margins demonstrate that the majority of Japanese companies continued to dump even after the imposition of antidumping duties.⁴⁶ Accordingly, it was apparent that it was unnecessary to change the November 4, 1999 likelihood of dumping determination, because independent WTO-consistent grounds continued to exist and support that determination.

46. The statement in paragraph 22 of the U.S. Opening Statement simply reflects the principle that implementation is prospective and, as a general matter, is achieved by either withdrawing the measure or revising the measure. Accordingly, if there were a single basis for the likelihood of dumping determination and that exclusive basis was found to be WTO inconsistent, the Member would have had to withdraw or revise the measure.

47. The situation here is different, however. In this dispute, Japan challenged a specific aspect of the November 4, 1999 sunset review, namely reliance upon margins calculated with zeroing in the likelihood of dumping determination. Japan did not challenge Commerce's reliance upon the remaining margins that were calculated without zeroing and the margins that predated the WTO Agreements. Neither the Panel nor the Appellate Body examined, let alone made any findings regarding, reliance upon such margins in the likelihood of dumping determination, because Japan did not challenge them in the underlying dispute. Because alternative WTO-consistent grounds independently support the original likelihood of dumping determination and Japan did not challenge them in the underlying dispute, it was unnecessary to change the original sunset determination.

E. AS SUCH

⁴⁴ See Exhibits US-A37 through US-A57.

⁴⁵ See Exhibit US-A24, n.3; Exhibits US-A37, A39, & A49; Exhibit US-A26 (BCI).

⁴⁶ The three periodic reviews of ball bearings that had periods of review occurring after creation of the WTO covered a total of five respondents. See Exhibits US-A54 through US-A57. Even if these five respondents were to stop dumping completely, their conduct does not change the fact that the majority of Japanese respondents continued to dump.

Q29. US: Please explain how the United States' decision to cease zeroing in W-W comparisons in original investigations validates the United States' claim that the single measure called "zeroing procedures" no longer exists.

48. This question is best answered by first reviewing the findings of the panel and the Appellate Body in the original proceeding. The panel was explicit that the zeroing procedures were a single measure that applied in all contexts and when using all comparison methodologies. As the panel noted, "in this case the evidence before us is sufficient to conclude that a rule or norm exists providing for the application of zeroing *whenever* USDOC calculates margins of dumping or duty assessment rates."⁴⁷ Moreover, "it is clear as a factual matter that USDOC *always* applies zeroing."⁴⁸ The panel also observed that "the consistent use of zeroing in specific cases reflects a rule or norm of general and prospective application, which provides that non-dumped export sales are not allowed to offset margins found on dumped export sales and which is applied *regardless* of the basis upon which export price and normal value are compared and *regardless* of the type of proceeding in which margins are calculated."⁴⁹ In the end, the panel concluded that "we consider that what Japan terms 'zeroing procedures' is a *measure* which can be challenged as such."⁵⁰ The Appellate Body upheld the panel's conclusion: "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*."⁵¹

49. It is clear that the original panel, and the Appellate Body, considered the zeroing procedures to be a single measure that was *always* applied in *any* comparison methodologies and in *any* antidumping proceeding – "whenever" Commerce calculates margins of dumping or assessment rates. Logically, if the United States stops using zeroing in any one of these different contexts, then the single measure that the original panel and Appellate Body found to exist is eliminated or withdrawn. Therefore, when Commerce announced on December 27, 2006 that it would no longer apply the zeroing procedures in W-to-W comparisons in original investigations,⁵² it eliminated the single measure that Japan had challenged and that was found to be "as such" inconsistent. In other words, that single measure no longer exists because of the U.S. decision to cease zeroing in W-to-W comparisons in investigations.

Q30. US: The Panel refers to para. 101 of Japan's oral statement. Please confirm whether or not the United States used zeroing in Reviews 4, 5, 6 or 9.

⁴⁷ US – Zeroing (Japan) (Panel), para. 7.50 (emphasis added).

⁴⁸ US – Zeroing (Japan) (Panel), para. 7.51 (emphasis added).

⁴⁹ US – Zeroing (Japan) (Panel), para. 7.53 (emphasis added).

⁵⁰ US – Zeroing (Japan) (Panel), para. 7.58 (emphasis added).

⁵¹ US – Zeroing (Japan) (AB), para. 88 (emphasis added).

⁵² *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77722 (Dec. 27, 2006) (Exhibit JPN-35).

50. As an initial matter, the United States recalls its position that Review Nos. 4, 5, 6 and 9 are not within the scope of this proceeding.⁵³ Accordingly, whether the United States employed zeroing in these reviews is not germane to this compliance proceeding.

51. In addition, as discussed above in reply to Question 1, the complaining Member in a WTO dispute (not the responding Member, nor the Panel) bears the burden of establishing a *prima facie* case. Thus, Japan bears the burden of establishing the existence of zeroing in Review Nos. 4, 5, 6 and 9 and this Panel, in turn, must determine whether Japan has met this burden.

Q31. US: The Panel would like more information about the United States' current anti-dumping practice.

a. Has USDOC made any W-W comparisons in original investigations since the adoption of the Notice referred to in para. 79 of the United States' FWS?

52. Yes, as we explained in the U.S. first written submission,⁵⁴ Commerce has made W-W comparisons in antidumping investigations subsequent to the adoption of the Notice.⁵⁵

b. Since the end of the RPT, have there been any periodic reviews, new shipper reviews, or T-T comparisons in original investigations, in which zeroing has not been applied.

53. The United States has completed multiple antidumping administrative investigations, reviews and new shipper reviews since the end of the RPT. These investigations and reviews occurred after February 22, 2007, the effective date of the United States' withdrawal of the single measure "zeroing procedures."⁵⁶ As a result, the single measure "zeroing procedures" was not employed in any of these investigations and reviews.

⁵³ See, e.g., U.S. Second Written Submission, paras. 21-34.

⁵⁴ U.S. First Written Submission, para 17. The United States also explained that as of that date, Commerce no longer performs W-to-W comparisons in antidumping investigations without offsets.

⁵⁵ 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).

⁵⁶ *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).

Q32 US: Imagine a panel report adopted by the DSB had found that a Member violated Article 3.1(a) of the SCM Agreement because a single one of its laws mandated the provision of prohibited export subsidies to both producers of cars and producers of commercial vessels. Imagine that Member amended the law so that, as of the end of the RPT, it only mandated the provision of prohibited export subsidies to producers of commercial vessels.

a. Would that amended law implement the recommendations and rulings of the DSB resulting from the original panel report?

54. Here, the DSB's recommendations and rulings apply to the provision of export subsidies to producers of cars, and the provision of export subsidies to producers of commercial vessels. Under Article 4.7 of the SCM Agreement, the offending Member would be required to withdraw the prohibited export subsidies. At least to the extent that the recommendations and rulings applied to two separate sets of export subsidies, it appears that the Member would not have withdrawn the prohibited subsidies extended to producers of commercial vessels, but would have complied with the DSB's recommendations and rulings with respect to prohibited subsidies extended to producers of cars.

55. The United States notes that the Panel's question makes the assumption that a single amended law exists, and that its content is well-defined.

b. Would that amended law be consistent with Article 3.1(a) of the SCM Agreement?

56. That amended law would most likely be inconsistent with Article 3.1(a).

[Question 33 is for Japan]

F. RELEVANCE OF COTTON (21.5)

Q34. US: 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 Japan's argument that "[i]f the new payments had not been 'measures taken to comply', it is not clear to Japan on what jurisdictional basis the United States considers the panel and the Appellate Body could have ruled that these new payments violated the Agreement on Subsidies and Countervailing Measures ('SCM Agreement')."

57. Japan has not understood that in the *Upland Cotton* compliance proceeding, the Appellate Body was considering the issue of the *existence* of measures taken to comply with the DSB’s recommendations and rulings on serious prejudice, rather than the issue of the consistency of a “measure taken to comply.” 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 payments subject to the DSB’s recommendations and rulings, those payments were subject to the obligation under Article 7.8 of the *Agreement on Subsidies and Countervailing Measures* (“SCM Agreement”) to withdraw the subsidy or remove its adverse effects.⁵⁷ The 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 for that reason the United States was acting inconsistently with the SCM Agreement. Thus, the jurisdictional basis under DSU Article 21.5 for examining the new payments rested on a disagreement as to the “*existence . . . of measures taken to comply with the recommendations and rulings [of the DSB].*”⁵⁸

[Question 35 is for Japan]

⁵⁷ *US – Upland Cotton (Article 21.5) (AB)*, paras. 248-49.

⁵⁸ DSU, Article 21.5 (emphasis added).