

#### **XIV. Findings and Conclusions**

469. For the reasons set out in this Report, the Appellate Body:

- (a) finds that the Panel did not err in refraining, in paragraphs 8.17 and 9.1(a) of the Panel Report, from making a finding on whether it was improperly composed;
- (b) in respect of the Panel's terms of reference:
  - (i) upholds the Panel's finding, in paragraph 8.80 of the Panel Report, that the subsequent reviews identified in the European Communities' panel request did not fall within the Panel's terms of reference under Article 21.5 of the DSU as "amendments" to the original measures at issue;
  - (ii) reverses the Panel's finding, in paragraph 8.119 of the Panel Report, that none of the subsequent reviews challenged by the European Communities that were decided before the adoption of the recommendations and rulings of the DSB fell within the Panel's terms of reference, and finds, instead, that the sunset reviews in *Granular Polytetrafluoroethylene Resin from Italy* (Case 24), *Stainless Steel Sheet and Strip in Coils from Germany* (Case 28), *Ball Bearings and Parts Thereof from France* (Case 29), *Ball Bearings and Parts Thereof from Italy* (Case 30), and *Ball Bearings and Parts Thereof from the United Kingdom* (Case 31), had a sufficiently close nexus with the declared measures "taken to comply", and with the recommendations and rulings of the DSB, so as to fall within the Panel's terms of reference under Article 21.5 of the DSU;
  - (iii) upholds the Panel's findings, in paragraph 8.126(i) and (v) of the Panel Report, that the 2004-2005 administrative reviews in Cases 1 and 6 fell within the Panel's terms of reference under Article 21.5 of the DSU; and

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<sup>599</sup>We share the Panel's view that the United States fails to comply with the recommendations and rulings of the DSB if it continues to apply cash deposit rates established on the basis of zeroing after the end of the reasonable period of time in respect of the Cases at issue here.

- (iv) finds that the Panel did not act inconsistently with Article 11 of the DSU in addressing the European Communities' alternative "close nexus" claim without first addressing the European Communities' "omissions" claim; and does not consider it necessary to make additional findings in relation to the European Communities' claim that the Panel erred in declining to rule on its claim that the subsequent reviews fell within the Panel's terms of reference as "omissions" or "deficiencies" in the United States' implementation of the recommendations and rulings of the DSB;
- (c) with respect to the United States' compliance obligations in relation to the Cases at issue in the original proceedings:
  - (i) considers that a subsequent administrative review determination issued after the end of the reasonable period of time in which zeroing is used, or, if no such review is requested, a determination issued after the end of the reasonable period of time by which anti-dumping liability is assessed on the basis of cash deposit rates calculated with zeroing, would establish a failure to comply with the recommendations and rulings of the DSB;
  - (ii) finds, with respect to measures that are consequent to assessment reviews that, in the ordinary course of the imposition of anti-dumping duties, derive *mechanically* from the assessment of duties would establish a failure by the United States to comply with the recommendations and rulings of the DSB to the extent that they are based on zeroing and that they are applied after the end of the reasonable period of time; and, accordingly, reverses the Panel's interpretation, in paragraph 8.199 of the Panel Report, that the United States' obligation to implement the recommendations and rulings of the DSB does not extend to the actual collection and liquidation of duties, and to the issuance of assessment or liquidation instructions, when these actions result from administrative review determinations made before the end of the reasonable period of time; and
  - (iii) declares the Panel's finding, in paragraphs 8.200 and 9.1(b)(iii) of the Panel Report, that the European Communities has not established that the United States failed to comply with the recommendations and rulings of the DSB by liquidating, after the end of the reasonable period of time, duties that were assessed with zeroing pursuant to administrative review determinations

issued before the end of the reasonable period of time, moot and of no legal effect, as it was based on an erroneous reasoning;

(d) with respect to *Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands* (Case 1):

(i) upholds the Panel's findings, in paragraphs 8.208 and 9.1(b)(i) of the Panel Report, that the United States acted inconsistently with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 in its determination in the 2004-2005 administrative review and in issuing the consequent assessment instructions; and that, as a result of the final results of this administrative review, the United States has failed to comply with the recommendations and rulings of the DSB to bring the original investigation in Case 1 into conformity; and

(ii) reverses the Panel's finding, in paragraphs 8.209 and 9.1(b)(iv) of the Panel Report, that the assessment instructions issued on 16 April 2007 and the liquidation instructions issued on 23 April 2007 do not establish that the United States failed to comply with the recommendations and rulings of the DSB to bring the original investigation in Case 1 into conformity with its obligations under the covered agreements by virtue of those instructions; and finds, instead, that these instructions, derived mechanically from the assessment of final duty liability in the ordinary course of the imposition of anti-dumping duties, are measures that were adopted after the end of the reasonable period of time, and thus establish a failure by the United States to comply with the recommendations and rulings of the DSB;

(e) with respect to *Stainless Steel Wire Rod from Sweden* (Case 6):

upholds the Panel's findings, in paragraphs 8.213 and 9.1(b)(i) of the Panel Report, that the United States acted inconsistently with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 in issuing the results of the 2004-2005 administrative review determination on 9 May 2007, as well as the consequential assessment and liquidation instructions; and also upholds the Panel's finding, in paragraphs 8.213 and 9.1(b)(i) of the Panel Report, that the United States failed to comply with the recommendations and rulings of the DSB to bring the original investigation in Case 6 into conformity;

- (f) with respect to *Ball Bearings and Parts Thereof from the United Kingdom* (Case 31):
- finds that the Panel erred in refraining, in paragraph 8.217 of the Panel Report, to make a specific finding with respect to the assessment after the end of the reasonable period of time of duty liability for imports from NSK Bearings Europe Ltd. in Case 31; and finds further that duties assessed after the end of the reasonable period of time on the basis of cash deposits reflecting zeroing establish a failure by the United States to comply with the recommendations and rulings of the DSB;
- (g) with specific respect to Cases 18 through 24 and 27 through 30, is not in a position to complete the analysis in relation to these Cases and declines to rule on whether the Panel did not comply with its duties under Article 11 of the DSU;
- (h) with respect to the subsequent sunset reviews:
- (i) finds that the Panel did not err in concluding, in paragraph 8.140 of the Panel Report, that the European Communities has not demonstrated that the United States failed to comply with the recommendations and rulings of the DSB in respect of the sunset review in *Stainless Steel Bar from Germany* (Case 3);
- (ii) declines to make a finding on whether the Panel erred in not ruling, in paragraph 8.141 of the Panel Report, on the European Communities' claim that the United States failed to comply with the recommendations and rulings of the DSB in the sunset reviews in *Stainless Steel Bar from France* (Case 2), *Stainless Steel Bar from Italy* (Case 4), and *Stainless Steel Bar from the United Kingdom* (Case 5);
- (iii) reverses the Panel's findings, in paragraph 8.140 the Panel Report, that any failure to comply by the United States in the sunset review in *Certain Pasta from Italy* (Case 19) had not yet materialized as of the date of establishment of the Panel and thus had no effect on the United States' implementation of the recommendations and rulings of the DSB and that, as a consequence, the European Communities has not demonstrated that the United States failed to comply with the recommendations and rulings of the DSB;

- (iv) finds that the sunset review in *Certain Pasta from Italy* (Case 19) is inconsistent with Article 11.3 of the *Anti-Dumping Agreement* and results in failure by the United States to comply with the recommendations and rulings of the DSB;
  - (v) is unable to complete the analysis in respect of the sunset review in *Granular Polytetrafluoroethylene Resin from Italy* (Case 24) in the absence of express factual findings by the Panel and undisputed facts in the Panel record;
  - (vi) finds that the sunset reviews in *Stainless Steel Sheet and Strip in Coils from Germany* (Case 28), *Ball Bearings and Parts Thereof from France* (Case 29), *Ball Bearings and Parts Thereof from Italy* (Case 30), and *Ball Bearings and Parts Thereof from the United Kingdom* (Case 31) are inconsistent with Article 11.3 of the *Anti-Dumping Agreement* and result in failure by the United States to comply with the recommendations and rulings of the DSB; and
  - (vii) finds that the Panel did not act inconsistently with Article 11 of the DSU in addressing the claims by the European Communities that the United States failed to comply with the recommendations and rulings of the DSB in subsequent sunset review proceedings;
- (i) finds that the Panel did not act inconsistently with Article 11 of the DSU in declining, in paragraphs 8.227 and 9.1(b)(vii) of the Panel Report, to make findings on the European Communities' claim that, by not taking measures to comply between 9 April and 23 April/31 August 2007, the United States violated Article 21.3 of the DSU;
- (j) in relation to the alleged arithmetical error in the Section 129 determination in *Stainless Steel Sheet and Strip in Coils from Italy* (Case 11):
- (i) finds that the Panel erred in finding, in paragraph 8.244 of the Panel Report, that the European Communities could not properly raise claims with respect to the alleged error in the calculation of TKAST's dumping margin in these Article 21.5 proceedings, because it could have raised them in the original proceedings, but failed to do so;

- (ii) however, is unable to complete the analysis on whether the European Communities could raise such claims, nor therefore to rule on whether the United States failed to comply with the recommendations and rulings of the DSB by failing to correct such an alleged error;
- (k) with respect to the establishment of the "all others" rates in the Section 129 determinations in *Stainless Steel Bar from France* (Case 2), *Stainless Steel Bar from Italy* (Case 4), and *Stainless Steel Bar from the United Kingdom* (Case 5):
  - (i) does not consider it necessary to make findings in relation to the European Communities' claim that the United States acted inconsistently with Article 9.4 of the *Anti-Dumping Agreement* in the establishment of the "all others" rate; and
  - (ii) finds that the Panel did not err in not making findings, in paragraphs 8.284 and 9.1(c)(iii) of the Panel Report, in respect of the European Communities' claims under Article 6.8 and Annex II of the *Anti-Dumping Agreement*; and
- (l) declines the request by the European Communities to make a suggestion on how the United States could implement the recommendations and rulings of the DSB in this case.

470. To the extent that the United States has failed to comply with recommendations and rulings of the DSB in the original proceedings, they remain operative. The Appellate Body recommends that the DSB request the United States to implement fully the recommendations and rulings of the DSB.

Signed in the original in Geneva this 26th day of April 2009 by:

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Shotaro Oshima  
Presiding Member

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Lilia R. Bautista  
Member

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Jennifer Hillman