

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

Recourse to Article 21.5 of the DSU by Japan

*Final Report of the Panel*



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

<b>Short Title</b>	<b>Full Cases Title and Citation</b>
<i>EC – Tariff Preferences</i>	Appellate Body Report, <i>European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries</i> , WT/DS246/AB/R, adopted 20 April 2004, DSR 2004:III, 951.
<i>Japan – Apples</i>	Appellate Body Report, <i>Japan – Measures Affecting the Importation of Apples</i> , WT/DS245/AB/R, adopted 10 December 2003, DSR 2003:IX, 4391.
<i>US – Corrosion-Resistant Steel Sunset Review</i>	Appellate Body, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R, adopted 9 January 2004.
<i>US – FSC (21.5 - EC) (II)</i>	Panel Report, <i>United States – Tax Treatment for "Foreign Sales Corporations"</i> , Second Recourse to Article 21.5 of the DSU by the European Communities, WT/DS108/RW2, adopted 14 March 2006, as upheld by the Appellate Body Report WT/DS108/AB/RW2, DSR 2006:XI, 4761.
<i>US – Gambling Services (21.5 – Antigua and Barbuda)</i>	Panel Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , Recourse to Article 21.5 of the DSU by Antigua and Barbuda, WT/DS285/RW, adopted 22 May 2007.
<i>US – OCTG from Argentina (21.5 - Argentina)</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , Recourse to Article 21.5 of the DSU by Argentina, WT/DS268/AB/RW, adopted 11 May 2007.
<i>US – Softwood Lumber IV (21.5 - Canada)</i>	Panel Report, <i>United States – Final Countervailing Duty Determination with respect to Certain Softwood Lumber from Canada</i> , Recourse by Canada to Article 21.5, WT/DS257/RW, adopted 20 December 2004, as upheld by the Appellate Body Report, WT/DS257/AB/RW.
<i>US – Softwood Lumber IV (21.5 - Canada)</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with respect to Certain Softwood Lumber from Canada</i> , Recourse by Canada to Article 21.5 of the DSU, WT/DS257/AB/RW, adopted 20 December 2005, DSR 2005:XXIII, 11355.
<i>US – Upland Cotton</i>	Panel Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/R, adopted 21 March 2005, as modified by the Appellate Body Report, WT/DS267/AB/R, DSR 2005:II- III- IV- V- VI, 297.
<i>US – Upland Cotton (21.5 - Brazil)</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , Recourse to Article 21.5 of the DSU by Brazil, WT/DS267/AB/RW, adopted 20 June 2008.
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R and Corr.1, adopted 23 May 2007, DSR 1997:I, 323.
<i>US – Zeroing (EC)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)</i> , WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, 417.
<i>US – Zeroing II (EC)</i>	Panel Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/R, adopted 19 February 2009, as modified by the Appellate Body Report WT/DS350/AB/R.
<i>US – Zeroing II (EC)</i>	Appellate Body Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/AB/R, adopted 19 February 2009.
<i>US – Zeroing (Japan)</i>	Panel Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews</i> , WT/DS322/R, adopted 23 January 2007, as modified by the Appellate Body Report WT/DS322/AB/R.



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

### TABLE OF ABBREVIATIONS

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

## I. INTRODUCTION

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

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

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

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

1.4 Chairman: Mr. José Antonio Buencamino

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

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

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

## II. BACKGROUND

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

- that by maintaining model zeroing procedures in the context of original investigations, the United States acted inconsistently with Article 2.4.2 of the *AD Agreement*;<sup>5</sup>
- that the United States acted inconsistently with Articles 2.4 and 2.4.2 of the *AD Agreement* by maintaining zeroing procedures when calculating margins of dumping on the basis of transaction-to-transaction comparisons in original investigations;<sup>6</sup>
- that the United States acted inconsistently with Articles 2.4 and 9.3 of the *AD Agreement* and Article VI:2 of the GATT 1994 by maintaining zeroing procedures in periodic reviews;<sup>7</sup>

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<sup>1</sup> WT/DS322/27.

<sup>2</sup> WT/DS322/28.

<sup>3</sup> Appellate Body Report, *US – Zeroing (Japan)*.

<sup>4</sup> Panel Report, *US – Zeroing (Japan)*.

<sup>5</sup> Panel Report, *US – Zeroing (Japan)*, para. 7.258(a).

<sup>6</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 190(b).

- that the United States acted inconsistently with Articles 2.4 and 9.5 of the *AD Agreement* by maintaining zeroing procedures in new shipper reviews;<sup>8</sup>
- that by applying zeroing procedures in the anti-dumping investigation regarding imports of cut-to-length carbon quality steel products from Japan, the United States acted inconsistently with Article 2.4.2 of the *AD Agreement*;<sup>9</sup>
- that the United States acted inconsistently with Articles 2.4 and 9.3 of the *AD Agreement* and Article VI:2 of the GATT 1994 by applying zeroing procedures in 11 periodic reviews; and<sup>10</sup>
- that the United States acted inconsistently with Article 11.3 of the *AD Agreement* when in two sunset review determinations it relied on margins of dumping calculated in previous periodic review proceedings through the use of zeroing.<sup>11</sup>

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

### III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

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

- (a) with respect to the DSB's recommendations and rulings regarding the United States' maintenance of the zeroing procedures challenged "as such" in the original proceedings:
  - the United States has failed to implement the DSB's recommendations and rulings in the context of T-to-T comparisons in original investigations, and under any comparison methodology in periodic and new shipper reviews, which is inconsistent with the United States' obligations under Articles 17.14, 21.1, and 21.3 of the DSU in the sense that these provisions aim at achieving a satisfactory and prompt settlement of the matter; and,
  - the United States' failure to do so is in continued violation of its obligations under Article 2.4 of the *AD Agreement* and Article VI:2 of the GATT 1994; as well as Article 2.4.2 of the *AD Agreement* with respect to T-to-T comparisons in original investigations; Article 9.3 with respect to periodic reviews; and Article 9.5 with respect to new shipper reviews;
- (b) with respect to the DSB's recommendations and rulings regarding the United States' periodic reviews, that:

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<sup>7</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 190(c).

<sup>8</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 190(d).

<sup>9</sup> Panel Report, *US – Zeroing (Japan)*, para. 7.258(b).

<sup>10</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 190(e).

<sup>11</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 190(f).

<sup>12</sup> WT/DS322/20.

- (i) in the case of five periodic reviews (Reviews 1, 2, 3, 7, and 8)<sup>13</sup> that were found to be WTO-inconsistent in the original proceedings:
- the United States has failed to implement the DSB's recommendations and ruling regarding the importer-specific assessment rates determined in those Reviews, which is inconsistent with its obligations under Articles 17.14, 21.1, and 21.3 of the DSU in the sense that these provisions aim at achieving a satisfactory and prompt settlement of the matter; and
  - the United States' failure to do so is in continued violation of its obligations under Articles 2.4 and 9.3 of the *AD Agreement*, and Article VI:2 of the GATT 1994;
- (ii) in the case of four subsequent periodic reviews (Reviews 4, 5, 6 and 9),<sup>14 15</sup> which are measures taken to comply, the United States has acted inconsistently with its obligations under Articles 2.4 and 9.3 of the *AD Agreement*, and Article VI:2<sup>16</sup> of the GATT 1994; and
- (c) with respect to the DSB's recommendations and rulings regarding the United States' sunset review determination of 4 November 1999:
- the United States has failed to bring its WTO-inconsistent measure into conformity with its WTO obligations, which is inconsistent with its obligations under Articles 17.14, 21.1, and 21.3 of the DSU in the sense that these provisions aim at achieving a satisfactory and prompt settlement of the matter; and,
  - the United States' failure to do so is in continued violation of its obligations under Article 11.3 of the *AD Agreement*; and

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

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

<sup>15</sup> Review 9 was adopted by the United States during the course of this proceeding. The inclusion of Review 9 in this proceeding is discussed *infra* at Section VI.B.2.

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

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

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

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

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

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

#### **IV. ARGUMENTS OF THE PARTIES**

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

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

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

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

## VI. INTERIM REVIEW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## VII. FINDINGS

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

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

#### 1. Standard of Review

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

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

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

- (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;
- (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

## 2. Burden of Proof

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

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

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

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

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

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

<sup>20</sup> Appellate Body Report, *Chile – Price Band System (21.5 – Argentina)*, para. 136 (footnotes omitted).

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

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

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

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

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

### 3. Treaty Interpretation

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

*Article 31: General rule of interpretation*

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

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

<sup>22</sup> Appellate Body Report, *EC – Tariff Preferences*, para. 105.

<sup>23</sup> Appellate Body Report, *EC – Tariff Preferences*, para. 105, footnote 220.

<sup>24</sup> Panel report, *EC – Sugar Subsidies*, para. 7.121 and footnote 437.

- (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
  - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
  - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
  - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
  - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

*Article 32: Supplementary means of interpretation*

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

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

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

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
3. The terms of the treaty are presumed to have the same meaning in each authentic text.
4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

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

B. PRELIMINARY ISSUES

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

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

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

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

7.14 Article 21.5 of the DSU provides:

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

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

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

(a) Main arguments of the parties: Japan

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

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

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

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<sup>25</sup> United States, Second Written Submission, para. 28; United States, First Written Submission, paras. 39, 52, 54, 58, 65, 66, 67.

<sup>26</sup> United States, First Written Submission, paras. 3, 44.

<sup>27</sup> United States, Second Written Submission, para. 8; United States, First Written Submission, paras. 44, 54.

<sup>28</sup> United States, Second Written Submission, para. 18; United States, First Written Submission, para. 44.

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

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

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

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

(ii) *The nexus-based test*

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

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

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<sup>29</sup> United States, Second Written Submission, paras. 18, 26.

<sup>30</sup> United States, First Written Submission, para. 51.

<sup>31</sup> United States, Second Written Submission, para. 18; United States, First Written Submission, paras. 52, 67.

<sup>32</sup> United States, Second Written Submission, para. 18 (emphasis in original).

<sup>33</sup> United States, First Written Submission, para. 52.

<sup>34</sup> Japan, Second Written Submission, paras. 24-25.

<sup>35</sup> United States, Second Written Submission, para. 18 (emphasis in original).

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

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

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

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

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<sup>36</sup> Appellate Body Report, *US – Softwood Lumber IV (21.5 - Canada)*, para. 83.

<sup>37</sup> Appellate Body Report, *US – Softwood Lumber IV (21.5 - Canada)*, para. 83.

<sup>38</sup> Appellate Body Report, *US – Softwood Lumber IV (21.5 - Canada)*, para. 85.

<sup>39</sup> Appellate Body Report, *US – Softwood Lumber IV (21.5 - Canada)*, para. 83.

<sup>40</sup> Appellate Body Report, *US – Softwood Lumber IV (21.5 - Canada)*, para. 81.

<sup>41</sup> Panel Report, *US – Softwood Lumber IV (21.5 - Canada)*, para. 4.41.

<sup>42</sup> Appellate Body Report, *US – Softwood Lumber IV (21.5 - Canada)*, para. 85 (internal citation omitted) (emphasis in original).

<sup>43</sup> Appellate Body Report, *US – Upland Cotton (21.5 - Brazil)*.

<sup>44</sup> Appellate Body Report, *US – Upland Cotton (21.5 - Brazil)*, para. 205.



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

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

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

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

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

- the original and subsequent measures all resulted from anti-dumping proceedings conducted by the USDOC and, in particular, the same type of proceeding, namely periodic reviews;
- the three subsequent reviews were all conducted pursuant to the same 1989 Anti-Dumping Order, and they all, therefore, concern the same subject product as the three relevant periodic reviews challenged in the original proceedings; and,
- the original and subsequent reviews concern dumping determinations made with respect to exports from the same companies.

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

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<sup>45</sup> Appellate Body Report, *US – Upland Cotton (21.5 - Brazil)*, para. 205.

<sup>46</sup> Appellate Body Report, *US – Upland Cotton (21.5 - Brazil)*, paras. 245-246.

<sup>47</sup> Appellate Body Report, *US – Upland Cotton (21.5 - Brazil)*, paras. 245-246.

<sup>48</sup> Appellate Body Report, *US – Softwood Lumber IV (21.5 - Brazil)*, para. 72. See also Appellate Body Report, *US – OCTG from Argentina (21.5 - Argentina)*, para. 151.

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

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

#### The effect of the subsequent administrative reviews on compliance

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

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

#### (b) Main arguments of the parties: United States

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

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<sup>49</sup> Appellate Body Report, *US – Softwood Lumber IV (21.5 - Canada)*, para. 83.

<sup>50</sup> Appellate Body Report, *US – Upland Cotton (21.5 - Brazil)*, para. 205.

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

<sup>52</sup> Appellate Body Report, *US – Upland Cotton (21.5 - Brazil)*, para. 246.

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

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

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

(ii) *The nexus-based test*

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

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

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

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<sup>53</sup> Appellate Body Report, *US – Softwood Lumber IV (21.5 - Canada)*, para. 93 (footnote omitted).

<sup>54</sup> Appellate Body Report, *US – Softwood Lumber IV (21.5 - Canada)*, para. 87 (footnote omitted).

<sup>55</sup> Japan, First Written Submission, para. 91.

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

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

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

#### The effect of the subsequent administrative reviews on compliance

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

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

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<sup>56</sup> Appellate Body Report, *US – Softwood Lumber IV (21.5 - Canada)*, para. 84.

<sup>57</sup> Appellate Body Report, *US – Softwood Lumber IV (21.5 - Canada)*, para. 84 (citing US additional memorandum, para. 12).

<sup>58</sup> Appellate Body Report, *US – Softwood Lumber IV (21.5 - Canada)*, para. 70 (emphasis in original).

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

<sup>60</sup> Panel Report, *Australia – Leather (21.5 - US)*.

<sup>61</sup> Panel Report, *Australia – Salmon (21.5 – Canada)*.

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

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

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

(c) Main arguments of the third parties

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

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

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<sup>62</sup> Appellate Body Report, *US – Upland Cotton (21.5 - Brazil)*, paras. 248-49.

<sup>63</sup> Japan, First Written Submission, paras. 81, 101.

<sup>64</sup> Appellate Body Report, *US – Upland Cotton (21.5 - Brazil)*, paras. 245-46.

<sup>65</sup> Appellate Body Report, *US – Upland Cotton (21.5 - Brazil)*, para. 205. The United States asserts that this correction was made in connection with the Appellate Body's findings on the US preliminary objection concerning export credit guarantees.

<sup>66</sup> Japan, First Written Submission, paras. 101-102.

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

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

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

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

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

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

(d) Evaluation by the Panel

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

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

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

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

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

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

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

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

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

<sup>68</sup> Panel Report, *Australia – Salmon (21.5 – Canada)*, para. 7.10, sub-para. 22.

<sup>69</sup> *Ibid.*

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

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

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

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

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

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<sup>70</sup> *Australia – Leather (21.5 - US)*, para. 6.5.

<sup>71</sup> Panel Report, *US – Softwood Lumber IV (21.5 - Canada)*, para. 4.41.

<sup>72</sup> Panel Report, *US – Softwood Lumber IV (21.5 - Canada)*, para. 4.42.

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

<sup>74</sup> Appellate Body Report, *US – Softwood Lumber IV (21.5 - Canada)*, para. 69.

<sup>75</sup> Appellate Body Report, *US – Softwood Lumber IV (21.5 - Canada)*, para. 67.

<sup>76</sup> Appellate Body Report, *US – Softwood Lumber IV (21.5 - Canada)*, para. 68, footnote omitted.



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

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

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

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

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

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

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<sup>77</sup> Appellate Body Report, *US – Softwood Lumber IV (21.5 – Canada)*, footnote 108.

<sup>78</sup> Appellate Body Report, *US – Softwood Lumber IV (21.5 – Canada)*, para. 71.

<sup>79</sup> Appellate Body Report, *US – Softwood Lumber IV (21.5 – Canada)*, para. 74.

<sup>80</sup> Appellate Body Report, *EC – Bed Linen (21.5 – India)*. Appellate Body Report, *US – Softwood Lumber IV (21.5 – Canada)*, para. 76.

<sup>81</sup> Appellate Body Report, *US – Softwood Lumber IV (21.5 – Canada)*, para. 77.

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

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

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

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

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

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<sup>82</sup> Appellate Body Report, *EC – Bananas III (21.5 – US)*, para. 245 (footnote omitted).

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

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

<sup>85</sup> Appellate Body Report, *US – Softwood Lumber IV (21.5 – Canada)*, para. 68.

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

<sup>87</sup> Issues regarding the timing of the relevant measures are addressed separately at paras 7.76– 7.80 *infra*.

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

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

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

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

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

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<sup>88</sup> United States, First Written Submission in the original proceeding, para. 7 ([http://www.ustr.gov/assets/Trade\\_Agreements/Monitoring\\_Enforcement/Dispute\\_Settlement/WTO/Dispute\\_Settlement\\_Listings/asset\\_upload\\_file372\\_7838.pdf](http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file372_7838.pdf)).

<sup>89</sup> Ibid, para. 13, footnotes omitted.

<sup>90</sup> We recall that the latest administrative review in that continuum is Review 9, discussed below at para. 7.114.

<sup>91</sup> United States, First Written Submission, para. 61.

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

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

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

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

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

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

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

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

<sup>94</sup> See paras. 7.160-7.166.

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

<sup>96</sup> United States, Reply to Question 3 from the Panel, para. 10, emphasis supplied.

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

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

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

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

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

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

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<sup>98</sup> United States, First Written Submission, para. 44.

<sup>99</sup> United States, First Written Submission, para. 44.

<sup>100</sup> United States, First Written Submission, para. 9 (emphasis supplied).

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

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

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

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

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

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

<sup>103</sup> United States, First Written Submission, para. 34.

<sup>104</sup> United States, First Written Submission, para. 39.

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

<sup>106</sup> Appellate Body Report, *US – Softwood Lumber IV (21.5 - Canada)*, para. 84.

<sup>107</sup> Appellate Body Report, *US – Softwood Lumber IV (21.5 - Canada)*, para. 84 (citing US additional memorandum, para. 12).

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

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

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

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

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<sup>109</sup> Appellate Body Report, *US – Softwood Lumber IV (21.5 - Canada)*, para. 84.

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

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

<sup>112</sup> See paras. 7.74 and 7.75.

<sup>113</sup> See paras. 7.69, 7.72, 7.73 and 7.74.

<sup>114</sup> United States, First Written Submission, para. 33 (emphasis supplied).

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

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

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

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

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

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<sup>115</sup> United States, First Written Submission, para. 43.

<sup>116</sup> Appellate Body Report, *US – Softwood Lumber IV (21.5 - Canada)* para. 67 (emphasis in original).

<sup>117</sup> Panel Report, *US – Gambling Services (21.5 – Antigua and Barbuda)*, para. 6.24 (emphasis in original).

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

<sup>119</sup> Appellate Body Report, *US – Softwood Lumber IV (21.5 - Canada)*, para. 88.

<sup>120</sup> Appellate Body Report, *US – Softwood Lumber IV (21.5 - Canada)*, para. 93 (footnote omitted).



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

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

### (a) Main arguments of the parties

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

7.85 Article 6.2 of the DSU provides:

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

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

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

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

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

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<sup>121</sup> WT/DS322/27, para. 12.

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

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

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

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

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

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

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

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

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

<sup>123</sup> Panel Report, *US – Upland Cotton*.

<sup>124</sup> United States, First Written Submission, para. 50.

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

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

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

(b) Main arguments of the third parties

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

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

(c) Evaluation by the Panel

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

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

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

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

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

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

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

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

<sup>126</sup> United States, First Written Submission, paras. 5 and 8.

<sup>127</sup> United States, First Written Submission, para. 44.

<sup>128</sup> WT/DS322/27, para. 12.

<sup>129</sup> United States, First Written Submission, para. 50.

<sup>130</sup> Appellate Body Report, *Brazil – Desiccated Coconut*, page 22.

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

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

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

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

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

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

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<sup>131</sup> United States, First Written Submission, para. 50.

<sup>132</sup> United States, First Written Submission, para. 50.

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

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

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

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

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

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

(iii) *Future measures*

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

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

<sup>135</sup> WT/DS322/27, para. 12.

<sup>136</sup> See para. 7.82 *supra*.

<sup>137</sup> See paras. 7.161 and 7.166 *infra*.

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

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

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

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

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<sup>138</sup> United States, Second Written Submission, para. 30 and United States, Response to Japan's Supplemental Submission, para. 11.

<sup>139</sup> Report of the Panel, *United States – Upland Cotton*, para. 7.158.

<sup>140</sup> Report of the Panel, *United States – Upland Cotton*, para. 7.160.

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

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

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

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

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

**1. Main arguments of the parties**

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

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

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

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

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<sup>143</sup> Appellate Body Report, *US – OCTG from Argentina (21.5 - Argentina)*, para. 173, note 367.



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

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

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

7.125 The United States asserts that the text of the GATT 1994 and the *AD Agreement* demonstrate that it is the legal regime in existence at the time that an import enters the Member's territory that determines whether anti-dumping duties apply to the import. The United States notes in this regard that Article VI:2 of the GATT 1994 authorises a Member to "levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product." According to the United States, Article VI:6(a) of GATT 1994 reflects the fact that the levying of a duty generally takes place in connection with "the importation of any product." Furthermore, the United States asserts that the interpretive note to paragraphs 2 and 3 of Article VI states:

As in many other cases in customs administration, a contracting party may require reasonable security (bond or cash deposit) for the payment of anti-dumping or countervailing duty pending final determination of the facts in any case of suspected dumping or subsidization.<sup>145</sup>

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

<sup>145</sup> Annex I, GATT 1994, Ad Article VI, paras. 2 and 3.

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

7.127 The United States submits that several provisions of the *AD Agreement* further demonstrate that determining whether relief is "prospective" or "retroactive" can only be assessed by reference to date of entry. The United States refers for example to Article 10.1 of the *AD Agreement*, which states that provisional measures and antidumping duties shall only be applied to "products which enter for consumption after the time" when the provisional or final determination enters into force, subject to certain exceptions. According to the United States, Article 10.1 demonstrates that the critical factor for determining whether particular entries are liable for the assessment of antidumping or countervailing duties is the legal regime in existence on the date of entry.

7.128 The United States contends that, similarly, Article 8.6 of the *AD Agreement* states that if an exporter violates an undertaking, duties may be assessed on products "entered for consumption not more than 90 days before the application of . . . provisional measures, except that any such retroactive assessment shall not apply to imports entered before the violation of the undertaking." The United States asserts that, once again, the critical factor for determining the applicability of the provision is the date of entry.

7.129 The United States further notes that Article 10.6 of the *AD Agreement* states that when certain criteria are met, "[a] definitive anti-dumping duty may be levied on products which were entered for consumption not more than 90 days prior to the date of application of provisional measures . . . .", whereas under Article 10.8 "[n]o duties shall be levied retroactively pursuant to paragraph 6 on products entered for consumption prior to the date of initiation of the investigation." The United States submits that, as with Articles 8.6 and 10.1, whenever the *AD Agreement* specifies an applicable date for an action, the scope of applicability is based on entries occurring on or after that date.

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

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

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

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

## 2. Main arguments of the third parties

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

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

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

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<sup>146</sup> Panel Report, *US – FSC (21.5 - EC)(II)*.

<sup>147</sup> United States, Second Written Submission, para. 72.

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

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

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

### 3. Evaluation by the Panel

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

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

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

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

<sup>150</sup> United States, First Written Submission, para. 54 (emphasis in original).

<sup>151</sup> Japan, First Written Submission, paras 141 – 145.

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

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

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

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

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

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

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

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

<sup>153</sup> Appellate Body Report, *US – OCTG from Argentina (21.5 - Argentina)*, para. 173, note 367.

<sup>154</sup> WT/DS322/20.

<sup>155</sup> United States, First Written Submission, para. 54.

<sup>156</sup> United States, First Written Submission, para. 54.

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

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

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

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

<sup>158</sup> United States, First Written Submission, para. 59.

<sup>159</sup> United States, First Written Submission, para. 59.

<sup>160</sup> United States, First Written Submission, para. 64.

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

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

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

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

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<sup>161</sup> We refer in this regard to the amendments cited at para. 35 of Japan's Replies to Questions from the Panel.

<sup>162</sup> The United States has not alleged that the importer-specific assessment rates expired before the end of the RPT.

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

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

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

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

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

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

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<sup>165</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 163.

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

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

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

<sup>169</sup> Appellate Body Report, *Canada – Wheat Exports*, para. 133.



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

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

(a) Main arguments of the parties

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

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

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

(b) Evaluation by the Panel

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

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<sup>170</sup> See paras. 7.82 and 7.114.

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

<sup>172</sup> See, for example, para. 7.51 of the original Panel Report, *US – Zeroing (Japan)*.

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

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

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

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

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

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<sup>174</sup> Exhibit-JPN 74, page 10.

<sup>175</sup> Exhibit JPN-75, page 11.

<sup>176</sup> Exhibit JPN-76, page 8, and Exhibit JPN-67.B, page 9.

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

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

<sup>179</sup> United States' Comments on Japan's Replies, para. 22.

<sup>180</sup> United States' Comments on Japan's Replies, para. 22, note 38.

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

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

7.165 The Appellate Body further found:

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

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

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<sup>181</sup> Appellate Body Report, *US – Zeroing II (EC)*, para. 340.

<sup>182</sup> Appellate Body Report, *US – Zeroing II (EC)*, para. 341.

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

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

#### E. THE ZEROING PROCEDURES AS SUCH

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

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

##### (a) Main arguments of the parties

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

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<sup>183</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 174.

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

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

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

The Department is adopting as its final modification its proposal that it will no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons. The Department is doing so in response to the panel's report in *US - Zeroing (EC)*, following the procedures set forth in section 123 of the URAA.<sup>187</sup>

...

In its March 6, 2006 Federal Register notice, the Department proposed only that it would no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons. *The Department made no proposals with respect to any other comparison methodology or any other segment of an antidumping proceeding, and thus declines to adopt any such modifications concerning those other methodologies in this proceeding.*<sup>188</sup>

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

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

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

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

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

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

<sup>189</sup> Japan, First Written Submission, 9 May 2005, para. 9.

<sup>190</sup> Japan, Opening Statement at the Third Meeting of the Panel, 12 June 2006, para. 4; Panel Report *US - Zeroing (Japan)*, para. 6.19 (emphasis in original).

<sup>191</sup> Appellate Body Report, *US - Zeroing (Japan)*, para. 88.

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

(b) Main arguments of the third parties

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

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

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

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

(c) Evaluation by the Panel

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

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

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<sup>192</sup> Panel Report, *US – Zeroing (Japan)*, para. 7.53, footnotes omitted.

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

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

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

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

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

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

that the United States acts inconsistently with Articles 2.4 and 9.5 of the *AD Agreement* by maintaining zeroing procedures in new shipper reviews.<sup>198</sup>

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

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<sup>193</sup> Panel Report, *US – Zeroing (Japan)*, para. 7.258(a).

<sup>194</sup> See Appellate Body Report, *US – Zeroing (Japan)*, para. 87.

<sup>195</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 86.

<sup>196</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 87.

<sup>197</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 88.

<sup>198</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 190. In making these findings, the Appellate Body reversed the original panel's finding that the maintenance of zeroing procedures in: T-to-T comparisons in original investigations; periodic reviews; and new shipper reviews was not WTO-inconsistent.

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

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

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

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

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

<sup>200</sup> Appellate Body Report, *US - Zeroing (Japan)*, para. 88.

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

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



zeroing in 13 anti-dumping proceedings other than W-to-W comparisons in original determinations since the end of the RPT.<sup>203</sup>

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

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

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

that the United States acts inconsistently with Articles 2.4 and 9.5 of the *AD Agreement* by maintaining zeroing procedures in new shipper reviews.<sup>204</sup>

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

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

F. ARTICLE II OF THE GATT 1994

(a) Introduction

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

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

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

<sup>204</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 190.

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

<sup>206</sup> See para. 7.155.

<sup>207</sup> United States, Response to Question 17 from the Panel.

<sup>208</sup> Exhibit JPN-88.

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

(b) Main arguments of the parties

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

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

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

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

(c) Evaluation by the Panel

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

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<sup>209</sup> Exhibit JPN-89.

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

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

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

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

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

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

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

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

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

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

<sup>212</sup> United States, First Written Submission, note 116.

<sup>213</sup> See analysis *infra*. at para. 7.207.

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

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

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

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

1. (a) Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.

(b) The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.

2. Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product:

(b) any anti-dumping or countervailing duty applied consistently with the provisions of Article VI.

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

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

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

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<sup>215</sup> The relevant liquidation notices are set forth in Exhibits JPN-81 to JPN-87.

<sup>216</sup> The relevant liquidation instructions are set forth in Exhibits JPN-40.A, and JPN-77 to JPN-80.

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

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

G. SUNSET REVIEW DETERMINATION OF 4 NOVEMBER 1999

(a) Main arguments of the parties

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

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

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<sup>217</sup> Appellate Body Report, *US – Zeroing (Japan)*, paras. 175 and 176.

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

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

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

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

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

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

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

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

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<sup>221</sup> Japan, Second Written Submission, para. 193.

<sup>222</sup> Appellate Body Report, *US – OCTG from Argentina (21.5 - Argentina)*.

<sup>223</sup> Japan, Opening Statement at Meeting with the Panel, para. 115.

<sup>224</sup> Japan, Opening Statement at Meeting with the Panel, paras. 118-119.

<sup>225</sup> United States, First Written Submission, para. 74.

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

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

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

(b) Main arguments of the third parties

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

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

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<sup>226</sup> United States, First Written Submission, para. 75.

<sup>227</sup> Appellate Body, *US – Corrosion Resistant Steel Sunset Review*.

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

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

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

(c) Evaluation by the Panel

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

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

7.223 In the original proceedings, the Appellate Body concluded:

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

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

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

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<sup>228</sup> Appellate Body Report, *United States – Zeroing (Japan)*, para. 185.



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

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

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

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

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

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

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

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

<sup>230</sup> United States, First Written Submission, para. 75.

<sup>231</sup> United States, Closing Statement at Meeting with the Panel, para. 13.

<sup>232</sup> United States, Response to Panel Question 28, para. 45 (emphasis added).

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

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

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

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

## VIII. CONCLUSIONS AND RECOMMENDATIONS

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

- (a) We find that the United States has failed to comply with the DSB's recommendations and rulings regarding the importer-specific assessment rates determined in Reviews 1, 2, 3, 7 and 8 that apply to entries covered by those Reviews that were, or will be, liquidated after the expiry of the RPT.
  - (i) Accordingly, we find that the United States is in continued violation of its obligations under Articles 2.4 and 9.3 of the *AD Agreement* and Article VI:2 of the GATT 1994.
  - (ii) We decline to rule on Japan's claim that this failure to comply is inconsistent with the United States' obligations under Articles 17.14, 21.1 and 21.3 of the DSU.
- (b) We find that the United States has acted inconsistently with Articles 2.4 and 9.3 of the *AD Agreement* and Article VI:2 of the GATT 1994 by applying zeroing in the context of Reviews 4, 5, 6 and 9.
- (c) We find that the United States has failed to comply with the recommendations and rulings of the DSB regarding the United States' maintenance of zeroing procedures challenged "as such" in the original proceedings. In particular, we find that the United States has failed to implement the DSB's recommendations and rulings in the context of T-to-T comparisons in original investigations and under any comparison methodology in periodic and new shipper reviews.
  - (i) Accordingly, we find that the United States remains in violation of Articles 2.4, 2.4.2, 9.3 and 9.5 of the *AD Agreement* and Article VI:2 of the GATT 1994.
  - (ii) We decline to rule on Japan's claim that this failure to comply is inconsistent with the United States' obligations under Articles 17.14, 21.1 and 21.3 of the DSU.
- (d) We find that the United States is in violation of Articles II:1(a) and II:1(b) of the GATT 1994 with respect to certain liquidation actions taken after the expiry of the RPT, namely with respect to the USDOC liquidation instructions set forth in Exhibits JPN-40A and JPN-77 to JPN-80 and the USCBP liquidation notices set forth in Exhibits JPN-81 to JPN-87.

- (e) We find that the United States has failed to comply with the DSB's recommendations and rulings with respect to the 1999 sunset review.
  - (i) Accordingly, we find that the United States remains in violation of Article 11.3 of the *AD Agreement*.
  - (ii) We decline to rule on Japan's claim that this failure to implement is inconsistent with the United States' obligations under Articles 17.14, 21.1 and 21.3 of the DSU.

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

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## ANNEX A

### EXECUTIVE SUMMARIES OF THE FIRST WRITTEN SUBMISSIONS OF THE PARTIES

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## ANNEX A-1

### EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF JAPAN

(7 July 2008)

#### I. INTRODUCTION

1. In the original proceedings in this dispute, the United States was found to have violated various of its obligations under the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") and the *Agreement on Implementation of Article VI of the GATT 1994* ("*Anti-Dumping Agreement*"). The measures at issue found to be WTO-inconsistent in the original proceedings were: the United States' zeroing procedures; 11 periodic reviews; and two sunset reviews. Japan has brought these proceedings because the United States has failed to implement the recommendations and rulings of the Dispute Settlement Body ("DSB") regarding these measures.

#### II. COMPLIANCE AND ORIGINAL PROCEEDINGS FORM PART OF A CONTINUUM OF EVENTS

2. Compliance panels and the Appellate Body have recognized that "Article 21.5 proceedings do not occur in isolation from the original proceedings, but that both proceedings *form part of a continuum of events*."<sup>1</sup> In *US – Softwood Lumber VI (21.5)*, the Appellate Body observed that "doubts could arise about the objective nature of an Article 21.5 panel's assessment if, on a specific issue, that panel were to deviate from the reasoning in the original panel report in the absence of any change in the underlying evidence."<sup>2</sup>

#### III. FACTUAL ASPECTS

##### A. THE ORIGINAL PROCEEDINGS

3. On 23 January 2007, the DSB adopted the Appellate Body Report and the original panel report, as modified by the Appellate Body Report.<sup>3</sup> In doing so, the DSB requested that the United States bring certain measures found to be inconsistent with the *Anti-Dumping Agreement* and the GATT 1994 into conformity with the United States' obligations under those agreements.<sup>4</sup>

4. On 4 May 2007, Japan and the United States agreed, pursuant to Article 21.3(b) of the DSU, that the reasonable period of time ("RPT") from the date of adoption for the United States to implement the DSB's recommendations and rulings would expire on 24 December 2007.<sup>5</sup>

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<sup>1</sup> Appellate Body Report, *Chile – Price Band System (21.5)*, para. 136, citing Appellate Body Report, *Mexico – Corn Syrup (21.5)*, para. 121 (emphasis added).

<sup>2</sup> Appellate Body Report, *US – Softwood Lumber VI (21.5)*, para. 103 (emphasis added).

<sup>3</sup> WT/DSB/M/225, para. 96.

<sup>4</sup> See Appellate Body Report, *US – Zeroing (Japan)*, para. 191.

<sup>5</sup> WT/DS322/20.

## B. THE UNITED STATES' DECLARED IMPLEMENTATION ACTION AND INACTION

### 1. Zeroing Procedures

5. On 23 January 2007, as noted, the DSB ruled that the zeroing procedures are WTO-inconsistent in the following situations: (i) in W-to-W and T-to-T comparisons in original investigations; (ii) under any comparison methodology in periodic reviews; and (iii) under any comparison methodology in new shipper reviews.

6. On 6 March 2006, two days before the original panel circulated its interim report, the United States Department of Commerce ("USDOC") published a notice of its intention to abandon the use of the zeroing procedures in W-to-W comparisons in original investigations "*in light of the panel's report in US – Zeroing [(EC)]*".<sup>6</sup>

7. On 27 December 2006, almost one month before the DSB's adoption of the original panel and Appellate Body reports in this dispute, the USDOC published a final notice announcing that it would no longer apply the zeroing procedures in W-to-W comparisons in original investigations.<sup>7</sup> The USDOC expressly declined to modify any aspect of its comparison methodologies for calculating dumping, other than the abandonment of zeroing in W-to-W comparisons in original investigations.

### 2. Periodic Reviews

8. Japan recalls that the DSB's recommendations and rulings require the United States to bring 11 periodic reviews into conformity with WTO law. However, the United States has taken no action to revise the WTO-inconsistent aspects of these measures. Instead, it asserts that no such action is required because it has taken action to adopt subsequent periodic reviews that it contends "supersede" the WTO-inconsistent periodic reviews. In these proceedings, Japan challenges five of the 11 periodic reviews that were at issue in the original proceedings and that the United States asserts were superseded, as well as three of the subsequent periodic reviews that it says superseded the original reviews.<sup>8</sup>

### 3. Sunset Reviews

9. The DSB's recommendations and rulings require the United States to bring two sunset reviews into conformity with its WTO obligations. Japan is unaware of any action taken by the United States to comply with these obligations. In these proceedings, Japan challenges one of the two sunset reviews found to be WTO-inconsistent, *i.e.*, the sunset review, of 4 November 1999, in relation to Anti-Friction Bearings. The anti-dumping order relating to the second sunset review has since been revoked, and Japan does not challenge the sunset review relating to that order in these proceedings.

## C. MEASURES AT ISSUE AND CLAIMS MADE IN THESE PROCEEDINGS

### 1. Zeroing Procedures

10. Japan challenges the United States' omission to take action to implement the DSB's recommendations and rulings that the zeroing procedures are WTO-inconsistent in the following

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<sup>6</sup> Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation, 71 Fed. Reg. 11189 (Dep't of Comm., 6 March 2006) (emphasis added) (Exhibit JPN-24).

<sup>7</sup> Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 Fed. Reg. 77722, 77723 (Dep't of Comm., 27 December 2006) (emphasis added) (Exhibit JPN-25).

<sup>8</sup> Japan reserves the rights to address any other subsequent closely connected measures.

situations: (i) in T-to-T comparisons in original investigations; (ii) under any comparison methodology in periodic reviews; and (iii) under any comparison methodology in new shipper reviews.<sup>9</sup>

## 2. Periodic Reviews

11. Japan challenges the United States' omission to take action to implement the DSB's recommendations and rulings with respect to five of the 11 periodic reviews found to be WTO inconsistent in the original proceedings (reviews numbered (1), (2), (3), (7) and (8), in paragraph 13 below).

12. Japan also challenges three subsequent periodic reviews, numbered (4), (5), and (6) in paragraph 13 below, as "measures taken to comply" under Article 21.5 of the DSU. The United States reported to the DSB that it had complied with the DSB's recommendations and rulings regarding the original periodic reviews because those reviews have been "superseded" by subsequent reviews, including the three subsequent reviews challenged by Japan in these proceedings.<sup>10</sup> The subsequent reviews are, therefore, replacement measures that undermine the United States' compliance with the DSB's recommendations and rulings regarding the original periodic reviews.<sup>11</sup>

13. The periodic reviews at issue in these proceedings are:

- (1) Ball Bearings and Parts Thereof From Japan (1 May 1999 through 30 April 2000) (JTEKT and NTN);
- (2) Ball Bearings and Parts Thereof From Japan (1 May 2000 through 30 April 2001) (NTN);
- (3) Ball Bearings and Parts Thereof From Japan (1 May 2002 through 30 April 2003) (JTEKT, NSK, and NTN);
- (4) Ball Bearings and Parts Thereof From Japan (1 May 2003 through 30 April 2004) (JTEKT, NSK, NPB, and NTN);
- (5) Ball Bearings and Parts Thereof From Japan (1 May 2004 through 30 April 2005) (JTEKT, NSK, NPB, and NTN);
- (6) Ball Bearings and Parts Thereof From Japan (1 May 2005 through 30 April 2006) (Asahi Seiko, JTEKT, NSK, NPB, and NTN);
- (7) Cylindrical Roller Bearings and Parts Thereof From Japan (1 May 1999 through 31 December 1999) (JTEKT and NTN); and,
- (8) Spherical Plain Bearings and Parts Thereof From Japan (1 May 1999 through 31 December 1999) (NTN).

14. With respect to each of these eight periodic reviews, the United States had not, by the end of the RPT, liquidated certain entries covered by the review and imported from the named exporters.

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<sup>9</sup> Japan's Panel Request, paras. 10-12.

<sup>10</sup> WT/DS322/22/Add.2.

<sup>11</sup> Japan's Panel Request, paras. 13-15 and Annex 1.

### 3. Sunset Reviews

15. Japan challenges the United States' omission to take action to implement the DSB's recommendations and rulings with respect to the sunset review determination of 4 November 1999 in relation to *Anti-Friction Bearings* that was found to be WTO inconsistent in the original proceedings.<sup>12</sup>

## IV. THIS PANEL HAS JURISDICTION OVER THE MEASURES AT ISSUE IN THESE PROCEEDINGS

### A. THE PANEL HAS JURISDICTION OVER AN IMPLEMENTING MEMBER'S ACTIONS AND OMISSIONS

16. The measures at issue identified in Japan's panel request include both actions and omissions by the United States. It is well-established that, like other WTO dispute settlement proceedings, Article 21.5 proceedings cover measures in both these forms – *i.e.*, omissions as well as positive actions taken to comply.

### B. THE THREE SUBSEQUENT PERIODIC REVIEWS ARE WITHIN THE SCOPE OF ARTICLE 21.5 OF THE DSU

#### 1. Review of the case-law on the interpretation of Article 21.5 of the DSU

17. Certain of the measures that Japan challenges were neither part of the original proceedings nor declared by the United States to be measures taken to comply with the DSB's recommendations and rulings regarding those original measures. These measures are, in particular, the periodic reviews numbered (4), (5), and (6) in paragraph 13.

18. The fact that the United States may not recognize measures challenged by Japan as "taken to comply" does not preclude them from so being. An implementing Member cannot decide for itself whether or not a measure is "taken to comply"; instead, a compliance panel must objectively assess whether a challenged measure meets the requirements of Article 21.5.<sup>13</sup> Further, as noted by the panel in *US – Gambling (21.5)*, measures cannot be excluded from the scope of compliance proceedings "due to the *purpose* for which they have been taken".<sup>14</sup>

19. Also, the fact that measures challenged under Article 21.5 were not challenged in the original proceedings does not preclude them from being "measures taken to comply". The Appellate Body recognized in one of its first Article 21.5 rulings that "Article 21.5 proceedings involve, in principle, not the original measure, but rather a *new and different measure which was not before the original panel*."<sup>15</sup>

20. In subsequent disputes, new measures – not recognized by the respondent as "taken to comply" – have been found to be covered by Article 21.5 because of a *close relationship* to the DSB's recommendations and rulings regarding the original measures and because the new measures *undermine compliance* with those recommendations and rulings.

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<sup>12</sup> Japan's Panel Request, para. 16 and Annex 2.

<sup>13</sup> Appellate Body Report, *US – Softwood Lumber IV (21.5)*, para. 73, note 111. *See also* Panel Report, *Australia – Salmon (21.5)*, para. 7.10, sub-para. 22, *quoted with approval* by the Panel in *US – Softwood Lumber IV (21.5)*, para. 4.38; Panel Report, *Australia – Leather (21.5)*, para. 6.4, *quoted with approval* by the Appellate Body in *US – Softwood Lumber IV (21.5)*, para. 73, note 111.

<sup>14</sup> Panel Report, *US – Gambling (21.5)*, para. 6.24 (emphasis in original).

<sup>15</sup> Appellate Body Report, *Canada – Aircraft (21.5)*, para. 41 (emphasis added).



21. In *US – Softwood Lumber IV (21.5)*, the United States asserted that a periodic review imposing countervailing duties on Canadian softwood lumber was not within the scope of Article 21.5 proceedings that stemmed from original proceedings regarding the USDOC's calculation of countervailing duties in an original investigation.

22. The Appellate Body disagreed, emphasizing that Article 21.5 establishes an "express link" between the measures covered by Article 21.5 and the DSB's recommendations and rulings.<sup>16</sup> After reviewing the approach taken by the panels in *Australia – Salmon (21.5)*<sup>17</sup> and *Australia – Leather (21.5)*<sup>18, 19</sup>, the Appellate Body concluded that where new measures have "a particularly close relationship to the declared 'measures taken to comply', and to the recommendations and rulings of the DSB", or where there are "sufficiently close links", those new measures are subject to review by an Article 21.5 panel.<sup>20</sup> In conducting that analysis, the Appellate Body held that a panel must employ a "nexus-based test"<sup>21</sup> to "scrutinize these relationships, which may, depending on the particular facts, call for an examination of the timing, nature, and effects of the various measures."<sup>22</sup>

23. In commenting on its findings in *US – Softwood Lumber IV (21.5)*, the Appellate Body in *US – Upland Cotton (21.5)*<sup>23</sup> noted that the First Assessment Review was a "measure taken to comply" because of its particularly close relationship to the Section 129 determination.<sup>24</sup> It also emphasized that new measures are regarded as "taken to comply" when they have "the effect of undermining compliance with the DSB's recommendations and rulings" or where justified "to avoid circumvention" of those recommendations and rulings.<sup>25</sup>

24. The Appellate Body in *US – Upland Cotton (21.5)* added that Article 21.5 must be interpreted to prevent the implementing Member from undermining the substantive disciplines in the covered agreements and also the dispute settlement mechanism in the DSU.<sup>26</sup> The Appellate Body noted that, if new subsidy payments identical to those at issue in the original proceedings had been excluded from the scope of Article 21.5, this would make the DSB's recommendations and rulings "essentially declaratory in nature", and create an endless cycle of never-ending litigation, with no implementation of the outcome forthcoming.<sup>27</sup>

25. Finally, the Appellate Body has explained that its approach to Article 21.5 strikes a balance between competing considerations, taking into account, among others, that the provision "seeks to promote the prompt resolution of disputes, to avoid a complaining Member having to initiate dispute settlement proceedings afresh when an original measure found to be inconsistent has not been brought into conformity with the recommendations and rulings of the DSB, and to make efficient use of the original panel and its relevant experience."<sup>28</sup>

26. In the sections to follow, Japan explains that the three subsequent periodic reviews are "measures taken to comply" under Article 21.5 because they undermine compliance with the

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<sup>16</sup> Appellate Body Report, *US – Softwood Lumber IV (21.5)*, para. 68.

<sup>17</sup> Panel Report, *Australia – Salmon (21.5)*, para. 7.10 (sub-para.22).

<sup>18</sup> Panel Report, *Australia – Leather (21.5)*, paras. 6.1 and 6.5.

<sup>19</sup> Appellate Body Report, *US – Softwood Lumber IV (21.5)*, paras. 73-76.

<sup>20</sup> Appellate Body Report, *US – Softwood Lumber IV (21.5)*, para. 77 (emphasis added).

<sup>21</sup> Appellate Body Report, *US – Softwood Lumber IV (21.5)*, para. 79.

<sup>22</sup> Appellate Body Report, *US – Softwood Lumber IV (21.5)*, para. 77.

<sup>23</sup> Appellate Body Report, *US – Upland Cotton (21.5)*, paras. 213 and 249.

<sup>24</sup> Appellate Body Report, *US – Upland Cotton (21.5)*, para. 205.

<sup>25</sup> Appellate Body Report, *US – Upland Cotton (21.5)*, para. 205.

<sup>26</sup> Appellate Body Report, *US – Upland Cotton (21.5)*, paras. 245-246.

<sup>27</sup> Appellate Body Report, *US – Upland Cotton (21.5)*, paras. 245-246.

<sup>28</sup> Appellate Body Report, *US – Softwood Lumber IV (21.5)*, para. 72. See also Appellate Body Report, *US – OCTG from Argentina (21.5)*, para. 151.

recommendations and rulings of the DSB as result of the close relationship between them and the original measures.

## 2. The Three Subsequent Periodic Reviews Are "Measures Taken To Comply"

27. In the present proceedings, the three subsequent periodic reviews (numbered (4), (5), and (6) in paragraph 13 above) involve action by the United States to replace the original WTO-inconsistent periodic reviews concerning ball bearings (numbered (1), (2), and (3) in paragraph 13 above). As discussed below, these measures have a very close substantive relationship, with the subsequent reviews replacing the original measures, and they all involve the WTO-inconsistent application of the zeroing procedures. Given the relationship between the measures, the three subsequent reviews undermine the United States' compliance with the DSB's recommendations and rulings regarding the original measures. As a result, the subsequent periodic reviews constitute "measures taken to comply" for purposes of Article 21.5 of the DSU.

28. In the next sub-section, Japan outlines the close substantive relationship between the original and subsequent reviews. It is the very closeness of this relationship that, as explained in the sub-section thereafter, means that the subsequent reviews have the potential to – and, in Japan's view, do – undermine compliance with, and circumvention of, the DSB's recommendations and rulings regarding the original periodic reviews.

### (a) The Original and Subsequent Reviews Are Substantively Related

29. With respect to the nature of the measures, the original and subsequent periodic reviews have essentially the same connections that led the Appellate Body to conclude in *US – Softwood Lumber IV (21.5)* that a "particularly close relationship" existed between the three measures at issue in those proceedings:

- the original and subsequent measures all resulted from anti-dumping proceedings conducted by the USDOC and, in particular, the same type of proceeding, namely periodic reviews;
- the three subsequent reviews were all conducted pursuant to the same anti-dumping order, namely "*Ball Bearings and Parts Thereof From Japan*" and they all, therefore, concern the same subject product as the seven "ball bearing" reviews challenged in the original proceedings;<sup>29</sup> and,
- the original and subsequent "ball bearing" reviews concern dumping determinations made with respect to exports from the same companies.

30. Moreover, like the measures at issue in *US – Softwood Lumber IV (21.5)*, a substantive relationship exists because the original and subsequent "ball bearing" reviews provide succeeding bases for the continued imposition of anti-dumping duties on ball bearings, with each new review (i) establishing a cash deposit rate that replaced the cash deposit rate from the previous review, and (ii) determining the definitive duty (*i.e.*, importer-specific assessment) rate for entries initially subjected to the cash deposit rate from a prior review. In other words, in substantive terms, the various measures form an unbroken chain of measures flowing from a single anti-dumping order.

31. Again like the measures at issue in *US – Softwood Lumber IV (21.5)*, with respect to each of the periodic reviews, Japan contests "a specific component" of the review, namely, the zeroing

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<sup>29</sup> Five of these seven measures are subject to these proceedings. The remaining two reviews – the reviews for 1998-1999 and 2001-2002 – are not because all of the entries covered by these reviews had been liquidated prior to the end of the RPT.

methodology used to make the dumping determinations.<sup>30</sup> This specific component of the three subsequent reviews – and not other aspects of those measures – is within the scope of these proceedings.

32. An important temporal relationship also exists between the three subsequent periodic reviews and the DSB's recommendations and rulings. In the case of each of the three reviews, the United States had not collected definitive anti-dumping duties on certain entries covered by these reviews at the end of the RPT. As a result, the United States will apply the WTO-inconsistent importer-specific assessment rate determined in these reviews after the end of the RPT.

(b) The Three Subsequent Reviews Undermine and Circumvent Compliance with the DSB's Recommendations and Rulings As a Result of the Close Relationship Between the Measures

33. To borrow from the words of the Appellate Body in *US – Upland Cotton (21.5)*, the three subsequent reviews have "the effect of undermining compliance", and "circumvent[ing]" the DSB's recommendations and rulings.<sup>31</sup> Instead of revising the cash deposit and importer-specific assessment rates established in the original reviews, the United States simply replaced those rates, as explained in paragraph 27, with new rates determined in the subsequent reviews using the same WTO-inconsistent zeroing methodology. Thus, the measures found to be WTO-inconsistent have been withdrawn and replaced by new measures that simply perpetuate the WTO-inconsistency that the United States was obliged to eliminate.

34. The United States itself has recognized that the subsequent reviews replace the original reviews. The United States informed the DSB of its view that it is not obliged to revise the results of the original WTO-inconsistent periodic reviews because "in each case the results were *superseded* by subsequent reviews".<sup>32</sup> It added that, "[b]ecause of this, no further action is necessary for the United States to bring these challenged measures into compliance with the recommendations and rulings of the DSB."<sup>33</sup> Thus, the United States considers that the adoption of the subsequent periodic reviews – which it says "superseded" the WTO-inconsistent reviews – involved implementation "action", and "no further" such "action" is needed to comply.

35. If the subsequent reviews are excluded from the scope of Article 21.5 of the DSU, the United States could disregard the DSB's recommendations and rulings with impunity. The DSB's recommendations and rulings would be "essentially declaratory in nature".<sup>34</sup> One set of WTO-inconsistent measures could simply be replaced by another set of substantively related measures that include the same WTO-inconsistency, and an endless cycle of never-ending litigation would ensue.

## V. THE UNITED STATES HAS FAILED TO BRING ITS WTO-INCONSISTENT MEASURES INTO CONFORMITY WITH ITS WTO OBLIGATIONS

36. These Article 21.5 proceedings concern the United States' failure to comply fully with the recommendations and rulings of the DSB. Specifically, Japan challenges both the existence and consistency of US measures taken to comply with the DSB's recommendations and rulings on: (i) the maintenance of zeroing procedures; (ii) eight periodic reviews; and (iii) two sunset reviews.

37. With respect to the zeroing procedures, the USDOC expressly stated that it was abandoning the zeroing procedures solely in W-to-W comparisons employed in original investigations. Under this limited rule change, the USDOC said that it was not making "any ... modifications" to its calculation

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<sup>30</sup> Appellate Body Report, *US – Softwood Lumber IV (21.5)*, para. 83.

<sup>31</sup> Appellate Body Report, *US – Upland Cotton (21.5)*, para. 205.

<sup>32</sup> WT/DS322/22/Add.2 (emphasis added).

<sup>33</sup> WT/DS322/22/Add.2 (emphasis added).

<sup>34</sup> Appellate Body Report, *US – Upland Cotton (21.5)*, para. 246.

methodologies in other situations, including T-to-T comparisons in original investigations, or in any comparison methodology in periodic and new shipper reviews. Since that time, the United States has taken no further action to implement the DSB's recommendations and rulings.

38. With respect to the five original periodic reviews that Japan challenges in these proceedings, the United States admits that has taken no action to implement the DSB's recommendations and rulings. Japan's challenge focuses on these five periodic reviews because they continue to produce legal effects after the end of the RPT. In particular, the United States will take action, after the end of the RPT, to collect definitive anti-dumping duties at importer-specific assessment rates determined with zeroing in these reviews. As regards the three subsequent reviews, these "measures taken to comply" are inconsistent with the Anti-Dumping Agreement and the GATT 1994 because the United States determined the cash deposit rate and importer-specific assessment rate using zeroing.

39. Finally, the sunset review at issue resulted in the maintenance by the United States of its anti-dumping order on ball bearings from Japan as from 4 November 1999. In the absence of that review, the order should have been revoked at that time. However, because the sunset review is WTO-*inconsistent*, it could not, and cannot today, provide a valid legal basis under Article 11.3 of the Anti-Dumping Agreement for the continued maintenance of the anti-dumping order in question. Following the adoption of the DSB's recommendations and rulings, the United States was given an opportunity to bring the sunset review into conformity with its obligations during the RPT but, to Japan's knowledge, elected not to take any action regarding the review.

## ANNEX A-2

### EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES

(4 August 2008)

#### I. INTRODUCTION

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

2. The United States has fully implemented the DSB's recommendations and rulings. Subsequent administrative reviews have superseded the administrative reviews found to be WTO-inconsistent, thereby eliminating the WTO inconsistencies found in the original proceeding. As to the challenged sunset review, the majority of the dumping margins relied on in that determination are not WTO-inconsistent and independently demonstrate that dumping at above the *de minimis* level continued after the imposition of the order. Accordingly, it was unnecessary to change the challenged sunset review determination. And lastly, the United States has eliminated the single measure known as the "zeroing procedures" that was found to be WTO-inconsistent "as such."

#### II. FACTUAL BACKGROUND

3. In the underlying dispute, the DSB adopted the Appellate Body report and panel report, as modified by the Appellate Body report, on 23 January 2007. The reasonable period of time ("RPT") for this dispute expired on 24 December 2007. The United States implemented all of the DSB's recommendations and rulings by that date. On 7 April 2008, Japan requested the establishment of this panel under Article 21.5 of the of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").

#### III. STANDARD OF REVIEW AND BURDEN OF PROOF

4. Under Article 11 of the DSU, a panel must "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability and conformity with the relevant covered agreements." In anticipation of US arguments on zeroing, Japan cites dicta from the recent Appellate Body report in *US – Stainless Steel (Mexico)* indicating that panels are allegedly bound to follow adopted Appellate Body reports on the same legal issues. To the extent that the reasoning in prior dispute settlement reports is persuasive, those reports may be taken into account, but they have no *stare decisis* effect. In addition, the burden in this dispute is on Japan to prove that the United States failed to implement the DSB's recommendations and rulings.

#### IV. PRELIMINARY RULING REQUESTS

##### A. THE THREE ADMINISTRATIVE REVIEWS ON BALL BEARINGS ARE NOT MEASURES "TAKEN TO COMPLY"

5. An Article 21.5 compliance panel may only examine a claim that a measure taken to comply does not exist, or that a measure taken to comply is inconsistent with a covered agreement. As the Appellate Body noted in *Canada – Aircraft (Article 21.5)*: "[p]roceedings under Article 21.5 do not concern just any measure of a Member of the WTO; rather, Article 21.5 proceedings are limited to those 'measures taken to comply with the recommendations and rulings' of the DSB. In our view, the phrase '*measures taken to comply*' refers to measures which have been, or which should be, adopted by a Member to bring about compliance with the recommendations and rulings of the DSB." (Emphasis added.) Accordingly, in assessing whether a challenged measure is a "measure taken to comply," the Panel must first look to the recommendations and rulings of the DSB.

6. Two of the administrative review determinations identified by Japan in its Article 21.5 panel request – Review Nos. 4 and 5 – cannot be considered measures taken to comply because they pre-date the adoption of the DSB's recommendations and rulings on 23 January 2007. The Appellate Body has found that "[a]s a whole, Article 21 deals with events *subsequent* to the DSB's adoption of recommendations and rulings in a particular dispute."

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

8. Relying on prior panel and Appellate Body reports, Japan asserts that the three subsequent administrative reviews are within the scope of the Article 21.5 proceeding. First, Japan asserts that the original administrative reviews and the three subsequent reviews have "essentially the same connections that led the Appellate Body to conclude in *US – Softwood Lumber IV (Article 21.5)* that a 'particularly close relationship' existed between the three measures at issue in those proceedings." Japan misunderstands the Appellate Body's findings in *US – Softwood Lumber IV (Article 21.5)*. As the Appellate Body stated in that dispute, "not . . . every assessment review will necessarily fall within the jurisdiction of an Article 21.5 panel." According to the Appellate Body, "such an approach would be too sweeping." This Panel should reject Japan's attempt to include subsequent reviews of *Ball Bearings* just because they are administrative reviews involving the same product exported from Japan by the same companies. If the overlap between product, exporting country, and exporting company were sufficient to establish the type of "particularly close relationship" found in *US – Softwood Lumber IV (Article 21.5)*, then every administrative review would fall within the jurisdiction of an Article 21.5 panel.

9. Japan, in relying on *US – Softwood Lumber IV (Article 21.5)*, ignores the differences between the two disputes. In making its finding in *US – Softwood Lumber IV (Article 21.5)*, the Appellate Body considered the timing between the two determinations at issue. The timing of these two determinations provided Commerce with the ability to take account of the DSB's recommendations and rulings, and as the Appellate Body emphasized, the United States expressly acknowledged that Commerce used the same pass-through analysis in the first administrative review (i.e., the alleged measure taken to comply) as in the Section 129 determination (i.e., the declared measure taken to

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

10. Japan, seeking to draw support from prior dispute settlement reports, claims that because the three subsequent *Ball Bearings* reviews "undermine" and "circumvent" the US compliance with the DSB's recommendations and rulings, they should be subject to Article 21.5. However, this dispute is distinguishable from disputes in which panels and the Appellate Body found subsequent measures to undermine the declared measure taken to comply. For example, in *Australia – Leather (Article 21.5)*, the DSB found that a grant contract by Australia to a particular company was inconsistent with Australia's obligations pursuant to the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"). Australia notified the DSB that the subsidy that had been found to be inconsistent had been withdrawn and, the next day, announced a new grant contract, made to the company's parent. In concluding that the new grant contract was within the compliance proceeding's terms of reference, the compliance panel noted that the contract was "inextricably linked to the steps taken by Australia in response to the DSB's ruling in this dispute, in view of both its timing and its nature." Australia thus chose to undertake action coincident with its implementation of the DSB's recommendations and rulings. Grant contracts are not *required* by the SCM Agreement. But assessment reviews *are* required under the WTO Anti-Dumping Agreement ("AD Agreement"), when requested. In *Australia – Leather (Article 21.5)*, Australia *chose* to provide a grant the day after it withdrew the WTO-inconsistent measure, thus affecting the existence of the withdrawal of the prohibited subsidy.

11. The facts are similar in *Australia – Salmon (Article 21.5)*, another dispute relied on by Japan. There, Australia claimed compliance with the recommendations and rulings of the DSB in July 1999, but in October 1999 Tasmania chose to impose a new import ban on salmonids. The panel noted its concern about a situation in which "an implementing Member could simply avoid any scrutiny of certain measures by a compliance panel" by claiming one measure was a measure taken to comply and that another was not, even though the latter, voluntary action had the effect of undoing the compliance. That is not the situation generally presented with administrative reviews, which occur upon request of interested parties on a schedule that is established without regard to dispute settlement proceedings and pursuant to rights and obligations established in the AD Agreement. The three subsequent reviews of *Ball Bearings* therefore had a timetable independent of the present dispute. In fact, the final results of two of the three reviews, as noted above, were issued well before the DSB's recommendations and rulings in the original dispute. None of these administrative reviews was a voluntary action taken by the United States around the time of implementation to circumvent or undermine declared compliance with the DSB's recommendations and rulings.

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

entirely different proposition from the (incorrect) suggestion that the subsequent administrative review was a measure taken to comply.

13. Japan also mistakenly relies on the Appellate Body report in *US – Upland Cotton (Article 21.5)*. In that dispute, the Appellate Body considered whether actionable subsidies claims against US support payments made after the end of the RPT were properly within the scope of the Article 21.5 proceeding, even though the DSB's recommendations and rulings were limited to payments made in prior years. The Appellate Body considered that the later payments, to the extent they were made under the same conditions and criteria as the original payments, were subject to the obligation under Article 7.8 of the SCM Agreement to withdraw the subsidy or remove its adverse effects and that they therefore were properly within the scope of the Article 21.5 proceeding. Contrary to Japan's assertion, the Appellate Body did not consider the subsequent payments to be "measures taken to comply" in the context of Article 21.5.

14. The Appellate Body did not adopt a broad test in *US – Upland Cotton (Article 21.5)* as to what should be considered a "measure taken to comply" in any and all proceedings under Article 21.5. Rather, it was interpreting compliance obligations in a specific dispute in light of Article 7.8 of the SCM Agreement, for which there is no analogous provision in the AD Agreement. Moreover, the Appellate Body's dicta in *US – Upland Cotton (Article 21.5)* were limited to concerns over the availability of relief against the adverse effects of actionable subsidies. In *US – Upland Cotton (Article 21.5)*, the Appellate Body also made clear that there is no general rule that any measure that has a "particularly close relationship" to the declared measure to comply with the DSB's recommendations and rulings would be within the scope of a compliance proceeding. This clarification counsels against the unwarranted expansion of Article 21.5 proceedings to cover subsequent administrative reviews simply because of the similarities between such reviews and those subject to the DSB's recommendations and rulings.

15. Japan also worries that if the Panel excludes subsequent reviews, then Members could never obtain relief against administrative reviews. The DSU and the other covered agreements cannot be rewritten to apply to additional measures just because that is what Japan believes would be a better approach. In any event, the United States has complied with the DSB's recommendations and rulings here, and so there is no issue about obtaining relief against non-compliance.

16. Lastly, Japan argues that it is, in fact, challenging the "omission" by the United States to take the necessary action to implement the DSB's recommendations and rulings with respect to the three administrative reviews of *Ball Bearings* (Review Nos. 1, 2, and 3). Japan is taking mutually exclusive positions. If Japan is making a claim under Article 21.5 that measures taken to comply do not exist, then it cannot also assert that such measures exist, and that they are inconsistent with the covered agreements.

#### B. JAPAN CANNOT INCLUDE MEASURES NOT YET IN EXISTENCE AT THE TIME OF ITS REQUEST FOR ESTABLISHMENT

17. Under Article 6.2, a panel request must identify the "*specific measures at issue*" in the dispute, and a panel's terms of reference under Article 7.1 are limited to those specific measures. Japan in its Article 21.5 panel request identified as measures "any amendments to the eight periodic reviews and the closely connected instructions and notices, as well as any subsequent closely connected measures." Japan also states in its first written submission that in addition to the claims it is making against the three subsequent administrative reviews, "Japan reserves the right to address any other subsequent closely connected measures." Japan nowhere has identified these alleged subsequent measures. The United States objects to Japan's failure to specifically identify the "subsequent closely connected measures" as required by Article 6.2 of the DSU. In particular, the United States is concerned that Japan is trying to include in the Panel's terms of reference any future



administrative reviews related to the eight identified in its panel request; this would, of course, be improper.

## V. ARGUMENT

### A. THE UNITED STATES HAS COMPLIED WITH THE DSB'S RECOMMENDATIONS AND RULINGS CONCERNING THE "AS APPLIED" FINDINGS WITH RESPECT TO ADMINISTRATIVE REVIEWS

18. Before this Panel, Japan argues that the United States has failed to eliminate zeroing in five administrative reviews. Japan's argument is premised on the incorrect and entirely unsupported assumption that this Panel should consider assessment (or "liquidation") of duties years after Japanese bearings entered the United States when determining whether the United States has complied with the DSB's recommendations and rulings in this dispute.

19. Japan misapprehends the nature and scope of WTO disputes challenging anti-dumping and countervailing duty measures. Implementation of the DSB's rulings and recommendations in these disputes applies *prospectively*. When – as is the case with the administrative reviews at issue in this proceeding – the United States has eliminated the cash deposit rates established by the administrative reviews that were found to be WTO-inconsistent in the original proceeding, nothing remains to be done to come into compliance with the DSB's recommendations and rulings.

20. Other Members have acknowledged that, for purposes of assessing compliance with the recommendations and rulings of the DSB relating to duties, one examines the treatment accorded to goods entered after the expiration of the reasonable period of time. As the EC explained to the panel that considered the *Section 129* dispute: "[t]he EC is concerned that Canada's claim implies a legal obligation of WTO Members not to act inconsistently with the DSB ruling with respect to all decisions taken after the expiry of the reasonable period of time even if these concern goods that entered before the expiry of the reasonable period of time or even before the adoption of the DSB ruling. Yet . . . the EC considers that no such obligation has been incurred by WTO Members under the DSU."

21. Likewise, the preamble to an EC regulation on measures that may be taken to comply in anti-dumping and countervailing duty disputes states: "The recommendations in the reports adopted by the DSB only have prospective effect. Consequently, it is appropriate to specify that any measures taken under this Regulation will take effect from the date of their entry into force, unless otherwise specified, and, therefore, do not provide any basis for the reimbursement of the duties collected prior to that date . . ." The EC took a similar view when it implemented the recommendations and rulings of the DSB in the dispute *EC – Customs Classification of Frozen Boneless Chicken Cuts*.

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

23. The text of GATT 1994 and the AD Agreement also demonstrate that it is the legal regime in existence at the time that an import enters the Member's territory that determines whether anti-dumping duties apply to the import. The text therefore confirms that the focus for implementation purposes should be on the time of entry of merchandise. Article VI:2 of GATT 1994 provides: "[i]n order to offset or prevent dumping, a contracting party may *levy* on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product."

24. Article VI:6(a) of GATT 1994 reflects the fact that the levying of a duty generally takes place in connection with "the importation of any product." Nonetheless, the interpretive note to

paragraphs 2 and 3 of Article VI states: "[a]s in many other cases in customs administration, a contracting party may require reasonable security (bond or cash deposit) for the payment of anti-dumping or countervailing duty pending final determination of the facts in any case of suspected dumping or subsidization." The interpretive note clarifies that, notwithstanding that duties are generally levied at the time of importation, Members may instead require cash deposits or other security, in lieu of the duty, pending final determination of the relevant information. Thus, the cash deposits serve as a place-holder for the liability which is incurred *at the time of entry*.

25. Several provisions of the AD Agreement further demonstrate that determining whether relief is "prospective" or "retroactive" can only be determined by reference to date of entry. For example, Article 10.1 of the AD Agreement states that provisional measures and anti-dumping duties shall only be applied to "products which *enter for consumption* after the time" when the provisional or final determination enters into force, subject to certain exceptions. Similarly, Article 8.6 of the AD Agreement states that if an exporter violates an undertaking, duties may be assessed on products "*entered for consumption* not more than 90 days before the application of . . . provisional measures, except that any such retroactive assessment shall not apply to imports *entered* before the violation of the undertaking." In addition, Article 10.6 of the AD Agreement states that when certain criteria are met, "[a] definitive anti-dumping duty may be levied on products which were *entered for consumption* not more than 90 days prior to the date of application of provisional measures . . . ." However, under Article 10.8, "[n]o duties shall be levied retroactively pursuant to paragraph 6 on products *entered for consumption* prior to the date of initiation of the investigation." As these articles demonstrate, the critical factor for determining whether particular entries are liable for the assessment of anti-dumping or countervailing duties is the legal regime in existence on the date of entry.

26. Contrary to Japan's claim, the United States is not attempting to transform "prompt compliance" under the DSU into "an endless period of non-compliance." Rather, in the five challenged administrative reviews, the United States has withdrawn the cash deposit rate resulting from the challenged review and calculated new cash deposit rates pursuant to separate and distinct administrative reviews.

27. With regard to the 1999 administrative reviews of *Cylindrical Roller Bearings* and *Spherical Plain Bearings* (i.e., Reviews Nos. 7 and 8), the United States revoked these anti-dumping duty orders effective 1 January 2000. As such, these Japanese bearings are entering the United States without regard to anti-dumping duties, and the United States is not collecting cash deposits pursuant to Reviews Nos. 7 and 8.

28. Turning to the remaining three administrative reviews (Reviews Nos. 1, 2, and 3), the United States is no longer collecting cash deposits pursuant to these administrative reviews, nor do these administrative reviews provide authority to assess anti-dumping duties on these products that enter the United States after 24 December 2007 (i.e., the end of the RPT). Commerce has completed subsequent administrative reviews of *Ball Bearings*. It has thus calculated new margins of dumping, *and put in place new cash deposits for the companies examined*. As a result, the cash deposit rates that had been established in the administrative reviews that Japan originally challenged are no longer applied at the border.

29. A proper interpretation of a Member's implementation obligations requires that retrospective duty assessment systems and prospective anti-dumping systems be placed on a "level playing field," unless a provision of the WTO Agreement provides otherwise. Under prospective anti-dumping systems, the Member collects the amount of anti-dumping duties at the time of importation. If an anti-dumping measure in a prospective system is found to be inconsistent with the AD Agreement, the Member's obligation is merely to modify the measure as it applies to imports occurring on or after the date of importation. That is, the Member changes the amount of anti-dumping duties to be collected on importations occurring after the end of the RPT. The Member need not remedy the effects of the measure on imports that occurred *prior* to the date of implementation. Neither the AD Agreement,

nor the DSU authorizes different implementation obligations in respect of the types of systems. Yet if the issuance of assessment or liquidation instructions *after* the RPT forms the basis for implementation obligations, as Japan wants, then retrospective systems will be subject to very different and more extensive implementation obligations than prospective anti-dumping systems.

30. Japan argues that the alleged US failure to bring the five challenged administrative reviews into conformity with its WTO obligations is a continuing violation of Articles 2.4 and 9.3 of the AD Agreement and Article VI:2 of the GATT 1994. Because the United States has complied with the DSB's "as applied" findings, Japan has no basis upon which to assert that the United States continues to be in violation of Articles 2.4 and 9.3 of the AD Agreement and Article VI:2 of GATT 1994 with respect to the challenged administrative reviews. Japan also claims that as to these five reviews, the United States has acted inconsistently with Article 17.14 of the DSU. Japan has not identified – whether in its Article 21.5 panel request or in its submission – a measure that would show conditional acceptance by the United States. Moreover, the United States has complied with the Appellate Body's findings in the original dispute, and therefore, Japan has no basis on which to assert that the United States conditionally accepted those findings. Japan also claims that as to the five reviews, the United States has acted inconsistently with Articles 21.1 and 21.3 of the DSU. These provisions do not impose substantive obligations. In any event, even if Articles 21.1 and 21.3 impose relevant obligations, the United States has not acted inconsistently with them because, as explained above, it has implemented the DSB's recommendations and rulings with respect to the challenged administrative reviews.

#### B. THE UNITED STATES HAS COMPLIED WITH THE DSB'S RECOMMENDATIONS AND RULINGS CONCERNING THE "AS APPLIED" FINDINGS FOR SUNSET REVIEWS

31. The Appellate Body found that with respect to the 4 November 1999 sunset review determination in *Antifriction Bearings from Japan*, the United States acted inconsistently with the AD Agreement "when it relied on margins of dumping calculated in previous proceedings through the use of zeroing." (Emphasis added.) The original likelihood of dumping determination did not rest exclusively upon margins that the Appellate Body found inconsistent with Article 11.3 of the AD Agreement. The *majority* of those margins cannot be characterized as inconsistent with the AD Agreement because they either *predate* the AD Agreement or did not involve the use of a zeroing methodology. Each of these two categories of margins independently support Commerce's determination that there was a likelihood of continuation of dumping. Accordingly, the margins that the Appellate Body found inconsistent with the AD Agreement are unnecessary to the overall validity of Commerce's finding in the challenged sunset review.

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

C. THE UNITED STATES HAS COMPLIED WITH THE DSB'S RECOMMENDATIONS AND RULINGS CONCERNING THE "AS SUCH" INCONSISTENCY OF THE ZEROING PROCEDURES

33. The DSB in *US – Zeroing (Japan)* ruled that the US zeroing procedures were "as such" inconsistent with various provisions of the AD Agreement and the GATT 1994. In the original proceeding, Japan challenged, *inter alia*, the US "zeroing procedures" as being "as such" inconsistent with various provisions of the AD Agreement and the GATT 1994. Japan considered the zeroing procedures to be "a *single measure* that applies to [weighted average-to-weighted average ("W-to-W")] comparisons, [transaction-to-transaction ("T-to-T")] comparisons and [weighted average-to-transaction ("W-to-T")] comparisons, used in any type of anti-dumping proceeding." The original panel and the Appellate Body agreed that the zeroing procedures are a single measure. According to the original panel, "we consider that what Japan terms 'zeroing procedures' is a *measure* which can be challenged as such." (Emphasis added.) Likewise, the Appellate Body concluded that "the Panel had sufficient evidence before it to conclude that the 'zeroing procedures' under different comparison methodologies, and in different stages of anti-dumping proceedings, do not correspond to separate rules or norms, but simply reflect different manifestations of a *single rule or norm*." (Emphasis added.) Accordingly, the DSB's recommendations and rulings applied to this single measure.

34. Commerce announced on December 27, 2006 that it would no longer apply the zeroing procedures in W-to-W comparisons in original investigations effective as of 22 February 2007. The United States thus eliminated the single measure that Japan had challenged and that was found to be "as such" inconsistent, well before the expiration of the RPT on 24 December 2007.

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

VI. CONCLUSION

36. For the foregoing reasons, the United States respectfully requests this Panel to find that the United States has complied with the recommendations and rulings of the DSB and to reject Japan's claims to the contrary.

## ANNEX B

### THIRD PARTIES' WRITTEN SUBMISSIONS OR EXECUTIVE SUMMARIES THEREOF

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## ANNEX B-1

### EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF THE EUROPEAN COMMUNITIES

(8 August 2008)

#### I. INTRODUCTION

1. In the present submission, first the European Communities will address some preliminary issues in connection with the US request for a preliminary ruling, including the scope of the Panel's review and the Panel's jurisdiction to deal with all the measures mentioned by Japan. Then, the European Communities will enter into the substance of this dispute, which refers to the US lack of compliance with the DSB's recommendations and rulings in the original dispute.

#### II. PRELIMINARY ISSUES: SCOPE OF REVIEW AND JURISDICTION OF THE PANEL

##### A. SCOPE OF THE PANEL'S REVIEW

2. The European Communities agrees with Japan's observations. Since it is not possible to relitigate the same issue twice in Article 21.5 proceedings, the European Communities submits that this Panel cannot enter again into the conformity of the zeroing procedures with the covered agreements. Moreover, the European Communities observes that the Appellate Body has noted that Article 21.5 panels are "bound to follow the legal interpretations contained in the original panel and Appellate Body reports that were adopted by the DSB". Consequently, the scope of review of this compliance Panel should be limited to examine the acts (or omissions) taken by the United States in light of its WTO obligations as derived from the covered agreements and the DSB's recommendations and rulings in the original dispute.

##### B. ALL THE MEASURES FALL UNDER THE SCOPE OF THIS COMPLIANCE PROCEEDING

3. The European Communities considers that all the measures (being US acts, omissions or deficiencies) challenged by Japan in this proceeding fall under the terms of reference of this Panel, including the three subsequent reviews listed by Japan. Thus, the Panel should reject the US request for a preliminary ruling.

4. First, the US omissions and deficiencies in compliance are covered by this Article 21.5 proceeding. Indeed, the phrase "measures taken to comply" in Article 21.5 of the DSU refers to measures which have been, or which should be, adopted by a Member to bring about compliance with the recommendations and rulings of the DSB. If the recommendations and rulings of the DSB have not been complied with, a measure taken to comply does not exist. The European Communities notes that, despite the fact that the DSB's recommendations and rulings in the original dispute contained a clear "as such" finding against the use of zeroing procedures in any anti-dumping proceeding, the United States has continued using zeroing in its anti-dumping determinations and when collecting duties based on zeroing after the end of the reasonable period of implementation. In this sense, the European Communities understands that Japan challenges the *omissions* by the United States to take the necessary measures to comply in this case, i.e., that the United States should, on

24 December 2007, have stopped (i) using zeroing procedures in any anti-dumping determination, and (ii) collecting anti-dumping duties and establishing new cash deposits based on zeroing in connection with any anti-dumping proceeding and, thus, with respect to the measures listed by Japan. Likewise, the United States should have revised its likelihood of recurrence of dumping determination in the sunset review at issue.

5. Second, the three subsequent administrative reviews listed by Japan also fall under the scope of this Article 21.5 proceeding. Indeed, a measure that essentially replaces an earlier measure remains within the terms of reference of an original panel. Thus, a 21.5 panel must be in a position to assess whether an annual administrative review determination that confirms and supersedes the original determination relating to the same anti-dumping duty imposed on the same country and the same product following the same WTO-inconsistent methodology (i.e., zeroing) constitutes a "continuing violation". In *US – Upland Cotton (21.5)*, the panel and the Appellate Body followed a similar approach. The reasoning developed by the Appellate Body in that case also applies in the present case. If subsequent reviews containing the same violation (i.e., the use of zeroing procedures) cannot be discussed in Article 21.5 proceedings, the WTO Member concerned would be forced to continue chasing a ghost through endless litigation. Thus, the Member concerned would not be able to obtain adequate relief against a violation of the covered agreements, contrary to the objective of "prompt settlement" of disputes contained in Articles 3.3 and 21.1 of the DSU.

6. In addition, as the Appellate Body observed in *US – Softwood Lumber IV (21.5)*, the European Communities considers that measures predating the adoption of the DSB's recommendations and rulings may also be covered by Article 21.5 proceedings. Otherwise, Members could adopt new measures diametrically against compliance in a particular case just the day before the adoption of report by the DSB. Therefore, the fact that a measure predates the adoption of the DSB report in question cannot exclude *per se* such a measure from the scope of compliance proceedings, as the United States suggests.

7. In light of this clear connection with the DSB's recommendations and rulings in the original dispute, the European Communities considers that the three subsequent administrative review proceedings listed by Japan are measures taken to comply falling within the scope of this proceeding.

**C. JAPAN'S PANEL REQUEST PROPERLY IDENTIFIED THE SUBSEQUENT CLOSELY CONNECTED MEASURES AS REQUIRED BY ARTICLE 6.2 OF THE DSU**

8. Japan's Panel Request contains a clear indication of the measures at issue, including "any amendments to the eight periodic reviews and the closely connected instructions and notices, as well as any subsequent closely connected measures". The fact that those measures may occur at a particular moment in time in the future has nothing to do with the specificity requirement in Article 6.2 of the DSU. Since Japan has identify the administrative reviews in Annex 1 of its Panel Request and because the procedures under US municipal law to modify those measures are limited, the United States cannot validly argue that it fails to know the specific measures which fall under the scope of this proceeding. Therefore, the European Communities considers that the Panel should reject the US request for a preliminary ruling in full since all the measures brought by Japan fall under the scope of this compliance proceeding.

**III. US FAILURE TO BRING ITS MEASURES INTO CONFORMITY WITH THE DSB'S RECOMMENDATIONS AND RULINGS IN THE ORIGINAL DISPUTE**

**A. US FAILURE TO COMPLY WITH RESPECT TO THE ZEROING PROCEDURES**

9. The European Communities fails to understand the US entrenched position as regards its compliance with respect to the "as such" finding as contained in the DSB's recommendations and

rulings in the original dispute. In this respect, it is evident that the single measure (i.e., the zeroing procedures) was not limited to one type of comparison in original investigations. It is also evident that the United States cannot change at this compliance stage the single measure challenged in the original dispute into a narrower measure simply covering one aspect of the zeroing procedures (i.e., the use of zeroing in W-to-W comparison in original investigations).

10. The European Communities considers that the United States has not yet modified its zeroing procedures and, thus, continues using zeroing in any anti-dumping determination (with the exception of original investigations when applying W-to-W comparison methods in original investigations). In particular, the USDOC has consistently maintained in recent administrative review proceedings that "because no change has yet been made with respect to the issue of 'zeroing' in administrative reviews, the Department has continued with its current approach to calculating and assessing antidumping duties in this administrative review". Therefore, the United States has failed to comply with the DSB's recommendations and rulings in the original dispute with respect to the "as such" finding against zeroing procedures.

#### B. US FAILURE TO COMPLY WITH RESPECT TO EIGHT ADMINISTRATIVE REVIEWS

11. Japan argues that the United States has continued collecting duties based on zeroing after the end of the reasonable period with respect to five administrative reviews challenged in the original dispute and three subsequent administrative reviews, thereby violating the DSB's recommendations and rulings. The European Communities agrees with the views expressed by Japan and would like to make the following observations.

##### **1. Liability to pay anti-dumping duties in the US system is determined at a later stage than the time of importation**

12. The European Communities considers that the date of entry is irrelevant when assessing the US compliance in this case. In light of the characteristics of the US system, the anti-dumping liability – whether or not it is "created" at the time of importation – is not finally determined at that time, but only at a later stage. According to the US system of duty assessment, the final and true liabilities are established by the USDOC based on a subsequent retrospective accounting exercise. This exercise may lead to the conclusion that the importer is not responsible for the payment of duties. Moreover, importers can appeal the amounts established by the USDOC in accordance with US municipal law. These proceedings may result in a finding of no liability at all and, thus, no obligation to pay duties (or, alternatively, a modification of the amounts to be collected due to, for example, arithmetical errors made by the USDOC when calculating the duties). In these circumstances, the European Communities cannot understand why the United States would not, in that simple accounting exercise, adjust its calculations so as to properly reflect the degree of dumping (i.e., without zeroing) that occurred (if any), having a full opportunity to do so (in subsequent reviews of the measures concerned or in the appeals filed by importers against them), and at least with effect from the end of the reasonable period of time.

##### **2. US compliance with the DSB's recommendations and rulings is prospective**

13. In the EC's view, prospective implementation of the DSB's recommendations implies that, after the end of the reasonable period, a WTO Member is prevented from taking positive acts which are diametrically contrary to the adopted DSB report. In this case, prospective implementation requires one to look at the actions taken by the United States after the end of the reasonable period of time (i.e., 24 December 2007) in order to examine whether the United States has adopted measures contrary to the DSB's recommendations and rulings in the original dispute.



14. The European Communities agrees with Japan that, in order to comply with the DSB's recommendations and rulings, the United States should stop taking any positive acts providing for the final payment of duties or retention of cash deposits based on zeroing with respect to those entries not finally liquidated before the end of the reasonable period. This form of compliance is *prospective* in nature.

15. The European Communities also agrees with Japan's observation that the adopted DSB reports do not constitute the temporal moment when a new treaty obligation enters into force; rather, they amount to an interpretation of the covered agreements and, thus, a declaration of the obligations for the Member concerned. In other words, the adopted DSB reports in the case at hand merely confirmed that the use of zeroing procedures in those circumstances is prohibited by the Anti-Dumping Agreement. Consequently, the US obligation to avoid using zeroing was already there when the Anti-Dumping Agreement entered into force on 1 January 1995. In light of this, any enforcement of the adopted DSB reports with respect to entries which occurred well after 1 January 1995 cannot amount to retrospective implementation.

### **3. Retrospective and prospective anti-dumping systems lead to identical results as regards compliance**

16. Contrary to what the United States asserts, the European Communities considers that, if duties have not yet been liquidated by the end of the reasonable period of time, no new measure can be taken that is inconsistent with the adopted DSB reports regardless of whether the Member concerned applies a retrospective or prospective duty assessment system. In both prospective and retrospective anti-dumping systems, after the end of the reasonable period of time to comply with the DSB's recommendations and rulings, no new measure (or omission) can be taken that is inconsistent with the adopted DSB report, regardless of the date of entry covered by that measure.

### **4. Conclusion**

17. In light of the foregoing, the European Communities agrees with Japan that the United States has not complied with the DSB's recommendations and rulings in the original proceeding and, thus, remains in violation of Articles 2.4.2 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the *GATT 1994*, since it continues collecting anti-dumping duties and establishing new cash deposit rates based on zeroing with respect to the administrative reviews challenged in the original dispute as well as the three subsequent reviews listed by Japan.

### **C. US FAILURE TO COMPLY WITH RESPECT TO ONE SUNSET REVIEW**

18. Japans observes that the United States has not taken any actions to bring one of the sunset reviews challenged in the original dispute into conformity with the DSB's recommendations and rulings. In contrast, the United States argues that it had the right to do nothing in this case since the majority of margins considered in the likelihood of dumping determination cannot be considered as WTO-inconsistent since they either predate the *Anti-Dumping Agreement* or did not involve the use of zeroing. In the EC's view, the United States is (once more) trying to disregard the specific findings of the adopted DSB report in the original dispute. Indeed, as the Appellate Body noted, "[t]he Panel found, as a matter of fact, that, in its likelihood-of-dumping determination, the USDOC relied 'on margins of dumping established in prior proceedings' (...) and [t]he Panel further found that these margins were calculated during periodic reviews 'on the basis of simple zeroing'" (emphasis added). Thus, the European Communities fails to understand on what basis the United States seeks to reopen a factual issue which was already established in the original proceeding. In addition, in EC's view, the United States cannot remain completely passive with respect to the sunset review concerned since it provides for the legal basis for the continued maintenance of the anti-dumping order in question.

19. Consequently, the European Communities considers that the United States has failed to comply with the DSB's recommendations and rulings in the original dispute when abstaining from taking any actions to review its likelihood of recurrence of dumping determination in the sunset review concerned.

#### **IV. CONCLUSIONS**

20. In light of the foregoing, the European Communities agrees with Japan's claims that the United States has failed to comply with the DSB's recommendations and rulings in the original dispute. The European Communities reserves the right to comment on other issues at a later stage in this compliance proceeding.

## ANNEX B-2

### THIRD PARTY WRITTEN SUBMISSION OF HONG KONG, CHINA

(8 August 2008)

#### 1. Introduction

1. Hong Kong, China welcomes the opportunity to present its views as a third party before this Article 21.5 Panel. Hong Kong, China has strong systemic concerns over the full compliance with the recommendations and rulings of the DSB in this dispute where the procedures of zeroing and the implementation obligations pertaining to administrative reviews under a retrospective duty assessment system are at issue.

2. Among the issues raised in these compliance proceedings, this submission focuses on two key issues.

#### 2. Implementation Obligations for Unliquidated Entries after the RPT

3. With respect to the five named administrative reviews<sup>1</sup> which the US failed to take action to implement the DSB's relevant recommendations and rulings as claimed by Japan, it is noted that the US argued in its first written submission essentially that implementation should be assessed by looking at the treatment accorded to goods entered *after* the expiration of the RPT. According to the US, the focus for implementation purposes should be on the time of entry of merchandise. It followed that for goods subject to the five administrative reviews, which were imported *before* the end of the RPT, the US might continue to collect excessive duties on the basis of the WTO-inconsistent zeroing procedures after the RPT.

4. Hong Kong, China questions the legal basis of the US assertions. Contrary to what the US submitted, there is no text in either GATT 1994 or the AD Agreement or the DSU that supports the US contention that the date of importation of the goods concerned is deterministic as to whether they are subject to the implementation of the DSB's recommendations and rulings. It is not clear in what way the provisions cited by the US<sup>2</sup> support its claims. None of the named provisions address, textually or contextually, the question of implementation obligations. Indeed, most of them serve to distinguish a prospective system from a retrospective system, or to address the question of when provisional measures shall take effect, and both of which are not matters in dispute.

5. While it is not disputed that the date of importation is one of the relevant considerations for the purposes of implementation, it is by no means exhaustive or exclusive as far as AD measures and obligations are concerned. As mentioned by the US in paragraph 61 of its first written submission, "notwithstanding that duties are generally levied at the time of importation, Members may instead require cash deposits or other security, in lieu of the duty, pending final determination of the relevant information". It is noted that the time gap that exists between collecting cash deposits at the time of importation and the liquidation of the same import entries subsequently upon final determination in

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<sup>1</sup> Japan First Written Submission of 30 June 2008, paragraph 51.

<sup>2</sup> US First Written Submission of 28 July 2008, paragraphs 59-64.

administrative reviews is a distinct feature of the retrospective duty assessment system administered by the US.

6. Insofar as the present case is concerned, entries of certain of the subject goods before the end of the RPT would continue to be liquidated by the US after the RPT on the basis of the administrative reviews already found to be WTO-inconsistent.<sup>3</sup> The US did not dispute this. Hong Kong, China submits that it is this continuous legal effect, that the WTO-inconsistent administrative reviews have on the acts of liquidation which would take place beyond the RPT, which is relevant in terms of implementation obligations for the US; and that the time of liquidation, rather than the time of importation, should be the correct focus for implementation purposes and the proper basis for implementation obligations. The above position that finality of duties and obligations occur only upon liquidation is congruent with the view of the Appellate Body on the retrospective duty assessment system that "[u]ntil an assessment review is conducted and the import entries are liquidated, there remains uncertainty ..., so that dumping remains in this respect, and until then, "suspected"". <sup>4</sup> This has actually been underlined by the US in that same case where the Panel noted that "[t]he United States argues that in no case is assessment – whether at the cash deposit rate or otherwise – conducted at the time of entry, and in all cases the cash deposit collected at the time of entry is a baseline proxy of the amount that may ultimately be assessed, and is never itself the final liability".<sup>5</sup>

7. The US considers that Japan's position provides for retrospective relief since it would apply to merchandise entered into the US territory before the end of the RPT. In other words, according to the US, "retrospectivity" of implementation is determined by the date of entry of the imports. However, Hong Kong, China, like Japan<sup>6</sup>, takes the view that the key date is that of the action undertaken by the WTO Member concerned rather than the date of entry of the imports. Furthermore, the prospective nature of the implementation of the DSB's recommendations implies that at the end of the RPT, a WTO Member is prevented from taking actions which are contrary to the DSB's recommendations. This relief is *prospective* since the WTO Member concerned is required to ensure that the actions it takes *as of* the end of the RPT are WTO-consistent. This implies that the US should in the present case refrain from collecting duties, as of the end of the RPT, on the basis of WTO-inconsistent zeroing procedures even though it relates to imports entered before the end of the RPT. This approach is the only one which is consistent with the objective and purpose of the WTO dispute settlement which is to ensure the prompt settlement of disputes, taking into account in particular the requirements under Article 19 of the DSU for the WTO Member concerned to bring the measure into conformity with the relevant covered agreement and Article 21 of the DSU to ensure a "prompt compliance with recommendations or rulings of the DSB".

8. As regards the contention of the US that inequality might be created between retrospective and prospective duty assessment systems should the case of Japan prevail<sup>7</sup>, Hong Kong, China submits that the different bases and endpoints of implementation obligations for the two duty assessment systems reflect merely their intrinsically different characteristics and features as envisaged and permitted under the AD Agreement. The question of uneven "level playing field" does not arise. If the objective of the AD Agreement were to achieve complete likeness, it would not expressly provide for two different duty assessment systems<sup>8</sup>, and would not under the retrospective system

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<sup>3</sup> Japan First Written Submission of 30 June 2008, paragraph 136.

<sup>4</sup> Appellate Body Report, *US – Measures Relating to Shrimp from Thailand/Customs Bond Directive for Merchandise Subject to Anti-dumping/Countervailing Duties*, WT/DS343/AB/R, WT/DS345/AB/R, paragraph 226.

<sup>5</sup> Panel Report, *US – Measures Relating to Shrimp from Thailand*, WT/DS343/R, paragraph 7.106.

<sup>6</sup> Japan First Written Submission of 30 June 2008, paragraphs 141-148.

<sup>7</sup> US First Written Submission of 28 July 2008, paragraphs 68-69.

<sup>8</sup> See for instance Article 9.3 of the AD Agreement.

allow the collection of cash deposits at the time of importation and permit subsequent adjustments, including upward adjustments of duties, pending final determination of liability, a feature not available to the prospective system. Also of note is that even under the retrospective duty assessment system, importing Members are under no WTO obligations not to liquidate relevant import entries within the RPT. It is a matter of decision, under domestic policy and practices, for the US not to liquidate the import entries before the expiration of the RPT and hence resulting in their being subject to the implementation obligations.

### 3. Implementation Obligations Pertaining to the Cash Deposits Rates

9. Japan also identified in its first written submission three administrative reviews<sup>9</sup> whose implementation obligations pertaining to cash deposits with which the US failed to comply. The US countered that it had complied with the recommendations and rulings of the DSB since the cash deposit rates as established by the three reviews that were found to be WTO-inconsistent had already been terminated and that new cash deposit rates pursuant to subsequent reviews had already been put in place.<sup>10</sup>

10. Hong Kong, China submits that in compliance with the implementation obligations in the present case, what is essentially required for the US is that its WTO-inconsistent procedures of zeroing be terminated.<sup>11</sup> By conducting subsequent reviews with the same WTO-inconsistent zeroing procedures, it is difficult to see how the implementation obligations of the US could have been fulfilled. While the original reviews might have been superseded, the succeeding reviews continued to apply the same WTO-inconsistent procedures of zeroing in establishing cash deposit rates, hence giving rise to the same violation of the WTO obligations.

11. By also asserting that the subsequent administrative reviews were "incidental" under the US retrospective duty assessment system, the US claimed that they were not "measures taken to comply" under Article 21.5 of the DSU and were outside the ambit of the compliance Panel.<sup>12</sup> It should be mindful that, under the retrospective duty assessment system of the US, the cash deposit rates are calculated and "superseded" periodically pursuant to successive administrative reviews until the anti-dumping measure is terminated. If subsequent administrative reviews are not deemed to be "measures taken to comply", it will be impossible for WTO Members to obtain Article 21.5 remedy for such WTO-inconsistent duty assessment procedures. And seeking a new panel to review the subsequent administrative reviews may equally be fruitless given that the subsequent reviews will likewise be "incidentally" superseded by further reviews. The WTO-inconsistent practice can then perpetuate endlessly without any meaningful remedy under the DSU. We would like to invite the Panel to give special consideration to the above situation in interpreting the language of Article 21.5 and in determining what are "measures taken to comply" in the present case. In this connection, it is recalled that the aim of Article 21.5 of the DSU, as construed by the Appellate Body, is "to promote the prompt compliance with DSB recommendations and rulings...by making it unnecessary for a complainant to begin new proceedings..."<sup>13</sup>

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<sup>9</sup> Covering Reviews Nos. 1, 2 and 3 as appeared in Japan first written submission of 30 June 2008, paragraph 53.

<sup>10</sup> US First Written Submission of 28 July 2008, paragraph 67.

<sup>11</sup> Appellate Body Report, *US – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, paragraph 190(c) where the AB found that the US acted inconsistently with Articles 2.4 and 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 by maintaining zeroing procedures in periodic reviews.

<sup>12</sup> US first written submission of 28 July 2008, paragraph 44.

<sup>13</sup> Appellate Body Report, *US – OCTG from Argentina* (21.5), WT/DS268/AB/RW, paragraph 151.

**4. Conclusion**

12. On the basis of the submissions of the parties to the dispute available to Hong Kong, China, and for, among others, the reasons stated in this representation, Hong Kong, China respectfully submits that the Panel should find that the US fails to comply with the recommendations and the rulings of the DSB in the original dispute.

13. Hong Kong, China reserves its right to comment on other issues raised in these proceedings.

## ANNEX B-3

### EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF KOREA

(1 September 2008)

1. In Korea's view, although the Dispute Settlement Body ("DSB") held that the application of zeroing by the USDOC in the original investigations, periodic reviews and sunset reviews constitutes violation of various provisions of the AD Agreement, and although the United States had the benefit of an 11-month long reasonable period of time ("RPT") for the implementation of the DSB rulings and recommendations, the United States has simply failed to implement them in good faith.
2. Regarding the jurisdiction of a compliance panel composed under Article 21.5 of the DSU, any form of non-compliance should be reviewed by a compliance panel. As long as the actions or omissions of an implementing Member occur after the expiration of the applicable RPT, the Member has failed to implement the decisions of the DSB in good faith.
3. As to the five periodic reviews being challenged by Japan, the United States did not take *any* action to eliminate the impact of zeroing as mandated by the DSB decisions. This is an omission which constitutes a Member's failure to implement the DSB decisions. Regarding the three subsequent periodic reviews, which were "measures taken to comply," the United States continues to apply the zeroing methodology. So, this is an affirmative action by an implementing Member to disregard the DSB decisions. Korea submits that both types of measures should fall under the jurisdiction of a compliance panel composed under Article 21.5 of the DSU.
4. Korea also agrees with Japan that subsequent review proceedings should be subject to the jurisdiction of the current Panel. Given the proximity in time and the almost identical nature of measures between periodic reviews in the original dispute and the subsequent reviews, one could reasonably argue that these subsequent measures are simply continuation of the WTO-inconsistent measures rather than new, separate measures. These subsequent review proceedings would be effective and meaningful evidence in examining how the implementing Member has implemented so far or plans to implement in the future.
5. To comply with the rulings and recommendations of the DSB, the losing Member must "withdraw" or "eliminate" the measure, or take otherwise comparable action, *before* the expiration of the RPT. In this case, the record evidence proves that the USDOC has continued to apply the zeroing practice in the original investigations, periodic reviews and sunset reviews *after* the 11-month RPT ended on 24 December 2007. The United States, therefore, has failed to implement the DSB ruling and recommendations in due course.
6. The DSB ruled that the zeroing procedures are WTO-inconsistent in both W-to-W comparison methodology and T-to-T comparison methodology in original investigations. In its final notice of 27 December 2006, however, the USDOC declared that it would not implement the decisions of the DSB to the letter. The 21.5 Panel should conclude that not only the United States has failed to implement the recommendations and rulings of the DSB, but also it does not have intention to do so in any foreseeable future.
7. Regarding the administrative reviews challenged by Japan in the current proceedings, the United States effectively ignored the recommendations of the DSB. The United States now attempts

to justify its position by arguing that in each administrative review case, a prior administrative review is superseded by a subsequent review, and that since the administrative reviews challenged in the original dispute do not exist any more with new cash deposit rates, the United States is not required to do anything to implement.

8. In Korea's view, however, the US position unfairly misconstrues the operating mechanism of an administrative review and seriously threatens to undermine the basic purpose of the dispute settlement procedure of the WTO. Such interpretation would make it impossible for a Member, who successfully challenged an administrative review by another Member, to get a viable remedy.

9. The anti-dumping measure challenged here is basically in place for five years until the sunset review, and all the administrative reviews basically accomplish is to adjust final assessment rates upward or downward on an annual basis. So, to some extent, one could argue that the administrative reviews have continuing effect during the five year period.

10. Therefore, by all accounts, an administrative review has not been terminated yet simply because there is a new administrative review going on or completed. An administrative review found to be WTO-inconsistent thus equally requires adequate implementation by the losing party irrespective of existence or completion of a subsequent review or reviews.

11. In 21.5 proceeding, sometimes the panel may face a situation where it is required to make a finding for a measure which has been "technically" or "procedurally" revoked. This would be particularly necessary when a new, subsequent measure is in place, which is quite similar to, and virtually identical with, the now-revoked original measure. Otherwise, a Member may easily revoke the inconsistent measure during the RPT and introduce a new, equally inconsistent measure promptly the whole purpose of which is to circumvent a good faith implementation obligation.

12. In the light of the above, Korea requests the Panel to reject the US position that all administrative reviews originally challenged did not require any action on the part of the United States simply because there were subsequent reviews afterwards. Korea requests the Panel to hold that the United States failed to implement the DSB recommendation in this respect.

13. In the original dispute, the DSB ruled that by relying on margins of dumping calculated in previous proceedings using the zeroing procedures in the two sunset reviews, the United States acted inconsistently with Article 11.3 of the AD Agreement. Despite the ruling, the anti-dumping orders are still in effect.

14. The United States appears to argue that even without zeroing, other independent grounds still support the likelihood or recurrence finding in the said sunset reviews. However, other than downplaying the importance of dumping margins found in prior periodic reviews in the context of a sunset review, the United States does not explain why and how it was able to reach the same likelihood or recurrence finding even with new, non-zeroed, hypothetical dumping margins. This explanation of the United States is particularly confusing since in conducting a sunset review, the margins and results of the original investigations and administrative reviews are examined by the USDOC as key factors.

15. In Korea's view, the sunset reviews of the USDOC cannot be separated from previous anti-dumping proceedings. Considering the way it is implemented, sunset reviews by the USDOC are more or less an extension of previous findings or prediction based on previous findings.

16. As the United States has not implemented the decisions of the DSB in original investigations (T-T comparisons) and periodic reviews, and continues to apply the zeroing practice, one could reasonably argue that the subsequent sunset reviews stand to be tainted by the previous investigations



and periodic reviews unless and until the zeroing practice is fully eliminated in these prior proceedings. As such, Korea submits that the United States has still failed to implement the decisions of the DSB when it comes to the sunset reviews.

17. In sum, despite the Appellate Body's decisions and recommendations to bring its measures into conformity, the United States has simply failed to do so. Korea respectfully submits that for the reasons stated above the Panel should hold that the United States failed to comply with recommendations of the DSB in the original dispute.

## **ANNEX B-4**

### **EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF NORWAY**

(8 August 2008)

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## I. INTRODUCTION

1. As a third party to this dispute, Norway would like to address the following issues discussed in the First Written Submissions of Japan and the United States:

- What measures are included in the scope of this proceeding – in other words – what measures are within the Panel's jurisdiction (chapter II); and
- The extension of one sunset review challenged in the original dispute (chapter III).

## II. JURISDICTION OF THE PANEL

### A. INTRODUCTION

2. Japan claims that in addition to the measures that the United States recognizes as being taken to comply, three subsequent reviews that supersedes the periodic reviews covered by the DSB's rulings and recommendations must be viewed as "measures taken to comply" under DSU Article 21.5, and therefore may be included in the scope of the current proceedings.<sup>1</sup>

3. The United States, on the other hand, sets out that the three subsequent reviews at issue are not "measures taken to comply" and therefore outside the scope of these proceedings.<sup>2</sup> In addition, the United States claims that Japan fails to meet the specificity requirement of Article 6.2 of the DSU, by attempting "to include future, indeterminate measures within the scope of this proceeding".<sup>3</sup> This point will not be discussed by Norway.

### B. THE SCOPE OF ARTICLE 21.5

4. Article 21.5 of the Dispute Settlement Understanding (DSU) determines the scope of a Panel's jurisdiction in compliance proceedings. Panels and the Appellate Body have ruled on the scope of this article several times, and set out the correct legal interpretation to be given to the provision.

5. It follows from the wording of Article 21.5 that both positive acts taken to comply and omissions are covered. The Appellate Body confirmed this in *US – Softwood Lumber IV (21.5 – Canada)*.<sup>4</sup> A complaining Member may thus challenge measures that have been adopted with a view to comply with the recommendations and rulings of the DSB ("consistency"), but also lack of such measures ("existence"), or a combination of both in situations where the measures taken to comply, through omissions or otherwise, may achieve only partial compliance.

6. Further, Panels and the Appellate Body have underlined that it is not up to the complaining Member alone to determine what constitutes a measure taken to comply. Rather, it is for the panel to make this determination.<sup>5</sup> To assist a panel in making a decision on what is a measure taken to comply, the Appellate Body has identified some additional criteria, requiring the panel to scrutinize the relationship between the relevant measures and to examine the timing, nature and effects of the various measures.<sup>6</sup>

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<sup>1</sup> Japan First Written Submission, para. 52.

<sup>2</sup> United States First Written Submission, para. 28.

<sup>3</sup> United States First Written Submission, para. 29.

<sup>4</sup> Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 67.

<sup>5</sup> Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 73 with references.

<sup>6</sup> Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77.

7. The Appellate Body has also underlined that whether the administrative review determination has "the effect of undermining compliance with the DSB's recommendations and rulings" forms an integral part of the assessment of what constitutes a measure taken to comply. And furthermore, that closely connected measures must be identified so as to avoid circumvention.<sup>7</sup>

### C. THE SCOPE OF THE PANEL'S JURISDICTION IN THE CASE AT HAND

8. The three periodic reviews at issue (cfr. paragraph 2 above) were neither part of the original proceedings, nor declared by the United States to be measures taken to comply with the rulings and recommendations by the DSB.<sup>8</sup> It is therefore for the Panel to determine whether or not the reviews are "measures taken to comply" within the meaning of Article 21.5. As set out in Section B, this requires that the Panel makes a concrete analysis of the measures to see if they have a sufficiently close nexus to another measure taken to comply or the recommendations and rulings of the DSB.

9. Norway believes that the Panel, following the same analysis as the panel and the Appellate Body in *US – Softwood Lumber IV (21.5 – Canada)* should find that the three subsequent reviews at issue in the current proceedings are within its terms of reference as "measures taken to comply". This does not mean that all aspects of these reviews fall within the Panel's jurisdiction. The panel and the Appellate Body in *US – Softwood Lumber IV (21.5 – Canada)* limited their analysis to the aspects of later reviews that concerned the methodology contested before the original panel. Based on the same approach, where "zeroing" is the contested methodology, any subsequent measure that continues or discontinues zeroing in respect of the same product (and where the subsequent measure "updates" or "supersedes" (or "replaces") previous calculations of dumping for the products subject to the same anti-dumping order) will be a "measure taken to comply".

10. The United States argues that two of the subsequent reviews identified by Japan cannot be considered measures taken to comply because they pre-date the adoption of the DSB's recommendations and rulings in the original dispute.<sup>9</sup> In light of previous findings of the Appellate Body it must be clear that the United States cannot be heard with this argument.

11. In *US – Softwood Lumber IV (Article 21.5 - Canada)* the Appellate Body assessed a measure that was initiated before the adoption of the report. The measure was considered to be part of the scope of the proceeding, even though it "was not initiated in order to comply with the recommendations and rulings of the DSB and that it operated under its own timelines and procedures (...)". That fact was, nevertheless, not sufficient to overcome the multiple and specific links that existed between the relevant measures. In Norway's view, similar considerations apply in the case at hand. The 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.

12. Furthermore, the Appellate Body has held that "[t]he fact that Article 21.5 mandates a panel to assess "existence" and "consistency" tends to weigh against an interpretation of Article 21.5 that would confine the scope of a panel's jurisdiction to measures that *move in the direction of, or have the objective of achieving, compliance*."<sup>10</sup> Measures cannot be excluded from the scope of compliance proceedings due to the purpose for which they have been taken.<sup>11</sup>

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<sup>7</sup> Appellate Body Report, *US – Subsidies on Upland Cotton (21.5 - Brazil)*, para. 205 with references.

<sup>8</sup> Japan, First Written Submission, para. 62.

<sup>9</sup> United States, First Written Submission, para. 33.

<sup>10</sup> Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 67.

<sup>11</sup> Panel Report, *US – Gambling (21.5)*, para. 6.24.

13. There can be no doubt that the three subsequent periodic reviews at issue has the effect of undermining the compliance by the United States with the recommendations and rulings by the DSB. If these reviews were not to fall within the scope of the proceeding, it would turn the United States' system of duty assessment into a moving target that escapes from anti-duty disciplines. Requiring Japan to initiate new panel proceedings in order to challenge dumping determinations in measures that confirm and supersede the original measures would run counter to the objective of Article 21.5.

14. In light of the above, it is Norway's opinion that all actions and omissions challenged by Japan in this dispute fall within the scope of the Panel's jurisdiction as provided for in Article 21.5 of the DSU, including the three specific subsequent periodic reviews that have superseded the original measures.

### III. SUNSET REVIEWS

15. In its First Written Submission paragraph 29, Japan notes that the United States extended one of the two sunset reviews covered by the DSB's recommendations and rulings in the original dispute through a subsequent sunset review. Japan challenges the United States' omission to implement the DSB's recommendations and rulings with regard to this sunset review. Amongst others, Japan claims that this omission results in a continued violation of Article 11.3 of the *Anti-Dumping Agreement*.<sup>12</sup>

16. The Appellate Body has held that all dumping margins in sunset reviews conducted in accordance with Article 11.3, must conform to the disciplines of Article 2.4. If the margins are calculated using a methodology that is inconsistent with Article 2.4, then this could give rise to an inconsistency not only with Article 2.4, but also with Article 11.3.<sup>13</sup> The Appellate Body has confirmed that this also applies where the investigating authority relies on margins calculated (with the use of zeroing) during periodic reviews.<sup>14</sup>

17. Clearly, an inconsistent Sunset Review cannot serve as a basis for the continuation of an anti-dumping measure. It appears from the facts that the United States did not redo the likelihood-of-dumping determination of the 1999 Sunset Review.<sup>15</sup> The United States appears to argue that it was not required to do so.<sup>16</sup> They believe they would have come to the same likelihood determination in any case and therefore had no need to redo the original determinations.

18. This approach by the United States is misguided. A mere statement in its First Written Submission that the United States would have come to the same result in any case is not sufficient to show compliance. The United States would have to show that it, *with correctly calculated dumping margins*, would have reached the same likelihood determination. And, furthermore, only the correctly calculated margins could then be used to set the anti-dumping duty rates for the future.

19. According to WTO case law, to the extent that a Member relies on dumping margins for a sunset review determination, such margins must always conform to the disciplines of Article 2.4.<sup>17</sup> This means that all margins that are relied upon for a sunset review determination must be calculated without zeroing.

20. Rather than do nothing, the United States would have been expected to do a Section 129 review of the Sunset Review of 1999, redo all margin calculations that were calculated with any form

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<sup>12</sup> Japan, First Written Submission, paras. 155 – 158.

<sup>13</sup> See e.g. Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, paras. 127 and 130.

<sup>14</sup> Appellate Body Report, *US – Zeroing (Japan)*.

<sup>15</sup> United States, First Written Submission, para. 75.

<sup>16</sup> United States, First Written Submission, para. 75.

<sup>17</sup> Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 127.

of zeroing (if they were to rely on dumping margins for their likelihood determination), and present fresh information that could credibly support a likelihood determination.

21. The United States, however, chose to do nothing to bring itself into conformity with the findings and recommendations of the DSB. This omission implies that the United States remains in violation of its obligations under Article 11.3.

#### **IV. CONCLUSION**

22. Norway respectfully requests the Panel to examine carefully the facts presented by the parties to this case in light of our arguments, in order to ensure a proper and consistent interpretation of the DSU and the *Anti-Dumping Agreement*.

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## ANNEX C

### EXECUTIVE SUMMARIES OF THE SECOND WRITTEN SUBMISSIONS OF THE PARTIES

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## ANNEX C-1

### EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF JAPAN

(3 September 2008)

#### I. THE UNITED STATES' PRELIMINARY RULING REQUEST SHOULD BE REJECTED

1. The United States requests the Panel to rule that: the three subsequent reviews (nos. 4, 5 and 6<sup>1</sup>) are not "measures taken to comply" under Article 21.5 of the DSU<sup>2</sup>; and that the Panel cannot examine any "subsequent closely connected" measures.<sup>3</sup> Japan requests that the Panel reject the United States' request, and find that the three subsequent reviews are measures taken to comply subject to Article 21.5 of the DSU. Japan notes that the United States bears the burden of proving that the three subsequent periodic reviews are excluded from the scope of these Article 21.5 proceedings.<sup>4</sup>

#### A. THE PANEL HAS JURISDICTION OVER THE THREE SUBSEQUENT REVIEWS CHALLENGED IN THESE PROCEEDINGS

2. The United States argues that the original *Ball Bearing* periodic reviews (nos. 1, 2, and 3), and the cash deposit rates they establish, were "withdrawn"<sup>5</sup>, "superseded"<sup>6</sup>, "eliminated"<sup>7</sup> and "replaced"<sup>8</sup> by the three subsequent reviews. Specifically, it contends that "has withdrawn" the original reviews "within the meaning of DSU Article 3.7"<sup>9</sup> by "put[ting] in place new cash deposits for the companies examined" in the three subsequent reviews.<sup>10</sup> In the United States' view, therefore, the subsequent reviews are replacement measures that secure the withdrawal of the original measures found to be WTO-inconsistent. The United States expressly declares that the three subsequent reviews are *measures taken to comply* with the DSB's recommendations and rulings regarding the three original *Ball Bearing* reviews.

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<sup>1</sup> In this submission, Japan uses the same numbering of the eight original and subsequent periodic reviews set forth in paragraph 53 of its First Written Submission.

<sup>2</sup> United States' First Written Submission, para. 28.

<sup>3</sup> United States' First Written Submission, para. 50.

<sup>4</sup> Panel Report, *EC – Bananas III (21.5 – US)*, para. 7.79.

<sup>5</sup> United States' First Written Submission, paras. 39, 52, 54, 58, 65, 66 and 67.

<sup>6</sup> United States' First Written Submission, paras. 3 and 44.

<sup>7</sup> United States' First Written Submission, paras. 44 and 54.

<sup>8</sup> United States' First Written Submission, para. 44.

<sup>9</sup> United States' First Written Submission, para. 52.

<sup>10</sup> United States' First Written Submission, para. 67. *See also* para. 44 ("*[t]he original reviews were superceded by subsequent reviews because the cash deposit rate from one review was replaced by the cash deposit rate from the next review.*"), para. 65 ("*in each of the five challenged administrative reviews that were the subject of the DSB's recommendations and rulings in the original dispute, the United States has withdrawn the cash deposit rate resulting from the challenged review and calculated new cash deposit rates pursuant to separate and distinct administrative reviews.*"), and para. 67 ("*In these subsequent determinations, Commerce . . . put in place new cash deposits for the companies examined*" and, as a consequence, "*the former cash deposit rate is terminated . . . Thus, the United States has complied with the recommendations and rulings of the DSB by withdrawing the challenged measures.*") (emphasis added).



3. Nonetheless, the United States argues that reviews issued before adoption of the DSB's recommendations and rulings are not "measures taken to comply" because, in view of the timing of the measures, it did not *intend* to comply with the DSB's recommendations and rulings when it adopted the three subsequent reviews. However, panels and the Appellate Body have consistently rejected an interpretations of Article 21.5 that focuses on the intent of the implementing Member.<sup>11</sup> Despite a recognized lack of intent to comply, the Appellate Body held that a periodic review was a "measure taken to comply" where it enjoyed "multiple and specific links" to the dispute.<sup>12</sup>

4. Under Article 3.7 and 19.1 of the DSU, a measure may, by its effects, 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. Articles 3.7, 19.1 and 21.5 must be interpreted harmoniously.<sup>13</sup> Thus, under Article 21.5, an implementing Member must be able to rely on a measure that, in effect, "secure[s] withdrawal", and/or "bring[s]" an original measure into conformity, to rebut a claim that no "measure taken to comply" is in "existence". Neither the implementing Member's intent nor its adoption of the measure prior to the DSB's recommendations and rulings preclude it from asserting such a defence. A compliance panel must equally be able to examine the "consistency" with the covered agreements of any measure that allegedly "secure[s] withdrawal" of an original measure and/or "bring[s]" it into conformity with its obligations.

5. The Panel should, therefore, reject the United States' arguments that the three subsequent reviews cannot be "measures taken to comply" simply because the USDOC had no intention of complying with the DSB's recommendations and rulings when it adopted the measures.

6. The United States' arguments regarding the status of the three subsequent reviews are tainted by a fundamental inconsistency. Japan claims that the United States has not adopted appropriate compliance measures that bring the five original measures into conformity with WTO law. In reply to Japan's non-"existence" claims, the United States contends that "measures taken to comply" do exist within the meaning of Article 21.5, namely, the three subsequent reviews. In arguing that these reviews secure compliance, the United States relies heavily on the *effects* of the reviews, excluding the USDOC's *intent* in adopting them. Simultaneously, in reply to Japan's claim concerning the "consistency" of the three subsequent reviews with the covered agreements, the United States contends that these measures are *not* "measures taken to comply" within the meaning of Article 21.5. Its argument that these measures are *not* "taken to comply" relies heavily on the USDOC's *intent* in taking them, excluding the *effects* of the three subsequent reviews. On the US view, Article 21.5 would permit an examination of the "existence" of any measure whose effect is to secure compliance; however, the "consistency" of such a measure could be reviewed solely if the measure was adopted for the purpose of complying.

7. Japan rejects this asymmetrical interpretation because it would seriously undermine the utility of Article 21.5. In Japan's view, Article 21.5 applies fully to any measure that the implementing Member declares secures the withdrawal of the original measures, within the meaning of Article 3.7 of the DSU.

8. The United States must, therefore, accept the consequences of its own declaration that the three subsequent reviews are "measures taken to comply" that "withdraw" the original *Ball Bearing*

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<sup>11</sup> Panel Report, *US – Gambling (21.5)*, para. 6.24, quoting Appellate Body Report, *US – Softwood Lumber IV (21.5)*, para. 67.

<sup>12</sup> Appellate Body Report, *US – Softwood Lumber IV (21.5)*, para. 88.

<sup>13</sup> Appellate Body Report, *Korea – Dairy*, paras. 80-81; Appellate Body Report, *Argentina – Footwear (EC)*, para. 81; *see also* Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 271; Appellate Body Report, *US – Gasoline*, p. 23; Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 12; and Appellate Body Report, *India – Patents*, para. 45.

periodic reviews.<sup>14</sup> As a result, the Panel can examine these measures in assessing Japan's claims regarding *both* the "existence" *and* "consistency" of "measures taken to comply".

9. Because of the United States' declaration that the three subsequent reviews are "measures taken to comply", there is no reason for the Panel to enquire into the existence of the substantive connections that, absent such a declaration, can bring a measure within the scope of Article 21.5. Nonetheless, Japan comments on the United States' arguments regarding the connections between the three subsequent reviews and the three original *Ball Bearing* reviews subject to the DSB's recommendations and rulings. The US arguments are beset with contradictions. On the one hand, it asserts that two of the three subsequent reviews (nos. 4 and 5) "have *no* connection with the DSB's recommendations and rulings".<sup>15</sup> Yet, on the other hand, as set forth in paragraph 2, it argues that these same reviews (and review no. 6) bring about compliance with the DSB's recommendations and rulings regarding reviews nos. 1, 2, and 3.<sup>16</sup>

10. It is absurd to suggest that such measures have "no connection with the DSB's recommendations and rulings".<sup>17</sup> To the contrary, they have obvious and important connections to the recommendations and rulings that they allegedly implement.<sup>18</sup> In light of these connections, the subsequent reviews are "measures taken to comply", irrespective of the United States' explicit recognition of that fact.

11. The United States also omits to mention certain of the specific substantive connections relied upon by Japan. In particular, it does not mention that a strong link exists between the reviews in terms of the "*specific component*" of the measures that was found to be WTO-inconsistent in the original proceedings, and that is challenged in these proceedings. That "specific component" is, of course, the zeroing methodology used to make the dumping determinations. Japan argues that *solely this specific component* is within the scope of these proceedings.<sup>19</sup> Thus, contrary to the United States' suggestion, neither every periodic review nor every aspect of every review is subject to these compliance proceedings.

12. For all these reasons, as well as those set forth in Japan's First Written Submission, Japan submits that the three subsequent reviews fall within the scope of these proceedings.

#### B. FUTURE CLOSELY CONNECTED MEASURES MAY FALL WITHIN THE SCOPE OF THESE PROCEEDINGS

13. The United States objects to Japan's reservation of the right to challenge future periodic reviews that are closely connected to the DSB's recommendations and rulings.<sup>20</sup> It argues that Japan fails to identify a specific measure, and seeks to include "future, indeterminate measures" to be adopted after the date of the Panel's establishment. Japan requests that the Panel reject the United States' request. *Australia – Salmon (21.5)*<sup>21</sup> and *EC – Bananas III (21.5 – US)*<sup>22</sup> support

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<sup>14</sup> United States' First Written Submission, paras. 51, 52, 54, 65 and 67.

<sup>15</sup> United States' First Written Submission, para. 34.

<sup>16</sup> United States' First Written Submission, para. 67.

<sup>17</sup> United States' First Written Submission, para. 34.

<sup>18</sup> For Japan's description of these connections, *see further* Japan's First Written Submission, paras. 90-93.

<sup>19</sup> Appellate Body Report, *US – Softwood Lumber IV (21.5)*, para. 83. ("[A] specific component" of a subsequent review was a "measure taken to comply" in circumstances where the same "specific component" was found to be WTO-inconsistent in an original measure concerning the same anti-dumping order, affecting the same product, exported by the same companies, from the same country.)

<sup>20</sup> United States' First Written Submission, para. 50.

<sup>21</sup> Panel Report, *Australia – Salmon (21.5)*, para. 7.10 (sub-para. 24). (the Panel held that its terms of reference included a Tasmanian import ban, "even though the ban was only introduced subsequent to this Panel's establishment and therefore not *expressis verbis* mentioned in Canada's Panel request.")

Japan's view. The Panel's terms of reference are sufficiently specific for the United States to identify exactly the measures concerned.<sup>23</sup> Finally, Japan considers that the United States' request is not ripe unless and until Japan seeks to include a future periodic review within the scope of these proceedings. There is, therefore, no reason for the Panel to exclude the possibility for Japan to challenge subsequent closely connected "measures taken to comply".

## II. THE UNITED STATES HAS FAILED TO BRING ITS WTO-INCONSISTENT MEASURES INTO CONFORMITY WITH ITS WTO OBLIGATIONS

### A. THE UNITED STATES HAS FAILED TO COMPLY FULLY WITH THE DSB'S RECOMMENDATIONS AND RULINGS WITH RESPECT TO THE ZEROING PROCEDURES

14. The United States argues that by announcing that it "would no longer apply the zeroing procedures in W-to-W comparisons in original investigations", it has "eliminated the single measure that Japan had challenged and that was found to be 'as such' inconsistent".<sup>24</sup> According to the United States, "[n]ow that zeroing is no longer used in W-to-W comparisons in antidumping investigations, the single measure that was subject to the DSB's recommendations and rulings has been withdrawn".<sup>25</sup>

15. Thus, the United States believes that eliminating the use of zeroing in *one* narrow situation results in the elimination of the zeroing procedures in *all* the other situations in which they were found to be WTO-inconsistent. However, a small limitation to the scope of application of a general rule does not eliminate the rule itself. Equally, implementing one of the DSB's four recommendations and rulings regarding the zeroing procedures does not amount to implementation of all four of those recommendations and rulings.

16. The United States also offers no evidence whatsoever to demonstrate that it has, in fact, eliminated the "single rule or norm"<sup>26</sup> in the various "manifestations" and situations in which it was found to be WTO-inconsistent. To the contrary, the evidence shows that the United States expressly decided in the *Zeroing Notice*<sup>27</sup> to limit its change of zeroing policy to W-to-W comparisons in original investigations. That decision is confirmed by: (1) a string of dumping determinations made since the end of the RPT that apply the zeroing procedures<sup>28</sup>; and (2) decisions of United States domestic courts since the end of the RPT.<sup>29</sup> The evidence, therefore, demonstrates that the

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<sup>22</sup> Panel Report, *EC – Bananas III (21.5 – US)*, para. 7.493. (The compliance panel agreed with the United States, as complainant, that a measure adopted many years after the end of the RPT could be a "measure taken to comply", even though not recognized as such by the implementing Member. This ruling supports the view of the panel in *Australia – Salmon (21.5)* that implementation is "an ongoing" process that can extend over many years.)

<sup>23</sup> WT/DS322/27, para. 12. The scope of Japan's panel request is circumscribed to include solely specific measures that are "closely connected" to the original measures and that are "measures taken to comply".

<sup>24</sup> United States' First Written Submission, para. 79.

<sup>25</sup> United States' First Written Submission, para. 80.

<sup>26</sup> Panel Report, *US – Zeroing (Japan)*, footnote 688.

<sup>27</sup> Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin during an Antidumping Investigation; Final Modification, 71 Fed. Reg. 77722, 77724 (Dep't of Comm., 27 December 2006) (Exhibit JPN-35).

<sup>28</sup> In Exhibit JPN-46, Japan presents a table summarizing evidence showing that, in the short time between 1 January 2008 and 11 August 2008, the United States has used the zeroing procedures in at least 13 anti-dumping proceedings other than W-to-W comparisons in original investigations. These include: 11 periodic reviews, one changes circumstances review, and one new shipper review.

<sup>29</sup> In several recent decisions, United States courts have confirmed that the United States has abandoned the use of zeroing only in W-to-W comparisons in original investigations. *Corus Staal BV v. United States*, 502 F.3d 1370, 1374 (Fed. Cir. 2007) (Exhibit JPN-61); *Corus Staal BV v. United States*, 493 F. Supp. 2d 1276,

United States' assertion that it has complied with the DSB's four recommendations and rulings regarding the zeroing procedures is incorrect.<sup>30</sup>

**B. THE UNITED STATES HAS FAILED TO COMPLY FULLY WITH THE DSB'S RECOMMENDATIONS AND RULINGS WITH RESPECT TO THE FIVE ORIGINAL PERIODIC REVIEWS**

17. The United States does not dispute that it has taken no action to revise the importer-specific assessment rates established in the five original periodic reviews. However, it objects that revision of these importer-specific assessment rates would involve retrospective relief, and explains that, in its view, a prospective remedy is one that applies solely to *new entries that occur on or after the end of the RPT*.<sup>31</sup> Thus, it believes that action is *never* required to bring importer-specific assessment rates into conformity with WTO obligations because these rates always apply to entries that occurred before the end of the RPT.

18. The United States' interpretation of the DSU "compromise[s] the effectiveness" of the disciplines in Article 9.3 of the *Anti-Dumping Agreement*, and is "difficult to reconcile with objectives of the DSU".<sup>32</sup> The United States has not demonstrated how the text of the DSU or the *Anti-Dumping Agreement* requires the extreme interpretation that it proposes.

19. The United States argues that the domestic "legal regime" that applied at the time of importation determines "whether [an] import is liable" for anti-dumping duties, and a Member is not required to change that "legal regime" during implementation.<sup>33</sup> The United States' argument is wrong. As the United States recognizes<sup>34</sup>, the domestic "legal regime" that applies at the time of importation is merely *provisional*, and notably *does not even include periodic reviews*, which are adopted *long after importation*. Further, the mere fact that Article VI of the GATT 1994 provides that potential liability for the payment of duties is triggered by importation does not mean that a Member is liberated from its obligations under Article 9.3 of the *Anti-Dumping Agreement* to ensure that the amount of duties definitively collected at a later date does not exceed the margin of dumping.

20. The United States argues that Articles 8.6, 10.1, and 10.6 of the *Anti-Dumping Agreement* demonstrate that "determining whether relief is 'prospective' or 'retroactive' can only be determined by reference to date of entry."<sup>35</sup> Japan disagrees. Articles 8.6, 10.1, and 10.6 set forth rules governing the earliest date of an importer's obligation to pay anti-dumping duties. The United States is not exonerated from its duty to bring the periodic reviews into conformity with Article 9.3 simply because, at the time of importation, it respected Articles 8.6, 10.1, and 10.6. The United States' argument regarding these three provisions is irrelevant.

21. Although the United States argues that the date on which an import enters the United States is decisive<sup>36</sup>, that date is not pertinent under Article 18.3 of the *Anti-Dumping Agreement*, which sets forth when that *Agreement* applies to a review. Under that provision, if an application for a periodic

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1288 (Ct. Int'l Trade 2007) (Exhibit JPN-62); and *NSK Ltd. v. United States*, 510 F. 3d 1375, 1380 (Fed. Cir. 2007) (Exhibit JPN-63).

<sup>30</sup> Even if the Panel were to find that the United States had eliminated the original zeroing procedures, the evidence shows that the original zeroing procedures have been replaced by new zeroing procedures that apply in all situations, except W-to-W comparisons in original proceedings.

<sup>31</sup> United States' First Written Submission, paras. 53 and 54.

<sup>32</sup> Appellate Body Report, *US – Upland Cotton* (21.5), para. 246, citing to Articles 3.3 and 21.1 of the DSU.

<sup>33</sup> United States' First Written Submission, para. 59.

<sup>34</sup> United States' First Written Submission, para. 61. See also the summary of the US arguments in panel report, *US – Customs Bond Directive*, para. 7.89.

<sup>35</sup> United States' First Written Submission, para. 62.

<sup>36</sup> United States' First Written Submission, paras. 59-62.

review had been made on 2 January 1995 in connection with entries that occurred in 1993 and 1994, the Member conducting the review would have been subject to the obligations in Article 9.3, even if the relevant entries occurred before the *Anti-Dumping Agreement* entered into force. The terms of Article 18.3, therefore, defeat the United States' assertion that the "legal regime" prevailing at the time of importation is decisive.

22. The United States' argument that the date of entry is decisive is also contradicted by United States domestic law, which treats the *date of liquidation* as the determining factor in deciding whether a *new methodology* can be applied to *past entries*.<sup>37</sup>

23. In Japan's view, the decisive issue in determining whether the United States must modify a WTO-inconsistent periodic review is *whether the review continues to produce legal effects after the end of the RPT*. If an implementing Member continues to take action pursuant to a review after that date, the rates established in the review must be modified to ensure that future applications of the rates, after the RPT, are WTO-consistent.<sup>38</sup>

24. Here, the five original periodic reviews do continue to be operational because the importer-specific assessment rates will be applied to determine the duties definitively due on entries that were unliquidated at the end of the RPT. The United States' liquidation actions, on the basis of these importer-specific assessment rates, will give rise to new violations, or continue existing violations, of the covered agreements through the collection of excessive duties after the end of the RPT, in particular under Article 9.3 of the *Anti-Dumping Agreement* and Article II:1(a) of the GATT 1994. As a result, the United States must bring the measure into conformity by modifying the importer-specific assessment rates to ensure that they are applied in a WTO-consistent fashion after the RPT expires.

25. Pursuant to Articles 13, 14 and 15 of the *ILC Articles*<sup>39</sup>, a breach of international law results from an act of a State, which may or may not be continuing in nature, or from a series of actions. For an act to be wrongful, the State must be subject to the obligation breached when the breach occurs or during the time that the breach is occurring, as set forth in Article 13 of the *ILC Articles*. The *ILC Articles* are useful in showing that the United States is subject to a "prospective" remedy if it is required to revise the importer-specific assessment rates in the original reviews to ensure that any definitive anti-dumping duties collected, *after the end of the RPT*, on the basis of those rates do not exceed the properly determined margin of dumping.

26. Japan analyses the United States' conduct, after the end of the RPT, pursuant to the five original periodic reviews from the perspective of the *ILC Articles*. This analysis focuses on two acts of the United States, *both of which are taken on the basis of the contested periodic reviews*: (1) the issuance by USDOC of instructions to United States Customs and Border Protection ("USCBP") to collect duties on the basis of the WTO-inconsistent importer-specific assessment rate in question; and, (2) the issuance by USCBP to importers of payment notices on the basis of those instructions, resulting in the collection of definitive duties and liquidation of entries.

27. Whether the USDOC's instructions and the USCBP notices issued after the end of the RPT are viewed (1) as completed acts when they occur, (2) as part of a continuing act, or (3) as part of a series of composite actions, they involve new or continued wrongful acts committed by the United States, *after the end of the RPT*, on the basis of periodic reviews that, *by that time*, should have been brought into conformity with WTO law. This interpretation is fully consistent with the view that

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<sup>37</sup> See *Parkdale International v. United States*, 475 F.3d 1375 (Fed. Cir. 2007) (Exhibit JPN-64).

<sup>38</sup> See also European Communities' Third Party Submission, para. 46 and Hong Kong, China, Third Party Submission, para. 7.

<sup>39</sup> International Law Commission's ("ILC") *Articles on Responsibility of States for Internationally Wrongful Acts* ("ILC Articles").

the DSB's recommendations and rulings have solely prospective effects, because the obligation to bring the original periodic reviews into conformity with WTO law affects solely the United States' future actions after the end of the RPT. Once again, the DSB's recommendations and rulings require nothing more from the United States than that it modify its periodic reviews so that it respects the WTO obligations that applied to the reviews at the time they were initiated and conducted.

28. Japan strongly disagrees that the United States' interpretation "creates inequality" in the implementation obligations that apply to retrospective and prospective duty collection systems.<sup>40</sup> The United States appears to believe that the definitive amount of anti-dumping duties due in a prospective system is fixed with certainty at the time of importation. This view is incorrect because it overlooks that, in a prospective system, the definitive amount of duties due may be revised *after* importation in a periodic review under Article 9.3.2. In such a review, as with the retrospective system, the authorities must examine whether the duties paid on importation exceed the margin of dumping determined for the product as a whole, for all entries covered by the review.<sup>41</sup> Following an Article 9.3.2 review, a refund of some or all of the duties initially paid may be made. Thus, in a prospective system, the definitive amount of duties due is determined in a periodic review, if requested, and not on importation.

29. The United States offers an interpretation that means that the level of protection afforded by anti-dumping duties in its retrospective system is *always* immune from the impact of WTO dispute settlement, whereas the level of protection afforded by duties in a prospective system is not always immune. There is no basis for imposing these differing implementation obligations on the two systems. Japan's interpretation avoids this imbalance by requiring that the results of a periodic review under either Article 9.3.1 or 9.3.2 be revised if the review will continue to be legally operational after the end of the RPT.

30. By omitting to bring the five periodic reviews found to be WTO-inconsistent into conformity with WTO law, the United States acts inconsistently with Articles 17.14, 21.1 and 21.3 of the DSU in the sense that these provisions aim at achieving a satisfactory and prompt settlement of the matter, and is in continued violation of Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994. With respect to Article II:1(a) of the GATT 1994, as shown in Exhibit JPN-40.A, after the end of the RPT, the United States adopted new measures – liquidations instructions and notices – that effect the collection of duties that exceed bound tariffs and that, therefore, give rise to new violations of that provision.

C. THREE SUBSEQUENT PERIODIC REVIEWS COMPLETED BY THE UNITED STATES ARE INCONSISTENT WITH THE ANTI-DUMPING AGREEMENT AND THE GATT 1994

31. In Section I.A above, Japan has explained that the Panel has jurisdiction to examine Japan's claims regarding the three subsequent periodic reviews, which the United States expressly declares are "measures taken to comply". For the reasons set forth in paragraphs 149 to 154 of Japan's First Written Submission, these three reviews are inconsistent with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement*, and Article VI:2 of the GATT 1994, due to the application of the zeroing procedures.

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<sup>40</sup> United States' First Written Submission, heading V.A.2 (preceding para. 68), and paras. 68 and 69.

<sup>41</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 160; Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 121.

D. THE UNITED STATES HAS FAILED TO COMPLY WITH THE DSB'S RECOMMENDATIONS AND RULINGS REGARDING ONE SUNSET REVIEW

32. Japan claims that the United States has failed to implement the DSB's recommendations and rulings regarding the sunset review of 4 November 1999 concerning *Anti-Friction Bearings* ("AFB").<sup>42</sup>

33. In reply, the United States admits that it has done nothing to implement the DSB's recommendations and rulings, but argues that "it was unnecessary to modify the final results of the challenged sunset review."<sup>43</sup> The basis for this startling position is an allegation that "an independent *WTO-consistent* basis for the likelihood of continuance of dumping determination exists".<sup>44</sup> The United States contends that the "majority" of the margins relied on by the USDOC in the 1999 *AFB* sunset review are not inconsistent with the *Anti-Dumping Agreement* because they either pre-date the *Anti-Dumping Agreement* or they did not involve zeroing. Thus, it suggests that there is "no basis" to consider that the sunset review "continues to be in violation of Article 11.3 of the AD Agreement".<sup>45</sup>

34. This argument is groundless and, once more, seeks to undermine the effectiveness of dispute settlement. The Appellate Body found that the 1999 *AFB* sunset review is inconsistent with Article 11.3 of the *Anti-Dumping Agreement*,<sup>46</sup> and the DSB's recommendations and rulings required the United States to bring this WTO-inconsistent measure into conformity with its WTO obligations. As the panel in *US – Gambling (21.5)* held, Article 21.5 proceedings do not provide respondents with an opportunity to re-litigate the WTO-consistency of measures found to be inconsistent in the original proceedings.<sup>47</sup> The Panel cannot reverse the Appellate Body's conclusion that the 1999 *AFB* sunset review is inconsistent with Article 11.3, absent a change in the facts warranting a different conclusion.

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<sup>42</sup> See Japan's First Written Submission, paras. 155 to 158.

<sup>43</sup> United States' First Written Submission, para. 75.

<sup>44</sup> United States' First Written Submission, para. 75.

<sup>45</sup> United States' First Written Submission, para. 73.

<sup>46</sup> Appellate Body Report, *US – Zeroing (Japan)*, paras. 186 and 190(f).

<sup>47</sup> Panel Report, *US – Gambling (21.5)*, para. 6.53.

## ANNEX C-2

### EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE UNITED STATES

(3 October 2008)

#### I. INTRODUCTION

1. Japan challenges the US implementation of the Dispute Settlement Body's ("DSB") recommendations and rulings in *US – Zeroing (Japan)*. As explained in the US first written submission, and more fully below, the United States has eliminated all measures that were found to be WTO-inconsistent. This Panel should also reject Japan's attempt to include measures that are outside the scope of this proceeding.

#### II. THE PANEL SHOULD GRANT THE US REQUEST FOR PRELIMINARY RULINGS

##### A. THE THREE SUBSEQUENT ADMINISTRATIVE REVIEWS OF *BALL BEARINGS FROM JAPAN* ARE OUTSIDE THE SCOPE OF THIS PROCEEDING

2. Japan erroneously claims that the United States considers the three subsequent administrative reviews of *Ball Bearings* to be "measures taken to comply" with the DSB's recommendations and rulings in the original dispute. Much of Japan's argument focuses on US statements that the cash deposit rates from the original administrative reviews were superceded by cash deposits rates from subsequent reviews. However, saying that the results of one administrative review were superceded by the results of another administrative review is not the same thing as saying that the subsequent review was a "measure taken to comply" within the meaning of DSU Article 21.5. The measures subject to the DSB's recommendations and rulings were eliminated as an *incidental consequence* of the US anti-dumping system when the cash deposit rate from one review was replaced by the cash deposit rate from the next review.

3. Japan misrepresents the US arguments concerning the three subsequent administrative reviews. The United States has not asked this Panel to focus on the subjective intent of the United States in adopting the final results in the three administrative reviews. Rather, as the United States has shown, from an objective standpoint, the three subsequent administrative reviews are not measures taken to comply. Concerning the two administrative reviews of *Ball Bearings* that were adopted prior to the DSB's recommendations and rulings, measures taken by a Member prior to adoption of recommendations and rulings typically are not taken for the purpose of achieving compliance with recommendations and rulings and would not be within the scope of an Article 21.5 proceeding. Therefore, the two determinations made long before the DSB's recommendations and rulings cannot be considered measures taken to comply.

4. Japan alleges that the United States argues here, as it did in *US – Softwood Lumber IV (Art. 21.5)* ("*US – SWL IV (Art. 21.5)*"), that an administrative review *initiated* prior to the DSB's recommendations and rulings cannot be a measure taken to comply. The United States, however, makes no such argument in this proceeding, but instead focuses on the date that the final results in the reviews were issued, a factor also considered important in *US – SWL IV (Art. 21.5)*.



5. As to all three of the subsequent reviews of *Ball Bearings*, the US first written submission examined factors that the Appellate Body considered in *US – SWL IV (Art. 21.5)*, and demonstrated why the present dispute is different. It is surprising that Japan thinks that the United States has asked the Panel to focus solely on "the subjective intent of the implementing Member." Japan's exclusive focus on effects is also disingenuous. The effect of the alleged measure taken to comply was just one factor examined in *US – SWL IV (Art. 21.5)*. Timing was another important element, although in this dispute, the timing of the subsequent administrative reviews demonstrates why they cannot be considered measures taken to comply. Japan is also mistaken to dismiss a Member's intentions altogether. The Appellate Body has considered that although a Member's intentions are not dispositive, they may nonetheless be relevant in determining whether a measure is a measure taken to comply. Here, unlike the alleged measure taken to comply in *US – SWL IV (Art. 21.5)*, the final results of the three subsequent reviews were not made "in view of" the DSB's recommendations and rulings. This fact, when considered alongside timing, demonstrates that the three reviews are not measures taken to comply.

6. Japan considers the US arguments concerning the three subsequent reviews as inconsistent. However, it is Japan's own arguments that are plagued by a "fundamental inconsistency." Japan asserts that the three reviews are measures taken to comply, but at the same time argues that the United States has *omitted* to take the necessary action to implement the DSB's recommendations and rulings with respect to the three administrative reviews of *Ball Bearings*. Japan's positions are mutually exclusive.

7. The United States has responded to each of Japan's contradictory arguments. As to the *existence* of measures taken to comply, the United States has shown that the United States removed the WTO-inconsistent cash deposit rate by the expiry of the reasonable period of time ("RPT"). As to Japan's *consistency* claim, the United States has not argued, nor does it argue now, that the three subsequent reviews are measures taken to comply. Moreover, the United States does not advocate an "*intent*-based approach" with respect to measures taken to comply.

8. Japan now tells the Panel that reliance on prior dispute settlement reports is not necessary and that there is no reason to examine the existence of substantive connections between the three subsequent reviews and the DSB's recommendations and rulings. Japan's argument is based on the erroneous proposition that the United States has expressly declared the three subsequent reviews to be measures taken to comply. Moreover, Japan, although dismissing the need to look at substantive connections, proceeds to an examination of the alleged "obvious and important" connections between the DSB's recommendations and rulings and the three subsequent reviews. However, there is no connection between Review Nos. 4 and 5 and the DSB's recommendations and rulings as the final results of these two reviews were issued long before the recommendations and rulings. Japan's attempt to establish close connections as to the 2005-06 administrative review of *Ball Bearings* also fails. This determination did not occur around the same time as US withdrawal of the administrative reviews subject to the DSB's recommendations and rulings, and did not closely correspond to the expiration of the RPT. In addition, unlike the alleged measure taken to comply in *US – SWL IV (Art. 21.5)*, the 2005-06 review did not incorporate elements from a Section 129 determination "in view of" the DSB's recommendations and rulings.

9. Japan, citing *US – SWL IV (Art. 21.5)*, emphasizes the similarity between a specific component (i.e., zeroing) that was found to be WTO-inconsistent in the original proceeding, and a specific component of the three reviews that is challenged here. However, even if the United States used zeroing in all three subsequent reviews, the subject matter of the measures subject to the DSB's recommendations and rulings and the measure at issue was but one factor examined by the Appellate Body in *SWL IV*. For example, the Appellate Body also accorded great importance to the timing of the declared and the undeclared measures taken to comply. Here, timing counsels against a finding that the three administrative reviews are measures taken to comply.

10. In attempting to rebut US arguments on *Australia – Salmon (Art. 21.5)* and *Australia – Leather (Art. 21.5)*, Japan notes that the critical issue in an Article 21.5 proceeding is whether the implementing Member has complied with the DSB's recommendations and rulings. The United States does not disagree. However, Japan is wrong to suggest that the United States considers the question to be whether a Member has complied with its own declared compliance measure. An Article 21.5 proceeding examines, to the extent provided in its terms of reference, whether the Member concerned has adopted a measure taken to comply, and if so, whether that measure is consistent with the covered agreements. Japan also worries about the alleged lack of a remedy were the Panel to find that the three subsequent reviews of *Ball Bearings* fall outside the scope of this proceeding. However, the jurisdiction of an Article 21.5 panel, and the scope of the overall dispute settlement system, is established by the covered agreements, as agreed to by all Members. If Japan or other Members wish to change the rules governing compliance, they must negotiate a change to the covered agreements. And in any event, Japan has obtained relief here in the form of the removal of the specific cash deposit rates that were challenged.

11. Japan continues to assert the relevancy of *US – Upland Cotton (Art. 21.5)* to its argument that the three subsequent administrative reviews are measures taken to comply. However, what Japan fails to comprehend is that in *Upland Cotton*, the Appellate Body was considering the issue of the *existence* of measures taken to comply. Japan also dismisses an important difference between this dispute and the one in *Upland Cotton*. The latter dispute involved an interpretation of the SCM Agreement, and not the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement"). The issue of withdrawing an annually-recurring subsidy in the sense of Article 7.8 of the SCM Agreement, addressed by the Appellate Body in *Upland Cotton*, is not pertinent to a dispute concerning compliance with the AD Agreement, which has no provision analogous to Article 7.8.

#### B. FUTURE ADMINISTRATIVE REVIEWS ARE OUTSIDE THE SCOPE OF THIS PROCEEDING

12. Japan would like to include in this proceeding any subsequent administrative reviews that it claims are "closely connected" to the DSB's recommendations and rulings. However, under Article 6.2 of the DSU, a panel request must identify the *specific* measures at issue, and under Article 7.1, the Panel's terms of reference are limited to those specific measures. Here, each determination that sets a margin of dumping is separate and distinct, and under Article 6.2, Japan had to identify each such measure in its panel request. Further, the future measures are outside the scope of this proceeding because they were not in existence at the time of the Panel's establishment. As prior panels have recognized, a measure that did not yet exist at the time of panel establishment cannot be within a panel's terms of reference.

13. Japan cites *Australia – Salmon (Art. 21.5)* to support its argument that subsequent administrative reviews may be challenged. That dispute is inapposite to the facts before this Panel. Unlike in *Australia – Salmon (Art. 21.5)*, Japan here is not challenging future measures that are related to a regulatory standard that was adopted to comply with the recommendations and rulings of the DSB. Rather, Japan is trying to challenge subsequent administrative reviews, which occur upon request of interested parties on a schedule that is established without regard to dispute settlement proceedings and pursuant to rights and obligations established in the AD Agreement.

14. Japan further cites *EC – Bananas III (Art. 21.5) (US)* to argue that a compliance panel may consider a measure adopted years after the end of the RPT. That point, however, is irrelevant here. In the *EC – Bananas III (Art. 21.5)* dispute, the question before that panel did not pertain to a failure to specify the measure, as required by DSU Article 6.2. That panel's findings are therefore inapposite to this dispute.

15. On 15 September 2008, Japan asked the Panel for permission to file a supplemental submission concerning an alleged additional measure taken to comply by the United States – the final results of the 2006-07 administrative review of *Ball Bearings*. Whatever concerns Japan may have had about ripeness of the US preliminary ruling are now irrelevant given Japan's request. The United States objects to Japan's request to file a supplemental submission. Japan never identified the 2006-07 administrative review in its request for establishment, as required by Article 6.2 of the DSU. The 2006-07 review is outside the scope of this Article 21.5 proceeding, and Japan does not have the right to file a submission on this alleged measure.

### **III. THE UNITED STATES HAS COMPLIED FULLY WITH THE DSB'S RECOMMENDATIONS AND RULINGS WITH RESPECT TO THE FIVE ADMINISTRATIVE REVIEWS**

#### **A. JAPAN HAS FAILED TO ESTABLISH THAT THIS DISPUTE REQUIRES THE RECALCULATION OF FINAL LIABILITY DETERMINED IN THE FIVE ADMINISTRATIVE REVIEWS**

16. Japan asserts that, to properly implement the DSB's recommendations and rulings, the United States must undo action taken with respect to imports that entered the United States prior to the date of implementation. Japan argues that the United States must recalculate the final anti-dumping liability by revising the importer-specific assessment rates determined in the five administrative reviews. Japan's theory of implementation would create substantial inequalities between the implementation obligations for retrospective and prospective anti-dumping systems if implementation obligations in anti-dumping disputes extended to unliquidated imports which entered the United States prior to the date of implementation. This is because there is no analogous concept of unliquidated entries in a prospective system. Under Japan's theory of implementation, there would be *two* implementation obligations under a retrospective system. The Member would modify the measure as it applies to imports occurring after the date of implementation and recalculate final liability as to any prior unliquidated entries.

17. The additional obligation that Japan argues applies to the five administrative reviews in this dispute is to recalculate the final liability applicable to prior unliquidated entries. The crux of Japan's argument is that this obligation would exist in a prospective system if a refund proceeding under Article 9.3.2 of the AD Agreement was challenged at the WTO and the proceeding remained legally operational after the RPT. Japan's argument is unsubstantiated. Japan provides no evidence that Members operating prospective systems allow WTO obligations to be implemented in refund proceedings, and even if so, that does not mean that the Member would be properly interpreting the covered agreements. Furthermore, the operation of the prospective system of at least one Member demonstrates that Japan's argument is incorrect.

18. Japan also argues that limiting implementation obligations to imports entering after the RPT would create advantages for retrospective systems because it would allow the United States to maintain assessment rates indefinitely without an obligation to change these rates. Japan is incorrect. Once a measure is found to be WTO-inconsistent, the same obligation exists under a retrospective or prospective system, including to refrain from assessing duties on post-implementation entries based on the WTO-inconsistent measure. With respect to the five administrative reviews, the United States has withdrawn the measures and completed subsequent administrative reviews before the end of the RPT, and therefore no anti-dumping duties will be assessed on imports entering the United States after the end of the RPT on the basis of the five WTO-inconsistent determinations.

19. In each of the five administrative reviews, the United States determined final liability for the entries in dispute. This final liability was established through importer-specific assessment rates that were calculated in each of the administrative reviews. Revising this final liability as Japan requests would not constitute prospective implementation because it would require Commerce to undo past

acts as to prior unliquidated entries. In this regard, the wording of Japan's argument is instructive. Japan is arguing that "the United States is required to *recalculate* the importer-specific assessment rate determined in the review to bring it into conformity with WTO law." This use of the term "recalculate" demonstrates that Japan is asking Commerce to undo past acts.

20. Japan references the fact that these entries remain unliquidated under US law after the RPT. Japan's argument is premised on a misunderstanding of liquidation. Liquidation is the ministerial act whereby US Customs determines what is owed on an entry. For entries subject to an anti-dumping order, Customs would collect the anti-dumping duties – as previously determined by Commerce – and also collect regular customs duties. Contrary to Japan's misunderstanding, liquidation has nothing to do with the determination of final liability for anti-dumping duties; Commerce makes that final determination at the conclusion of an administrative review.

21. The United States calculated the final liability for the entries in the five administrative reviews but did not liquidate these entries. Liquidation did not occur because these entries were subject to domestic litigation in the United States that included court injunctions suspending liquidation during the pendency of the litigation. Japan's theory of US implementation obligations is dependent on the existence of these injunctions because, without them, the United States would have liquidated all of the entries from the five administrative reviews long before the end of the RPT. Japan is attempting to rely on domestic US litigation to alter its WTO rights.

22. In the US retrospective anti-dumping system, the deadline for liquidation following an administrative review must occur within six months of Commerce's determination of final liability in an administrative review, unless such liquidation is enjoined by domestic litigation. Because WTO disputes will invariably last longer than six months, liquidation will always occur before the conclusion of a WTO dispute – *absent a domestic injunction*. For the five original administrative reviews, liquidation did not occur within six months for exactly this reason. The necessity of these injunctions demonstrates that Japan's attempt to expand implementation obligations to reach these prior unliquidated entries is not grounded in the rights and obligations found in the WTO Agreements.

23. In explaining that "prospective" and "retrospective" relief can only be determined by reference to the date of importation, the United States identified several provisions of the AD Agreement that support its argument, including Articles 8.6, 10.1, 10.6 and 10.8, as well as Article VI:2 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") and its interpretative note. In response, Japan principally relies on Articles 18.3 and 9.3 of the AD Agreement to argue that implementation obligations must extend to prior unliquidated entries.

24. With respect to Article 18.3 of the AD Agreement, Japan notes that this provision provides that the AD Agreement applies to any administrative review based on an application made on or after 2 January 1995. Because the five challenged administrative reviews were initiated pursuant to applications made after that date, Japan reasons that there is no manner in which a requirement to revise importer-specific assessment instructions in the five reviews at issue can be viewed as imposing an obligation on the United States retroactively. Article 18.3 of the AD Agreement cannot mean what Japan asserts it means. As an initial matter, Article 18.3 of the AD Agreement simply provides a transition rule with respect to the new provisions of the AD Agreement and does not address the implementation obligations of Members pursuant to the dispute settlement provisions, nor is it listed as a special or additional dispute settlement rule. Japan's argument also assumes what it wants to prove. Japan claims that a dispute based on a post-WTO entry-into-force application concerning pre-WTO entry-into-force entries could lead to a revision of those pre-entry-into-force entries. However, to reach that result assumes that there is an obligation to revise prior entries, but the validity of that assumption is precisely the question at issue.

25. Furthermore, through Article 18.3 of the AD Agreement, Japan attempts to introduce an implausible definition of "retroactivity" into WTO anti-dumping disputes. According to Japan, as

long as a WTO dispute involves an administrative review that was based on an application received on or after 2 January 1995, then the dispute could result in an obligation to revise that administrative review *in any manner*. Article 18.3 of the AD Agreement cannot support application of such an implausible definition of "retroactive" to the AD Agreement.

26. With respect to Article 9.3 of the AD Agreement, Japan notes that this article contains disciplines that apply to importer-specific assessment instructions. According to Japan, an administrative review by definition determines an importer-specific assessment rate for entries occurring before initiation of the review, before a WTO dispute challenging the administrative review, and long before the end of the RPT. Japan concludes that the US argument that implementation applies only to imports occurring after the date of implementation means that WTO-inconsistent assessment rates need never be brought into conformity, rendering Article 9.3 of the AD Agreement a nullity. US implementation obligations under Article 9.3 of the AD Agreement are the same as those for a Member operating a prospective system. Under either system, if the results of a review pursuant to Article 9.3 are challenged and found to be WTO-inconsistent, implementation does not require the Member to undo the results of the review as to the period examined and (presumably) refund additional duties.

27. Japan's argument under Article 9.3 of the AD Agreement fails to distinguish between obligations that exist under the AD Agreement and implementation obligations under the DSU. The United States does not dispute that Article 9.3 of the AD Agreement obliges WTO Members to ensure that the amount of anti-dumping duty collected not exceed the margin of dumping established under Article 2 of the AD Agreement. However, the existence of this obligation does not establish that the United States must retroactively recalculate final anti-dumping liability. Japan attempts to bolster its Article 9.3 argument by citing to *US – Upland Cotton (Art. 21.5) (AB)* and arguing that the United States interpretation of the DSU compromises the effectiveness of the AD Agreement and conflicts with the objectives of the DSU. However, it is Japan's interpretation that would result in significant damage to the dispute settlement system by creating inequality between WTO dispute resolution in prospective and retrospective anti-dumping systems and by making implementation obligations entirely dependent upon domestic US litigation.

#### B. JAPAN'S ARGUMENT IMPROPERLY RELIES ON THE ARTICLES ON RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS

28. Japan argues that the International Law Commission's ("ILC") Articles on Responsibility of States for Internationally Wrongful Acts ("ILC Articles") confirm Japan's arguments with respect to the five original administrative reviews. The ILC Articles are not incorporated either expressly or implicitly into the covered agreements, and do not constitute an element of WTO law. In addition, when interpreting the provisions at issue in this proceeding, there is no reason for this Panel to invoke the ILC Articles for interpretive guidance or support. There is no provision in the *Vienna Convention* justifying reference to the ILC Articles. Lastly, the ILC Articles are not "relevant rules of international law" for purposes of this dispute. The ILC Articles themselves make plain that they are not intended to apply in the situation presented by this proceeding. Article 55 provides that the ILC Articles "do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law." Here, the specific WTO provisions on dispute settlement and compliance trump the general rules as set forth in the ILC Articles.

#### C. JAPAN HAS NOT ESTABLISHED A VIOLATION OF DSU ARTICLES 17.14, 21.1, AND 21.3, NOR A VIOLATION OF ARTICLE II OF THE GATT 1994

29. Japan argues that the United States has failed unconditionally to accept the Appellate Body's findings with respect to the five original administrative reviews in this dispute in violation of Article 17.14 of the DSU. Nothing Japan argues can change the fact that the United States

unconditionally accepted the recommendations and rulings of the DSB in this dispute. Japan also argues that the alleged US failure to promptly comply with the recommendations and rulings of the DSB concerning the five original administrative reviews is inconsistent with Articles 21.1 and 21.3 of the DSU. The United States maintains that these DSU provisions do not impose a substantive obligation on Members. The panel reports to which Japan cites do not support Japan's claims as to these articles.

30. The United States reiterates its general objection to Japan's Article II claims. These Article II claims are entirely derivative, and the Panel is not required to address them to resolve this dispute. Japan also failed to request findings from the Panel under these Article II claims. Even were the Panel to address Japan's claims under Article II of the GATT 1994, the United States notes that the liability for anti-dumping duties that Japan claims resulted in collection of duties above the bound rate was incurred prior to the expiration of the RPT. 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.

**D. JAPAN HAS FAILED TO ESTABLISH A CONTINUING VIOLATION OF ARTICLES 2.4 AND 9.3 OF THE AD AGREEMENT AND ARTICLE VI:2 OF THE GATT 1994**

31. The United States brought the five original administrative reviews into conformity with the AD Agreement and the GATT 1994 by withdrawing each of these measures. As such, these administrative reviews cannot serve as a basis to claim a continued violation of the covered agreements.

**IV. THIS PANEL SHOULD NOT REACH THE MERITS OF JAPAN'S CLAIMS CONCERNING THE THREE SUBSEQUENT ADMINISTRATIVE REVIEWS**

32. As the United States has explained here and in its prior submission, these reviews of *Ball Bearings from Japan* are not measures taken to comply and are not properly within the scope of this proceeding. Therefore, this Panel should not reach the issue of the WTO consistency of these alleged measures.

**V. THE UNITED STATES HAS COMPLIED FULLY WITH THE DSB'S RECOMMENDATIONS AND RULINGS WITH RESPECT TO THE SUNSET REVIEW OF ANTI-FRICTION BEARINGS**

33. In the underlying dispute, Japan challenged a specific aspect of the *AFB* sunset review, namely the reliance upon margins calculated with zeroing. The Appellate Body found that the United States acted inconsistently with the AD Agreement in that review, "when it relied on margins of dumping calculated in previous proceedings through the use of zeroing." Accordingly, both Japan's challenge and the Appellate Body's finding were limited to the extent the United States relied on margins from previous proceedings calculated *with zeroing*. Japan's assertion that the United States should have presented the arguments defending its reliance upon non-zeroed margins and pre-WTO margins in the original proceeding is unfounded.

34. Japan's reliance on the dispute settlement reports in *US – Gambling (Art. 21.5)* and *US – Shrimp (Art. 21.5)* is misplaced. In this dispute, the United States is not seeking a new finding on that part of the sunset review determination that was already litigated and on which there were recommendations and rulings. Rather, the United States is asking this Panel to examine issues which were never addressed by the panel or the Appellate Body (i.e., the reliance upon margins that were determined *without zeroing* or the margins that predated the AD Agreement).

35. Commerce in the sunset review of *AFB* was required to determine the likelihood of dumping on an order-wide basis, and did so by examining the results from administrative reviews concluded

during the sunset review period. Its finding of likelihood of dumping was supported by higher than *de minimis* margins that were calculated without zeroing. In the fifth administrative review, Commerce reviewed twenty-one respondents, eleven of which failed to cooperate. For ten of those eleven respondents, Commerce applied the dumping margin of 106.61 percent that was based upon a petition rate calculated *without* zeroing. These respondents were not subsequently reviewed during the sunset period and their non-zeroed dumping margins represent their most recent dumping experience. These high dumping margins vitiate Japan's argument that the order should have been terminated. It is entirely unreasonable to interpret the Appellate Body's findings in this dispute as prohibiting the United States from relying upon margins calculated without zeroing. Finally, Japan cites no authority that supports its argument that a Member cannot rely upon pre-WTO margins in making a sunset determination.

## **VI. THE UNITED STATES HAS COMPLIED WITH THE DSB'S RECOMMENDATIONS AND RULINGS WITH RESPECT TO THE ZEROING PROCEDURES**

36. Japan misapprehends the DSB's recommendations and rulings concerning the "zeroing procedures." Those recommendations and rulings applied to the *single measure* known as the "zeroing procedures," regardless of the comparison methodology used or the type of anti-dumping proceeding. Japan, however, has de-constructed that single measure, and essentially treats each use of zeroing as a separate measure that the United States was required to withdraw.

37. The original panel was explicit that the zeroing procedures were a single measure that applied in all contexts and when using all comparison methodologies. The panel concluded that the "zeroing procedures" were "*a measure* which can be challenged as such." The Appellate Body upheld the panel's conclusion. 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* anti-dumping 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, *as it did*, then the single measure is eliminated or withdrawn.

38. Japan now contradicts the very same position that it took in the original proceeding, and with which the panel and the Appellate Body agreed. Japan, for example, considered the zeroing procedures to be "*a single measure* that applies to W-to-W comparisons, T-to-T comparisons and W-to-T comparisons, used in any type of anti-dumping proceeding." According to Japan's own view, the zeroing procedures were a single measure applied in all contexts. Once the use of zeroing was eliminated in any one of these contexts, then the measure ceased to exist.

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## ANNEX D

### SUPPLEMENTAL SUBMISSIONS OF THE PARTIES OR EXECUTIVE SUMMARIES THEREOF

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## ANNEX D-1

### EXECUTIVE SUMMARY OF THE SUPPLEMENTAL SUBMISSION OF JAPAN

(17 October 2008)

#### I. THE PANEL HAS JURISDICTION OVER THE 06/07 REVIEW

1. As demonstrated below, the Panel has jurisdiction to assess the consistency with the Anti-Dumping Agreement and the GATT 1994 of the 06/07 review. Specifically, Japan's request for establishment of this Panel includes the 06/07 review, which constitutes a "measure taken to comply", within the meaning of Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").

2. In this submission, Japan explains that the 06/07 review is a "measure taken to comply" under Article 21.5 of the DSU due to its close connections with the other Ball Bearing reviews at issue, and with the DSB's recommendations and rulings. Thereafter, Japan responds to two arguments made by the United States that attempt to exclude this "measure taken to comply" from the scope of these proceedings. In particular, Japan shows that its panel request is sufficiently specific to identify the 06/07 review, and that measures adopted during panel proceedings may fall within a panel's terms of reference.

3. The Appellate Body has recognized that "Article 21.5 proceedings involve, in principle, not the original measure, but rather *a new and different measure which was not before the original panel*". Where such new measures have "*a particularly close relationship* to the declared 'measures taken to comply', and to the recommendations and rulings of the DSB", or where there are "*sufficiently close links*" among them, the Appellate Body has concluded that those new measures are subject to review by an Article 21.5 panel.

4. The 06/07 review enjoys the *same close substantive relationship* to the reviews challenged in the original proceedings as do reviews 4, 5 and 6. Specifically:

- the 06/07 review, like the original reviews and the reviews 4, 5 and 6, resulted from anti-dumping proceedings conducted by the United States Department of Commerce ("USDOC") and, in particular, the same type of proceeding, namely periodic reviews;
- the 06/07 review, like several of the original reviews and reviews 4, 5 and 6, was conducted pursuant to an anti-dumping order concerning "Ball Bearings and Parts Thereof From Japan", which is to say that it concerns the same subject product and the same exporting country as the original reviews and reviews 4, 5 and 6; and,
- the 06/07 review, like the original reviews and reviews 4, 5 and 6, concerns dumping determinations made with respect to exports from the same companies.

5. Moreover, as with reviews 4, 5 and 6, the 06/07 review constitutes a replacement measure that "supersedes" the previous periodic review involving ball bearings (review 6). That is, the 06/07 review establishes a cash deposit rate that replaces the cash deposit rate from the previous review, and determines the importer-specific assessment rate for entries initially subjected to the cash deposit rate from previous reviews.

6. Finally, Japan notes that, as with the original reviews and reviews 4, 5 and 6, Japan contests "a specific component" of the 06/07 review, namely, the use of the zeroing procedures in making the dumping determinations. Japan challenges this specific component of the 06/07 review – and not other aspects of that measure – in these proceedings.

7. Thus, the 06/07 review is part of a chain of measures with extremely close substantive connections that succeed each other year after year, with each successive measure in essence changing only the rates determined in the previous measure in the chain. In a report circulated on 1 October 2008, the panel in *United States – Continued Existence and Application of Zeroing Methodology* ("*US – Zeroing II (EC)*") also examined a chain of successive periodic reviews, and reached a similar conclusion. It found that a series of periodic reviews identified in the European Communities' panel request were within its terms of reference, even if not identified in the consultations request, because they referred to "the same subject matter, the same dispute".

8. The United States resists the inclusion of the 06/07 review as a "measure taken to comply", for two reasons. *First*, the 06/07 review is not properly within the Panel's terms of reference, because it was not identified in Japan's panel request with sufficient specificity, as required by Article 6.2 of the DSU; and, *second*, the 06/07 review cannot be part of these proceedings because it did not exist at the time of panel establishment. For the reasons provided below, the United States is in error.

9. Japan disagrees that the 06/07 review was not identified in Japan's panel request. Section III:B of Japan's panel request identifies the periodic reviews at issue, namely: (i) five reviews at issue in the original proceedings; (ii) three closely connected reviews that the United States argues have "superseded", and secured "withdrawal" of, certain measures at issue in the original proceedings; and, (iii) "any subsequent closely connected measures". The 06/07 review is such a "subsequent closely connected measure", and for that reason, is part of these proceedings.

10. Although the United States now contends that Japan's panel request is not sufficiently specific, in its First Written Submission, the United States quoted Japan's reference in the panel request to "any subsequent closely connected measures", and stated:

... the United States is concerned that Japan is trying to include in the Panel's terms of reference any future administrative reviews related to the eight identified in its panel request ... .

11. The United States, therefore, understood that the words of Japan's request identified future periodic reviews related to the Ball Bearing reviews. This confirms that the terms of Japan's panel request are sufficiently specific to identify the 06/07 review.

12. With respect to the second objection raised – the timing of the 06/07 review – the United States argues that this review is not properly within the Panel's terms of reference, because it did not exist at the time of panel establishment. Again, the United States is in error.

13. Before turning to the specific arguments on the timing of the 06/07 review, Japan notes that the timing of subsequent periodic reviews is a major feature of the US attempts to force all disputes regarding such reviews into fresh WTO proceedings, thereby turning dispute settlement into a Ground Hog Day. In particular, Japan notes that the United States contends that the timing of four Ball Bearing reviews – 03/04 (review 4), 04/05 (review 5), 05/06 (review 6) and 06/07 reviews – excludes each from the scope of these proceedings. In short, the United States' view is that the reviews were adopted *too soon* to be part of these proceedings (reviews 4 and 5), *not close enough* to the end of the reasonable period of time ("RPT") for implementation (review 6), or *too late* (06/07 review). It seems there is never a moment when the timing of a subsequent review would allow it to be part of compliance proceedings.

14. With respect to the 06/07 review, the United States argues that future measures can never be part of a panel's terms of reference. This interpretation is contradicted by previous interpretations of Articles 6.2 and 21.5 of the DSU. In *US – Zeroing II (EC)*, circulated just last week, the panel, building on several earlier decisions, expressly recognized that, in appropriate circumstances, future measures identified in a panel request can be included within a panel's terms of reference:

There may be exceptional cases where panels may consider to make findings on measures not identified in the complaining party's panel request if circumstances justify it. For that to happen, however, the new measure or measures have to constitute "a measure" within the meaning of Article 6.2 of the DSU and have to come into existence during the panel proceedings.

15. The panel concluded that, although the European Communities' panel request had identified a category of measure that might exist at some time in the future, the European Communities had failed to demonstrate that any such measure existed at any time before or subsequent to panel establishment. The panel therefore declined to make findings with respect to those measures.

16. In these proceedings, the 06/07 review satisfies the circumstances identified by the panel. In contrast to the alleged measures challenged by the European Communities in *US – Zeroing II (EC)*, there is no dispute that the 06/07 review exists or that it came into existence during these panel proceedings. Furthermore, as stated above, the measure was adequately identified in Japan's panel request.

17. The compliance panel in *Australia – Salmon (21.5)* also found that measures adopted during panel proceedings may fall within a panel's terms of reference, particularly in the context of compliance proceedings. In that dispute, the DSB's recommendations and rulings required Australia to bring a federal ban on salmon imports into conformity with its WTO obligations. Although Australia withdrew the federal ban, the state of Tasmania imposed a new import ban on salmon subsequent to establishment of the compliance panel.

18. The panel undertook a two-step analysis to determine whether the Tasmanian ban was properly subject to its review. In a first step, the panel assessed whether the Tasmanian ban was a "measure taken to comply" under Article 21.5 of the DSU, and concluded that it was. Japan recalls that it has similarly established that the 06/07 review is a "measure taken to comply" on the basis of the close substantive relationship between the 06/07 review, the reviews subject to the original proceedings, and the DSB's recommendations and rulings regarding the original reviews.

19. In a second step, the panel in *Australia – Salmon (21.5)* considered whether the Tasmanian ban was properly within its terms of reference under Article 6.2 of the DSU, even though the ban "was only introduced subsequent to this Panel's establishment and therefore not *expressis verbis* mentioned in Canada's Panel request".

20. In finding that the ban was part of its terms of reference, the panel noted that Canada's panel request identified measures taken to comply that Australia "has taken or does take", which the panel found to be a reference to "future measures". The panel also found that "[t]he ban falls within the *category of measures specified in the Panel request*". Australia was, therefore, on notice that future measures belonging to an identified category of measures were at issue.

21. The United States appears to believe that the Tasmanian ban was part of the panel's terms of reference in *Australia – Salmon (21.5)* because it "implemented" or was "similar" to a declared compliance measure, namely the removal of the federal ban. Japan is unsure why the United States takes the view that introducing a regional ban "implements" or is "similar" to the elimination of a country-wide ban. The Tasmanian ban did not implement any aspect of the elimination of the federal ban; nor is a new ban similar to the elimination of an old ban.

22. Instead, the crucial feature of *Australia – Salmon (21.5)* is that a subsequent "measure taken to comply" was part of the panel's terms of reference *because it belonged to a category of measures identified in the panel request*. Similar to *Australia – Salmon (21.5)*, the 06/07 review is a "measure taken to comply" that falls within a category of measures explicitly identified in the panel request, namely "any subsequent closely connected measures".

23. The panel in *Australia – Salmon (21.5)* also held that the *particular characteristics of compliance proceedings* compelled the inclusion of the Tasmanian ban within its terms of reference:

What is referred to this Article 21.5 Panel is basically a disagreement as to implementation. One measure was explicitly identified [in Canada's panel request], with the knowledge, however, that further measures might be taken. To exclude such further measures from our mandate once we have found that they are "measures taken to comply", would go against the objective of "prompt compliance" set out in Articles 3.3 and 21.1 of the DSU. To rule that such measures fall within our mandate would not, in our view, deprive Australia of its right to adequate notice under Article 6.2. On the basis of the Panel request Australia should have reasonably expected that any further measures it would take to comply, could be scrutinized by the Panel. We are faced here not with an Australian measure that was unexpectedly included by Canada in its claims, but with a measure taken during our proceedings by Australia, . . . and as part of Australia's implementation process to which Canada subsequently referred. Arguably, the surprise or lack of notice may, indeed, be more real for Canada than for Australia.

24. Thus, like Canada's panel request in *Australia – Salmon (21.5)*, Japan's panel request identified certain original and subsequent reviews "with the knowledge" of both Parties that future "closely connected", and identified, subsequent reviews might be taken. Indeed, the United States was very much aware that the 06/07 review might be adopted during these proceedings given that it initiated the review on 29 June 2007, during the RPT.

25. As the panel *Australia – Salmon (21.5)* said,

... compliance is often an ongoing or continuous process and once it has been identified as such in the panel request, as it was in this case, any "measures taken to comply" can be presumed to fall within the panel's mandate, unless a genuine lack of notice can be pointed to.

26. In these proceedings – as with *Australia – Salmon (21.5)* – the respondent has received ample "notice". The terms of Japan's request were sufficiently specific to alert the United States that the panel request addressed, in the United States' own words, "any future administrative reviews related to the eight identified in its panel request ... ". There was, therefore, nothing whatsoever "unexpected[]" in Japan's claims regarding the 06/07 review in these proceedings.

27. As the panel in *Australia – Salmon (21.5)* said, this interpretation of Article 6.2 promotes the prompt settlement of disputes under Articles 3.3 and 21.1 of the DSU. With successive periodic reviews withdrawing, replacing, and succeeding each other year after year, compliance in these proceedings is an "ongoing or continuous" process, just as it was in *Australia – Salmon (21.5)*. The settlement of any disputes regarding this "ongoing" process must be addressed in Article 21.5 proceedings.

28. For all these reasons, the 06/07 review is a "measure taken to comply" that is properly within the Panel's terms of reference.

## II. THE 06/07 REVIEW IS INCONSISTENT WITH THE ANTI-DUMPING AGREEMENT AND THE GATT 1994

29. In the 06/07 review, the USDOC calculated: (1) a margin of dumping for each examined exporter that became the cash deposit rate for all entries of the product, from that exporter, occurring after 11 September 2008; and (2) an importer-specific assessment rate based on the total amount of dumping attributable to each importer, which determined that importer's final liability for anti-dumping duties in connection with the entries that occurred during the review period.

30. In the review proceedings, several interested parties argued that the USDOC should not use the zeroing procedures to calculate either the cash deposit or importer-specific assessment rates, because these procedures are WTO-inconsistent. However, rejecting these arguments, the USDOC decided to maintain its use of zeroing:

While the Department has modified its calculation of weighted-average dumping margins when using average-to-average comparisons in antidumping investigations, the Department has not adopted any other modifications concerning any other methodology or type of proceedings, such as administrative reviews.

In concluding, the USDOC stated that it "has continued to deny offsets to dumping based on export transactions that exceed normal value in these reviews".

31. Japan notes that the 06/07 review constitutes yet another example of the United States' maintenance of the zeroing procedures, following the expiry of the RPT on 24 December 2007, in situations other than weighted average-to-weighted average comparisons in original investigations. In addition, the 06/07 review was completed with four other reviews issued under separate anti-dumping orders concerning the importation of ball bearings from France, Germany, Italy and the United Kingdom. The United States also used zeroing in these four other reviews. To reflect these five additional examples of the use of zeroing following the end of the RPT, Japan submits Exhibit JPN-68, which is an updated version of Exhibit JPN-46 that includes these five reviews.

32. In addition to relying on the 06/07 review as evidence of the maintenance of the zeroing procedures, Japan also makes claims regarding that review. The sole element of the 06/07 review that Japan contests is the USDOC's use of the zeroing procedures. The Appellate Body has ruled in three separate disputes, including in the original proceedings in this dispute, that the United States acts inconsistently with the *Anti-Dumping Agreement* and the GATT 1994 by relying on zeroing to calculate margins of dumping in periodic reviews. Equally, in a report circulated on 1 October 2008, the panel in *US – Zeroing II (EC)* reached the same conclusion.

33. For the reasons given in these rulings, Japan submits that the 06/07 periodic review is inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 due to the application of the zeroing procedures. Moreover, for the reasons given in the original proceedings in this dispute, the review is also inconsistent with the "fair comparison" obligation of Article 2.4.

34. Finally, Japan recalls its claim that the United States has violated Article II of the GATT 1994 by issuing instructions and notices for the liquidation of entries at WTO-inconsistent importer-specific assessment rates determined in the periodic reviews numbered (1), (2), (7) and (8) in paragraph 53 of Japan's First Written Submission. Japan wishes to clarify that it does not pursue claims under Article II of the GATT 1994 in relation to liquidations instructions and notices issued pursuant to the 06/07 review, because no such instructions have yet been issued.

## ANNEX D-2

### RESPONSE OF THE UNITED STATES TO THE SUPPLEMENTAL SUBMISSION OF JAPAN

(3 November 2008)

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<i>Australia – Salmon (Art. 21.5) (Panel)</i>	Panel Report, <i>Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS18/RW, adopted 20 March 2000
<i>Japan – Film (Panel)</i>	Panel Report, <i>Japan – Measures Affecting Consumer Photographic Film and Paper</i> , WT/DS44/R, adopted 22 April 1998
<i>US – Softwood Lumber Dumping (AB)</i>	Appellate Body Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/AB/R, adopted 31 August 2004
<i>US – Softwood Lumber IV (Art. 21.5) (AB)</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS257/AB/RW, adopted 20 December 2005
<i>US – Upland Cotton (Panel)</i>	Panel Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/R, adopted 21 March 2005, as modified by the Appellate Body Report, WT/DS267/AB/R
<i>US – Zeroing (Japan) (AB)</i>	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews</i> , WT/DS322/AB/R, adopted 23 January 2007
<i>US – Zeroing II (EC) (Panel)</i>	Panel Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/R, circulated 1 October 2008, not yet adopted

## I. INTRODUCTION

1. The United States would like to thank the Panel for this opportunity to respond to Japan's supplemental submission of 10 October 2008. Japan asserts that the 2006-07 administrative review of *Ball Bearings from Japan* falls within the scope of this proceeding.<sup>1</sup> However, this administrative review is not a measure taken to comply within the meaning of Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and is therefore outside the Panel's terms of reference. Moreover, Japan improperly uses its submission as an opportunity to re-argue whether alleged "subsequent closely connected measures" may fall within the scope of this proceeding.<sup>2</sup> The Panel should therefore exclude Japan's additional arguments from consideration. Even aside from the fact that the Panel should not take into account Japan's arguments on this issue, the United States has demonstrated throughout this compliance proceeding and further discusses below, that under the DSU, the Panel may not consider future measures that were not identified in Japan's panel request and that were not in existence at the time of panel establishment.

## II. THIS PANEL DOES NOT HAVE JURISDICTION OVER THE 2006-07 ADMINISTRATIVE REVIEW OF *BALL BEARINGS FROM JAPAN*

### A. THE 06/07 REVIEW IS NOT A MEASURE TAKEN TO COMPLY

2. Japan erroneously claims that the 06/07 review is a measure taken to comply with the DSB's recommendation and rulings.<sup>3</sup> Japan's argument depends on the same flawed logic that Japan used when attempting to demonstrate why the three subsequent reviews of *Ball Bearings* were allegedly within the Panel's terms of reference.<sup>4</sup> As the United States will show, the 06/07 review – just as the other three subsequent reviews – is not a measure taken to comply, and therefore does not fall within the scope of this proceeding under Article 21.5 of the DSU.

3. Japan relies extensively on the alleged "particularly close relationship" or "sufficiently close links" between the 06/07 review, the administrative reviews challenged in the original proceeding, and Review Nos. 4, 5, 6.<sup>5</sup> Japan highlights similarities, such as the fact that the reviews all involve the "same subject product", "the same exporting countries", and "the same companies".<sup>6</sup> Further, Japan notes that the cash deposit rate from one review replaces the rate from another, overlooking the fact that this is an incidental consequence of the US anti-dumping system.<sup>7</sup> Based on Japan's reasoning, every subsequent review would be swept into the scope of an Article 21.5 proceeding.

4. Japan's approach is so broad as to render the requirements of Article 21.5 of the DSU meaningless. As the Appellate Body stated in *US – Softwood Lumber IV (Art. 21.5)*, "not . . . every assessment review will necessarily fall within the jurisdiction of an Article 21.5 panel".<sup>8</sup> According to

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<sup>1</sup> Japan refers to this administrative review throughout its supplemental submission as the "06/07 review". See, e.g., Japan Supplemental Submission, para. 1. For ease of reference, and to avoid confusion, the United States adopts the same terminology.

<sup>2</sup> Japan Panel Request, para. 12; Japan Second Written Submission, paras. 59-65.

<sup>3</sup> Japan Supplemental Submission, para. 3.

<sup>4</sup> These three administrative reviews of *Ball Bearings and Parts Thereof from Japan* are identified as Review Nos. 4, 5, and 6 in Japan's first written submission. See Japan First Written Submission, paras. 52-53. More specifically, the reviews are: Review No. 4 – *Ball Bearings and Parts Thereof From Japan* (1 May 2003 through 30 April 2004) (JTEKT, NSK, NPB and NTN); Review No. 5 – *Ball Bearings and Parts Thereof From Japan* (1 May 2004 through April 30 2005) (JTEK, NS, NPB, and NTN); Review No. 6 – *Ball Bearings and Parts Thereof From Japan* (1 May 2005 through 30 April 2006) (Asahi Seiko, JTEKT, NSK, NPB and NTN).

<sup>5</sup> Japan Supplemental Submission, paras. 4-5.

<sup>6</sup> Japan Supplemental Submission, para. 5.

<sup>7</sup> Japan Supplemental Submission, para. 6.

<sup>8</sup> *US – Softwood Lumber IV (Art. 21.5) (AB)*, para. 93 (footnote omitted).



the Appellate Body, "such an approach would be too sweeping."<sup>9</sup> This Panel should reject Japan's attempt to include the 06/07 review just because of the superficial similarities between that review, the original reviews, and the three subsequent reviews. If the overlap between product, exporting country, and exporting company, or the incidental operation of the anti-dumping system, was sufficient to establish the type of "particularly close relationship" found in *US – Softwood Lumber IV (Art. 21.5)*, then every administrative review would fall within the jurisdiction of an Article 21.5 panel. In line with the Appellate Body's statements in *US – Softwood Lumber IV (Art. 21.5)*, the DSU does not permit such an approach.

5. The timing of the 06/07 review is important, despite Japan's attempt to downplay and dismiss this factor as somehow irrelevant.<sup>10</sup> The 06/07 review was initiated at the request of interested parties, on a schedule *independent* of dispute settlement and pursuant to domestic law implementing the rights and obligations in the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement"). The results of the review were not issued around the same time as the withdrawal of the measure that brought the United States into compliance,<sup>11</sup> and not around the time of the expiry of the reasonable period of time ("RPT").<sup>12</sup> By contrast, in *US – Softwood Lumber IV (Art. 21.5)*, the determination in the first administrative review (alleged measure taken to comply) was issued a few days after the Section 129 determination (declared measure taken to comply) and both closely corresponded to the expiry of the RPT.<sup>13</sup> The Appellate Body accorded these facts considerable weight in finding that the subsequent review was a measure taken to comply.

6. Japan further relies on the recent panel report in *US – Zeroing II (EC)* to demonstrate that the 06/07 review is part of a "chain of measures" which falls within the scope of an Article 21.5 proceeding.<sup>14</sup> This report has been circulated to Members but has not been adopted by the DSB and is subject to appeal by either party. In any event, Japan misunderstands the panel's findings. In *US – Zeroing II (EC)*, the panel was not addressing the issue of whether a subsequent review was a measure taken to comply within the meaning of Article 21.5. In fact, that dispute was not a compliance dispute at all; rather, the panel was addressing the EC's "as applied" zeroing claims. Moreover, Japan relies on language from the panel's preliminary ruling that measures included in the panel request but not included in the consultations request fell within the scope of the panel proceeding.<sup>15</sup> The panel's treatment of that issue is irrelevant to the issue currently before this Panel, which is not considering whether measures specified in a panel request, but not a consultation request, are properly before it.

7. Perhaps of even greater significance from a systemic point of view is that Japan's "closely related" approach would mean that the terms of reference of an Article 21.5 panel could spread ever outward like ripples in a pond. This is because a measure (referred to as "measure B" for convenience) that is "closely related" to a measure taken to comply (referred to as "measure A") is itself then deemed to be a measure taken to comply by virtue of that close relationship. In that case, any measure (e.g., "measure C") that is "closely related" to measure B then itself becomes a "measure taken to comply." In turn then, any measure closely related to measure C could become a measure taken to comply, with each succeeding iteration perhaps bearing a more and more remote relationship to the original measure, measure A. Members nowhere agreed to such an approach in the DSU.

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<sup>9</sup> *US – Softwood Lumber IV (Art. 21.5) (AB)*, para. 87 (footnote omitted).

<sup>10</sup> Japan Supplemental Submission, para. 14.

<sup>11</sup> The cash deposit rate for the most recent administrative review of *Ball Bearings* that was subject to the DSB's recommendations and rulings (i.e., the 2002-03 review) was replaced by the cash deposit from the 2003-04 review in September 2005, about three years before the final results of the 06/07 review were announced.

<sup>12</sup> The RPT expired on December 24, 2007.

<sup>13</sup> *US – Softwood Lumber IV (Art. 21.5) (AB)*, para. 84.

<sup>14</sup> Japan Supplemental Submission, para. 8.

<sup>15</sup> *US – Zeroing II (EC) (Panel)*, paras. 7.11-7.28.

**B. THE PANEL MAY NOT CONSIDER AN ADMINISTRATIVE REVIEW NOT SPECIFIED IN JAPAN'S PANEL REQUEST**

**1. The Panel Should Reject Japan's Additional Arguments**

8. As an initial matter, Japan has used its supplemental submission as an opportunity to attempt to rebut once again the US arguments regarding the specificity of Japan's panel request.<sup>16</sup> The United States recalls that it objected to Japan's attempt to include "any subsequent closely connected measures" that were not anywhere identified in Japan's panel request.<sup>17</sup> The United States asked for a preliminary ruling under Article 6.2 of the DSU to exclude such future measures. Japan had an opportunity to rebut the US arguments in its second written submission and attempted to do so.<sup>18</sup> Japan also raised this issue in its 15 September 2008 request to file a supplemental submission on an alleged additional measure taken to comply, and attempted to justify why it had the right to file a submission on future measures.<sup>19</sup> The United States, as part of its second written submission, responded to Japan's rebuttal submission and Japan's separate request to file a supplemental submission.<sup>20</sup> The Panel, without ruling on the issue of specificity, then permitted Japan to file its supplemental submission regarding why the 06/07 review was an alleged measure taken to comply.

9. Japan is now using its supplemental submission to address yet again an issue that has been fully argued by both parties and for which it did not request permission to file a supplemental submission. The Panel should disregard Japan's further arguments as to why "any subsequent closely connected measures"—in this instance, the 06/07 review—are within the scope of this proceeding. Nevertheless, the United States will respond to Japan's argument, without prejudice to its objection that Japan has improperly inserted additional argumentation into its supplemental submission.

**2. Japan's Panel Request Does Not Meet the Specificity Requirement of DSU Article 6.2**

10. Japan's panel request did not properly address the specific measures at issue—in this instance, the 06/07 review. Under Article 6.2 of the DSU, a panel request must identify the *specific* measures at issue, and under Article 7.1, the Panel's terms of reference are limited to those specific measures. Here, each anti-dumping determination that sets a margin of dumping for a defined period of time is separate and distinct, and under Article 6.2, Japan had to identify each such measure in its panel request.

11. As the United States explained in its second written submission,<sup>21</sup> future administrative reviews, like the 06/07 review, also fall outside the scope of this proceeding because under the DSU, measures not yet in existence at the time of panel establishment cannot be subject to dispute settlement.<sup>22</sup> The results of the 06/07 review were issued in September 2008, months after Japan made its request for establishment. The simple fact that Japan had to seek to make a "supplemental submission" well after Japan was to have provided all of its written submissions only highlights that the measure was not in existence at the time of the Panel's establishment and could not have been specified by Japan in its panel request. Therefore, this subsequent administrative review cannot fall within the Panel's terms of reference.

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<sup>16</sup> Japan Supplemental Submission, paras. 9-28.

<sup>17</sup> US First Written Submission, para. 50.

<sup>18</sup> Japan Second Written Submission, paras. 59-65.

<sup>19</sup> Japan's Letter to the Panel, 15 Sept. 2008 (citing *Australia – Salmon (Art. 21.5) (Panel)*).

<sup>20</sup> US Second Written Submission, paras. 29-34.

<sup>21</sup> US Second Written Submission, para. 30.

<sup>22</sup> *US – Upland Cotton (Panel)*, paras. 7.158-7.160 (rejecting inclusion of the Agricultural Adjustment Act of 2003 in the panel's terms of reference because that law did not come into existence until after panel establishment) ("In this case, the Agricultural Assistance Act of 2003 could not possibly have been impairing any benefits at the date of Brazil's referral of its complaint to the DSB because it did not yet exist.").

12. Japan argues that the United States "received ample 'notice'" of Japan's intention to challenge future reviews;<sup>23</sup> this argument, however, is beside the point. Article 6.2 of the DSU imposes no burden on a party to show that it failed to receive adequate notice as to certain measures not identified in the panel request, or that it was somehow prejudiced by the lack of specificity in a panel request. And no such requirement is found in any other provision of the DSU, or anywhere else in the covered agreements.<sup>24</sup> The requirements of Article 6.2 of the DSU are clear – the panel request must "*identify the specific measures at issue.*"<sup>25</sup> Measures not so identified do not fall within the panel's terms of reference. Japan could not have identified a measure not yet in existence. This is all that the United States is required to show in order to prevail on its preliminary objection under Article 6.2 of the DSU.

13. Japan cites to the recent, unadopted panel report in *US – Zeroing II (EC)* to support its erroneous argument that future administrative reviews may fall within a panel's terms of reference.<sup>26</sup> Again, this report has not been adopted by the DSB and may be appealed by either party. In any event, in that report, the panel actually rejected the EC's attempt to obtain "a remedy which would affect anti-dumping proceedings that the USDOC may conduct in the future" *following* panel establishment.<sup>27</sup> As the panel found, "in our view, Article 6.2 of the DSU, in principle, does not allow a panel to make findings regarding measures that do not exist as of the date of the panel's establishment."<sup>28</sup> The panel noted that there may be "exceptional circumstances" where future measures could fall within the panel's terms of reference.<sup>29</sup> But the panel found that this was not the case where a complaining Member was attempting to reach future anti-dumping determinations that were not in existence at the time of panel establishment.

14. Japan relies once again on the panel report in *Australia – Salmon (Art. 21.5)* and accuses the United States of misreading the panel's findings.<sup>30</sup> As the United States has demonstrated,<sup>31</sup> it is Japan that distorts the reasoning from that dispute to argue that future reviews are properly before the Panel.

15. In *Australia – Salmon (Art. 21.5)*, Canada requested leave to file a supplemental submission on a Tasmanian import ban that was adopted after the panel proceeding had begun. Australia objected that the new measure was outside the panel's terms of reference. Canada's panel request identified measures that Australia "has taken or would take" to comply "with the recommendations and rulings of the DSB by implementing the policies for non-viable salmonids outlined in AQPM 1999/51."<sup>32</sup> The compliance panel noted that future measures that were taken "to implement AQPM 1999/51" (namely, AQPM 1999/64, 66, 69, 70, 77, and 79) were within scope of proceeding, and that neither

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<sup>23</sup> Japan Supplemental Submission, para. 27.

<sup>24</sup> In *US – Zeroing II (EC) (Panel)*, the panel found that "neither Article 6.2 of the DSU nor any other provision of the WTO Agreement supports the argument that the defendant has to show prejudice in cases where the complaining Member's panel request falls short of the requirements of Article 6.2." *US – Zeroing II (EC) (Panel)*, para. 7.63.

<sup>25</sup> Emphasis added.

<sup>26</sup> Japan Supplemental Submission, paras. 15-17.

<sup>27</sup> *US – Zeroing II (EC) (Panel)*, para. 7.59.

<sup>28</sup> *US – Zeroing II (EC) (Panel)*, para. 7.59.

<sup>29</sup> The panel may have had in mind the panel report in *Japan – Film*, which it earlier dismissed as irrelevant to the issue under consideration. See *US – Zeroing II (EC)*, para. 7.54. In *Japan – Film*, the panel found that subsequent measures promulgated under a framework law that was identified in the panel request fell within its terms of reference. It considered these measures "subsidiary" or "closely related" to the law of general application specifically identified. See *Japan – Film (Panel)*, paras. 10.8-10.14. Unlike *Japan – Film*, this dispute does not involve subsequent regulations issued under a law of general application.

<sup>30</sup> Japan Supplemental Submission, paras. 18-29.

<sup>31</sup> US Second Written Submission, paras. 32-33.

<sup>32</sup> *Australia – Salmon (Art. 21.5) (Panel)*, para. 7.10(25) (emphasis in original).

party contested this fact.<sup>33</sup> The panel then reasoned that the Tasmanian measure, "for similar reasons" was within scope of the Article 21.5 proceeding.<sup>34</sup> In other words, the panel found that the Tasmanian ban fell within a "category of measures" to comply that were specified in the panel request, or was "closely related" to those measures.<sup>35</sup> The panel also considered it important that Australia apparently had agreed, with respect to other, future measures, that such measures were within the panel's terms of reference.<sup>36</sup>

16. Japan ignores the key difference from *Australia – Salmon (Art. 21.5)*. Here, Japan is not challenging future measures that implement or that are "closely related" to a framework regulation that was adopted to comply with the recommendations and rulings of the DSB. Rather, Japan is trying to challenge a subsequent administrative review, which occurred upon request of interested parties based upon provisions of the AD Agreement and on a schedule established without regard for dispute settlement proceedings. The 06/07 review, and any other subsequent reviews of *Ball Bearings*, therefore are separate and distinct measures, independent of the present dispute, and independent of other prior reviews. Japan's challenge is not analogous to challenging subsequent measures which implement or are closely related to a framework law or regulation.

### III. THE PANEL SHOULD NOT REACH THE MERITS OF JAPAN'S CLAIMS CONCERNING THE 06/07 REVIEW

17. Japan claims that the 06/07 review violates Articles 2.4 and 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 due to the application of zeroing procedures.<sup>37</sup> As the United States has explained, this review is not a measure taken to comply and is not properly within the scope of this proceeding.<sup>38</sup> Therefore, this Panel should not reach the issue of the WTO consistency of this alleged measure.

### IV. CONCLUSION

18. For the reasons set forth above, along with those set forth in the US written submissions, the United States requests that the Panel reject the 06-07 administrative review of *Ball Bearings from Japan* as outside the scope of this proceeding.

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<sup>33</sup> *Australia – Salmon (Art. 21.5) (Panel)*, para. 7.10(26).

<sup>34</sup> *Australia – Salmon (Art. 21.5) (Panel)*, para. 7.10(27) (emphasis added).

<sup>35</sup> *Australia – Salmon (Art. 21.5) (Panel)*, para. 7.10(27). The panel's reasoning was based in part on the panel report in *Japan – Film*, which similarly found that measures closely related to the implementation of a framework law could be included in a panel's terms of reference, even if they came into existence after the panel request. See *Australia – Salmon (Art. 21.5) (Panel)*, para. 7.10(26) & n.144.

<sup>36</sup> *Australia – Salmon (Art. 21.5) (Panel)*, para. 7.10(26).

<sup>37</sup> Japan Supplemental Submission, para. 34.

<sup>38</sup> In making its argument on the merits, Japan relies on the recent, unadopted panel report in *US – Zeroing II (EC)*, as well as the Appellate Body reports in *US – Zeroing (EC)* and *US – Stainless Steel (Mexico)*. See Japan Supplemental Submission, paras. 33-34 & nn. 35-37. The United States notes that dispute settlement reports are not binding except with respect to resolving the particular dispute between the parties to that dispute. See *US – Softwood Lumber Dumping (AB)*, para. 111 (citing *Japan – Alcohol Taxes (AB)*); *Argentina – Poultry (Panel)*, para. 7.41. Although panels may take the persuasiveness of other reports into account, there is no *stare decisis* in the WTO dispute settlement system, and prior reports from other disputes do not bind this Panel.

## ANNEX D-3

### RESPONSE OF JAPAN TO THE UNITED STATES' RESPONSE TO THE SUPPLEMENTAL SUBMISSION OF JAPAN

(5 November 2008)

#### I. INTRODUCTION

1. Mr. Chairman, Japan appreciates the opportunity to make a short statement regarding the United States' rebuttal to our supplemental submission on the 06/07 periodic review. Japan will not respond to every US argument, because the United States repeats many of the arguments it has made in connection with the other subsequent reviews.

#### II. THE PANEL'S TERMS OF REFERENCE

2. We begin with observations on the United States' argument that the terms of Japan's *panel request* do not cover the 06/07 review. This argument is contradicted by the fact that the United States understood Japan's panel request to include "future administrative reviews related to the eight identified in its panel request".<sup>1</sup> The United States' ability to identify the measures at issue confirms that Japan's panel request meets the specificity and due process requirements of Article 6.2.<sup>2</sup>

3. The United States argues that a panel request cannot include measures that come into existence during the panel proceedings.<sup>3</sup> In making this argument, the United States attempts to distinguish the situation in these compliance proceedings from those in *Australia – Salmon (21.5)*. In so doing, it mis-states the findings of the panel in *Australia – Salmon (21.5)*. As in its previous submissions,<sup>4</sup> the United States argues that a measure *imposing a regional ban* was found to be within the panel's terms of reference, because the regional ban was *taken to implement*, and was *similar to, federal measures withdrawing a federal ban* that were specified in the panel request.<sup>5</sup>

4. Besides reasserting its earlier argument, the United States has not explained how the introduction of a regional ban "implements" or is "similar" to the elimination of a federal ban. The regional ban did not implement any aspect of the federal measures eliminating the federal ban; imposing a new ban is not similar to eliminating an old ban.<sup>6</sup> Japan does not, therefore, agree with the US reading of *Australia – Salmon (21.5)*.

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<sup>1</sup> United States' First Written Submission, para. 50.

<sup>2</sup> Appellate Body Report, *Thailand – H-Beams*, para. 88.

<sup>3</sup> United States' Supplemental Submission, para. 11.

<sup>4</sup> United States' Second Written Submission, paras. 32, 33.

<sup>5</sup> United States' Supplemental Submission, para. 15 ("The compliance panel noted that future measures that were take to implement AQPM 1999/51 . . . were within scope of proceeding, and that neither party contested this fact. The panel then reasoned that the Tasmanian measure, 'for similar reasons' was within scope of the Article 21.5 proceeding").

<sup>6</sup> Japan's Supplemental Submission, para. 22.

5. Instead, as the United States concedes,<sup>7</sup> the panel found that the regional ban was within its terms of reference *because it belonged to a category of measures identified in the panel request*, namely any "measure taken to comply". Similar to *Australia – Salmon (21.5)*, the 06/07 review is within this Panel's terms of reference because it falls within a category of measures explicitly identified in the panel request, namely "any subsequent closely connected measures".

6. However, even if – as the United States asserts<sup>8</sup> – the panel's findings in *Australia – Salmon (21.5)* were based on the "close relationship" between the regional ban and the federal measures withdrawing the original federal ban, *Australia – Salmon (21.5)* still supports inclusion of the 06/07 review in this Panel's terms of reference. For reasons enumerated in our Supplemental Submission, the 06/07 review is, indeed, "similar" and "closely related" to other measures that the United States does not contest are identified in Japan's panel request: five original reviews, and three subsequent reviews.<sup>9</sup>

### III. THE 06/07 REVIEW IS A "MEASURE TAKEN TO COMPLY"

7. We turn briefly to US arguments that the 06/07 review is not a "measure taken to comply". In *US – Zeroing II (EC)*, the panel found that periodic reviews under a single anti-dumping order, involving the same calculation methodology, were part of "the same subject matter" and "the same dispute", because of the close substantive links between the reviews.<sup>10</sup> The panel correctly held that this close relationship may be important in defining a panel's terms of reference in original proceedings.

8. The United States contends that the panel's statement in *US – Zeroing II (EC)* is "irrelevant" to these proceedings, because the statement was not made in compliance proceedings.<sup>11</sup> Japan disagrees. Original and compliance proceedings are, in fact, part of "the same dispute". As panels and the Appellate Body have said, "Article 21.5 proceedings do not occur in isolation from the original proceedings, but both proceedings *form part of a continuum of events*" that extends until compliance is fully achieved.<sup>12</sup>

9. As a result, where the original proceedings concern a chain of periodic reviews that are part of "the same subject matter" and "the same dispute", new links in that chain involving the same disputed calculation methodology are necessarily part of a "continuum of events" prolonging "the same dispute".<sup>13</sup> In the context of such a dispute, there is no basis for artificially splitting the chain of measures and events, either at the end of the original proceedings or after the end of the RPT.

10. The United States also suggests that the 06/07 review bears a "more remote relationship to the original measure[s]" than the other subsequent reviews.<sup>14</sup> Again, Japan disagrees. Japan has outlined that *the close substantive connections* linking the 06/07 review, and the other subsequent reviews, to the original measures.<sup>15</sup> That is, the same substantive features of the original periodic reviews – which define the contours of this dispute – are mirrored in each of the subsequent reviews. The later measures are no less substantively connected to the dispute than the earlier measures.

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<sup>7</sup> United States' Supplemental Submission, para. 15 ("In other words, the panel found that the Tasmanian ban fell within a "category of measures" to comply that were specified in the panel request, or was "closely related" to those measures") (underlining added).

<sup>8</sup> United States' Supplemental Submission, paras. 15-16.

<sup>9</sup> Japan's Supplemental Submission, paras. 5-7.

<sup>10</sup> Panel Report, *US – Zeroing II (EC)*, para. 7.28.

<sup>11</sup> United States' Supplemental Submission, para. 6.

<sup>12</sup> Appellate Body Report, *Chile – Price Band System (21.5)*, para. 136, *citing* Appellate Body Report, *Mexico – Corn Syrup (21.5)*, para. 121 (emphasis added).

<sup>13</sup> Panel Report, *US – Zeroing II (EC)*, para. 7.28.

<sup>14</sup> United States' Supplemental Submission, para. 6.

<sup>15</sup> *See* Japan's Supplemental Submission, paras 5-7.

11. In reality, given that the key substantive features of the periodic reviews are unchanged, the US "remoteness" argument is code for its argument on timing. In essence, the United States argues that, where there is a chain of measures with a close substantive connection to the original measures, the latest measure ceases to be part of the dispute if it is too distant in time from the original proceedings. Japan has already expressed its disagreement with this point.<sup>16</sup> Compliance is an "ongoing or continuous process",<sup>17</sup> and panels must be able to scrutinize the latest measures that undermine the DSB's recommendations and rulings. Otherwise, in a dispute regarding *recurring* measures – such as periodic reviews or recurring subsidies – an implementing Member is rewarded under Article 21.5 for its persistence in ignoring the DSB's recommendations and rulings.

12. Thank you, Mr. Chairman.

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<sup>16</sup> See, e.g., Japan's Opening Statement, para. 32.

<sup>17</sup> Panel Report, *Australia – Salmon (21.5)*, para. 7.10 (sub-para. 28).

## ANNEX E

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

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## ANNEX E-1

### EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF JAPAN

11 November 2008

#### I. THE PANEL HAS JURISDICTION OVER THE FOUR SUBSEQUENT PERIODIC REVIEWS CHALLENGED IN THESE PROCEEDINGS

1. Japan has demonstrated that four subsequent periodic reviews – reviews 4, 5, 6 and 9<sup>1</sup> – constitute "measures taken to comply", under Article 21.5 of the DSU.

##### A. THE FOUR SUBSEQUENT PERIODIC REVIEWS ARE DECLARED MEASURES TAKEN TO COMPLY

2. The United States argues that the periodic reviews at issue in the original proceedings were "withdrawn",<sup>2</sup> "superseded",<sup>3</sup> "eliminated",<sup>4</sup> "replaced"<sup>5</sup> and "removed"<sup>6</sup> by the subsequent periodic reviews challenged by Japan in these compliance proceedings. Significantly, the United States asserts that, with the adoption of the subsequent reviews, it "has *taken measures to comply with [the DSB's] recommendations and rulings*".<sup>7</sup> It adds that, with the subsequent reviews, "compliance was accomplished".<sup>8</sup>

3. The DSU allows the United States to assert the subsequent periodic reviews as vehicles for, and evidence of, its implementation of the DSB's recommendations and rulings. But the DSU also requires this Panel to verify the US assertions, by assessing whether those same reviews actually accomplish compliance in a WTO-consistent fashion.

##### B. THE UNITED STATES' INTENT TO COMPLY IS NOT DECISIVE UNDER ARTICLE 21.5 OF THE DSU

#### 1. Subsequent periodic reviews pre-dating adoption of the DSB's recommendations and rulings can be measures "taken to comply"

4. The United States declares that the four subsequent periodic reviews are "measures taken to comply". Specifically, it asserts that the subsequent reviews secure withdrawal of the original, WTO-inconsistent reviews, accomplish compliance with the DSB's recommendations and rulings.

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<sup>1</sup> These reviews are the 03/04, 04/05, 05/06 and 06/07 periodic reviews for ball bearings. Japan relies on the numbering of the periodic reviews in Japan's First Written Submission, para. 53. Review 9 is the 06/07 review for ball bearings.

<sup>2</sup> United States' Second Written Submission, para. 28; United States' First Written Submission, paras. 39, 52, 54, 58, 65, 66, 67.

<sup>3</sup> United States' First Written Submission, paras. 3, 44.

<sup>4</sup> United States' Second Written Submission, para. 8; United States' First Written Submission, paras. 44, 54.

<sup>5</sup> United States' Second Written Submission, para. 18; United States' First Written Submission, para. 44.

<sup>6</sup> United States' Second Written Submission, paras. 18, 26.

<sup>7</sup> United States' First Written Submission, para. 51.

<sup>8</sup> United States' Second Written Submission, para. 18; United States' First Written Submission, paras. 52, 67.

5. Nonetheless, the United States argues that since the subsequent periodic reviews only accomplished compliance *accidentally*, rather than *purposefully*, they cannot be considered "measures taken to comply".

6. Although the United States argues that the *timing* of a measure constitutes an "objective" factor under Article 21.5, the words it uses show that timing is relied on to demonstrate an absence of "intent" to comply, which then excludes the measures from review by this Panel.<sup>9</sup> The date on which the recommendations and rulings were adopted may be an "objective" marker. However, the United States offers that marker to argue that compliance could not have been the *intended objective* of measures taken before that date.

7. The distinction drawn by the United States between incidental and purposeful compliance is without foundation in the DSU. The Appellate Body and compliance panels have insisted that, for a measure to be "taken to comply", it need not be taken for the *purpose* or *objective* of complying with the DSB's recommendations and rulings.

8. *First*, the Appellate Body has stated that a measure need not "move in the direction of . . . compliance" to be considered a measure "taken to comply".<sup>10</sup>

9. *Second*, the Appellate Body has stated that compliance panels are not limited to reviewing measures that "*have the objective of achieving[] compliance*".<sup>11</sup> Nor are compliance panels limited to review of measures that were "initiated *in order to comply* with the recommendations and rulings of the DSB".<sup>12</sup> Echoing this view, the compliance panel in *US – Gambling (21.5)* emphasized that it did not "exclude any potential 'measures taken to comply' due to the *purpose* for which they may have been taken".<sup>13</sup>

10. Accordingly, a measure that complies by accident – that is, a measure taken neither "for the purpose of" achieving compliance,<sup>14</sup> nor "in view"<sup>15</sup> or "consideration"<sup>16</sup> of the DSB's recommendations and rulings – can fall within the scope of Article 21.5. Equally, because intent is not decisive, the fact that the measure was taken before the DSB's recommendations and rulings is also not decisive.

11. This view is reinforced by the Appellate Body's emphasis of the need for "an examination of the *effects* of a measure" alleged to be "taken to comply".<sup>17</sup> This focus on the *effects* of a measure, as distinct from the implementing Member's *intent*, is confirmed by the text of Articles 3.7 and 19.1 of the DSU. The United States recognizes that the timing of a measure is only one "element" in determining whether it is "taken to comply".<sup>18</sup> Indeed, the United States holds out the Zeroing Notice,<sup>19</sup> which withdraws the zeroing procedures in W-to-W comparisons in investigations, is a "measure taken to comply", *even though it was taken before adoption of the DSB's recommendations and rulings*.

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<sup>9</sup> United States' Second Written Submission, para. 9.

<sup>10</sup> Appellate Body Report, *US – Softwood Lumber IV (21.5)*, para. 67.

<sup>11</sup> Appellate Body Report, *US – Softwood Lumber IV (21.5)*, para. 67.

<sup>12</sup> Appellate Body Report, *US – Softwood Lumber IV (21.5)*, para. 88 (emphasis added).

<sup>13</sup> Panel Report, *US – Gambling (21.5)*, para. 6.24.

<sup>14</sup> United States' Second Written Submission, para. 10 (emphasis added). *See also Id.*, para. 16. *See also* United States' First Written Submission, para. 33.

<sup>15</sup> United States' Second Written Submission, para. 15.

<sup>16</sup> United States' First Written Submission, para. 39.

<sup>17</sup> Appellate Body Report, *US – Softwood Lumber IV (21.5)*, para. 67 (emphasis added).

<sup>18</sup> United States' Second Written Submission, para. 14.

<sup>19</sup> Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 Fed. Reg. 77722, 77723 (Dep't of Comm., 27 December 2006) (emphasis added) (Exhibit JPN-35).

**2. Subsequent periodic reviews post-dating adoption of the DSB's recommendations and rulings are measures "taken to comply" even if not proximate to the date of declared measures taken to comply or the date of DSB adoption**

12. The United States' principal arguments concerning timing apply only to reviews 4 and 5, since reviews 6 and 9 were taken *after* adoption of the DSB's recommendations and rulings. Nonetheless, the United States also argues that timing disqualifies reviews 6 and 9 from consideration as "measures taken to comply", because they "did not occur around the same time as US withdrawal of" the original reviews, and "did not closely correspond to the expiration of the RPT".<sup>20</sup>

13. The former consideration is simply not relevant. On the second argument, nothing in Article 21.5 requires that, to be considered as "taken to comply", a measure must "closely correspond to the expiration of the RPT". The United States has itself successfully argued, in recent compliance proceedings in *EC – Bananas III*, that measures adopted nearly *seven years* after the end of the RPT are "measures taken to comply".<sup>21</sup> Review 6 was adopted on 12 October 2007,<sup>22</sup> just two-and-a-half months before the end of the RPT on 24 December 2007. The determination date for review 6 did "closely correspond to" the end of the RPT.

**C. THE FOUR SUBSEQUENT PERIODIC REVIEWS ENJOY CLOSE SUBSTANTIVE CONNECTIONS TO THE RECOMMENDATIONS AND RULINGS OF THE DSB**

14. Even if the Panel finds that the four subsequent periodic reviews are not effectively *declared* measures taken to comply, Japan has demonstrated that they are measures taken to comply by virtue of the *close substantive connections* they share with the DSB's recommendations and rulings.<sup>23</sup>

15. Specifically, Japan has noted that the subsequent reviews resulted from the *same type of USDOC anti-dumping proceedings* that were at issue in the original proceedings. Moreover, they were conducted pursuant to the *same anti-dumping order* concerning ball bearings. As such, they all concern the *same subject product*, the *same exporting country* and, additionally, concern determinations made with respect to exports by the *same companies*.<sup>24</sup>

16. Moreover, the United States characterizes the subsequent periodic reviews as measures that "withdraw", "supercede", "eliminate", "replace" and "remove" previous ball bearings reviews, in two senses.<sup>25</sup> Each subsequent review establishes a cash deposit rate that replaces the cash deposit rate from the previous review; and each subsequent review determines the importer-specific assessment rate for entries initially subjected to the cash deposit rate from previous reviews.<sup>26</sup>

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<sup>20</sup> United States' Second Written Submission, para. 23; United States' First Written Submission, para. 39.

<sup>21</sup> See WT/DS27/15 (RPT ended on 1 January 1999); Panel Report, *EC – Bananas III (Article 21.5 – US)*, para. 8.4 (Measure considered by the panel to be a measure "taken to comply" was adopted on 29 November 2005). See also Panel Report, *US – FSC (21.5 II)*, paras. 1.1, 7.50 (Implementation period ended on 1 November 2000, while the Jobs Act, considered by the panel and the Appellate Body to be a measure "taken to comply", was adopted nearly four years later, on 22 October 2004).

<sup>22</sup> Exhibit JPN-44.

<sup>23</sup> Appellate Body Report, *US – Softwood Lumber IV (21.5)*, para. 77 (emphasis added) (following discussion, at paras. 73-76, of the approach taken by the panels in *Australia – Salmon (21.5)* and *Australia – Leather (21.5)*). See Japan's First Written Submission, paras. 66-76.

<sup>24</sup> Japan's First Written Submission, paras. 90-93.

<sup>25</sup> See footnotes 2-6, above.

<sup>26</sup> Japan's First Written Submission, para. 91.

17. The subsequent periodic reviews are, therefore, part of a chain of closely-connected measures that succeed each other year after year.<sup>27</sup>

## **II. THE UNITED STATES HAS FAILED TO BRING ITS WTO-INCONSISTENT MEASURES INTO CONFORMITY WITH ITS WTO OBLIGATIONS**

### **A. THE UNITED STATES HAS FAILED TO COMPLY FULLY WITH THE DSB'S RECOMMENDATIONS AND RULINGS WITH RESPECT TO THE ZEROING PROCEDURES**

18. The Appellate Body concluded "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".<sup>28</sup> To capture the WTO-inconsistency of this "single rule or norm" in its various "manifestations", the DSB made four separate rulings regarding the zeroing procedures, addressing the application of those procedures in four different settings.<sup>29</sup>

19. The United States narrowed the scope of application of the zeroing procedures to exclude weighted average-to-weighted average ("W-to-W") comparisons in original investigations. The United States maintains the zeroing procedures in the three other "manifestations" or situations.

20. In assessing the evidence, Japan recalls the Appellate Body's admonition that "Article 21.5 proceedings do not occur in isolation from the original proceedings, but that both proceedings form part of a continuum of events."<sup>30</sup> In light of this "continuum of events", the Appellate Body observed that "doubts could arise about the objective nature of an Article 21.5 panel's assessment if, on a specific issue, that panel were to deviate from the reasoning in the original panel report in the absence of any change in the underlying evidence."<sup>31</sup>

21. There is no relevant change to the underlying evidence to justify a conclusion that the United States has eliminated the zeroing procedures in the three remaining "manifestations" subject to the DSB's recommendations and rulings.

22. Finally, even if the Panel were to conclude that the original zeroing procedures have been withdrawn through a narrowing of their scope of application, the evidence shows that they were simultaneously replaced by new zeroing procedures, with exactly the same precise content, applying in all situations addressed by the DSB's recommendations and rulings, except W-to-W comparisons in original investigations.

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<sup>27</sup> The panel in *US – Zeroing II (EC)* agreed that periodic reviews in such a chain were part of "the same subject matter" and "the same dispute". (Panel Report, *US-Zeroing II(EC)*, para. 7.28.)

<sup>28</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 88.

<sup>29</sup> Japan's Second Written Submission, para. 66.

<sup>30</sup> Appellate Body Report, *Chile – Price Band system (21.5)*, para. 136, citing Appellate body Report, *Mexico Corn Syrup (21.5)*, para. 121.

<sup>31</sup> Appellate Body Report, *US – Softwood Lumber VI (21.5)*, para. 103.

**B. THE UNITED STATES HAS FAILED TO COMPLY FULLY WITH THE DSB'S RECOMMENDATIONS AND RULINGS WITH RESPECT TO THE FIVE ORIGINAL PERIODIC REVIEWS**

**1. The United States Must "Bring" the Importer-Specific Assessment Rates "Into Conformity" with its WTO Obligations**

23. With respect to the five original periodic reviews, the disagreement between the Parties concerns the US failure to bring the importer-specific assessment rates into conformity with its WTO obligations. The United States argues that it need not bring these rates into conformity, because such action would impose a "retrospective" remedy given that the rates were established in the past, and relate to past entries.<sup>32</sup> Japan, in contrast, contends that modifying the rates involves "prospective" implementation, because it affects future US actions taken pursuant to the original reviews.

24. Neither the DSU nor the *Anti-Dumping Agreement* uses these words to describe a Member's implementation requirements. Instead, the Panel must interpret and apply the treaty words to which the Members agreed. Consistent with Articles 19.1, 22.1, 22.2 and 22.8 of the DSU, the DSB recommended that the United States "*bring [the five periodic reviews] into conformity*" with its WTO obligations. The DSB's recommendations and rulings apply to the importer-specific assessment rates because the Appellate Body expressly found that these rates were WTO-inconsistent.<sup>33</sup>

25. The ordinary meaning of the verb "bring" is "to cause to come *from, into, out of, to, etc.* a certain state or condition" and "to cause to become".<sup>34</sup> This verb, therefore, connotes *transformative action* by the implementing Member that changes the "state" of a measure. The immediate context of the verb in the DSU shows that the action must transform the measure into a state of "conformity" with WTO law. This meaning is confirmed by the Appellate Body's statement that an implementing Member must take transformative action "by modifying or replacing [the WTO-inconsistent measure] with a revised measure".<sup>35</sup>

**2. The United States' Arguments that Implementation Would Be Retrospective Are Misplaced**

26. The United States rejects Japan's view that implementation is "prospective" on the grounds that Japan's argument would require Commerce to "*recalculate the final liability*" in the five original reviews.<sup>36</sup> The United States' objections to the "*re*"-vision of WTO-inconsistent measures would, again, eviscerate WTO dispute settlement. Simply by tagging the "*re*"-vision of a measure as "retrospective" implementation, Members could: maintain and enforce WTO-inconsistent measures after the end of the RPT; continue to nullify and impair benefits; and perpetuate an imbalance in the Members' rights and obligations.

**3. Implementation Action Is Required When Measures Continue to Produce Legal Effects**

27. In cases where the WTO-inconsistent measure continues to produce WTO-inconsistent legal effects, panels require that the measure be brought into conformity.

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<sup>32</sup> See, e.g., United States' First Written Submission, paras. 53 and 58.

<sup>33</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 175.

<sup>34</sup> Definition of "to bring", *The Oxford English Dictionary*, J.A. Simpson and E.S.C. Weiner (eds.) (Clarendon Press, 1989, 2<sup>nd</sup> ed.), Volume II, page 555 (1<sup>st</sup> column, numbered 8) (original italics). Exhibit JPN-69.

<sup>35</sup> Appellate Body Report, *US – OCTG from Argentina (21.5)*, para. 173 (footnote 367) (emphasis added).

<sup>36</sup> United States' Second Written Submission, para. 47.

28. Japan has already referred to *EC – Commercial Vessels*, in which the panel insisted that the EC was obliged to take action to implement the DSB's recommendations and rulings with respect to WTO-inconsistent measures "to the extent that [they] *continue to be operational*".<sup>37</sup> A similar conclusion was reached in *India – Autos*.<sup>38</sup>

29. The panel indicated that the duty to bring a WTO-inconsistent measures into conformity does *not* arise if past measures "have *ceased to have an effect*".<sup>39</sup> It noted, though, that the past "as applied" measures at issue "remain[ed] binding and enforceable",<sup>40</sup> and concluded that the measures should be brought into conformity with the relevant agreement.<sup>41</sup>

30. There are very close parallels between the five periodic reviews at issue in these proceedings and the measures in *India – Autos*. In both disputes, the legal conclusion is the same. In *India – Autos*, India had to bring the "as applied" measures into conformity with its WTO obligations to ensure that the future enforcement of the measures was WTO-consistent. In these proceedings, because the WTO-inconsistent importer-specific assessment rates continue to be binding, enforceable and produce legal effects, the respondent must bring them into conformity.

#### **4. The United States Continues to Nullify or Impair Benefits Through the Collection of Excessive Anti-Dumping Duties After the End of the RPT**

31. In these proceedings, the five original periodic reviews were found to be inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.

32. As the Appellate Body put it, these provisions "ensure that the total amount of anti-dumping duties *collected* on the entries of a product from a given exporter" does not exceed the exporter's margin of dumping.<sup>42</sup> It also said that this margin of dumping "operates as a *ceiling* for the total amount of anti-dumping duties that can be *levied* on the entries of the subject product".<sup>43</sup> The Appellate Body's interpretation is confirmed by the title of Article 9, "*Imposition and Collection of Anti-Dumping Duties*".

33. The United States expressly states that it agrees with this interpretation:

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<sup>37</sup> Panel Report, *EC – Commercial Vessels*, para. 8.4 (emphasis added).

<sup>38</sup> Panel Report, *India – Autos*, paras. 8.4 and 8.5. (In that dispute, India subjected the importation of automotive products to the fulfilment of certain WTO-inconsistent conditions. Among others, importation was conditioned on an agreement by importers to export a minimum amount of production. India withdrew the original measures such that *new* imports were no longer subject to the WTO-inconsistent restrictions. India argued that there was, therefore, no duty to implement, because the measures had been withdrawn, and *new* entries were not subject to restrictions.)

<sup>39</sup> Panel Report, *India – Autos*, para. 8.26.

<sup>40</sup> Panel Report, *India – Autos*, para. 7.235.

<sup>41</sup> Panel Report, *India – Autos*, para. 8.58 ("The essential issue here is that the [restrictive condition] foreseen in [the past measures], which was found to be inconsistent, continues to be binding and to produce effects .... This issue does not relate to whether any *past execution of* [the past measures] might be required to be "undone" or otherwise called into question, but merely to establishing whether the measure previously found to be in violation of two of the GATT provisions continues to have an existence today, so that the Panel would be justified in making a recommendation that this measure be brought into conformity with the relevant agreement as of today.") (underlining added).

<sup>42</sup> Appellate Body Report, *US – Zeroing (EC)*, para. 130, and Appellate Body Report, *US – Zeroing (Japan)*, para. 155.

<sup>43</sup> Appellate Body Report, *US – Zeroing (EC)*, para. 130, and Appellate Body Report, *US – Zeroing (Japan)*, para. 155 (underlining added).

The United States does not dispute that Article 9.3 of the AD Agreement obliges Members to ensure that *the amount of antidumping duty collected not exceed the margin of dumping* established under Article 2 of the AD Agreement.<sup>44</sup>

34. Pursuant to this interpretation, irrespective of the date a periodic review is completed, Article 9.3 and Article VI:2 discipline a Member's actions in *collecting* duties. Moreover, the benefits that accrue to Japan under this provision concern the amount of the anti-dumping duties actually collected.

35. In these proceedings, the importer-specific assessment rates continue to be binding and enforceable, and continue to produce legal effects, after the end of the RPT. After that date, the United States will take enforcement actions to collect anti-dumping duties in excess of the margin of dumping. By collecting excessive duties, the United States violates Article 9.3 and Article VI:2, and nullifies or impairs benefits.

36. Furthermore, the US enforcement actions are distinct measures that also nullify or impair benefits under Article II of the GATT because, through these measures, the United States imposes duties at rates in excess of its tariff bindings.

## **5. Actions by US Courts Do Not Excuse the United States From the Requirement to Bring the Five Original Periodic Reviews into Conformity**

37. The United States argues that the importer-specific assessment rates in the five original periodic reviews need not be "brought into conformity", even though they continue to produce legal effects, because enforcement was delayed until after the end of the RPT due to injunctions issued in domestic litigation.<sup>45</sup>

38. Japan disagrees. In fact, all Members must provide judicial review of anti-dumping determinations under Article 13 of the *Anti-Dumping Agreement*. Moreover, the *Agreement* specifically envisions the possibility that judicial proceedings required by Article 13 may delay enforcement of a periodic review.<sup>46</sup>

39. The status of a measure under domestic law – including the "existence of domestic litigation" affecting that measure – is a fact.<sup>47</sup>

40. *Brazil – Tyres* provides an illustration.<sup>48</sup>

41. The court injunctions do not involve acts by private enterprises. Instead, they are acts of the United States' own courts, attributable to the United States under WTO law. As noted by the Appellate Body in *US – Shrimp*, the United States "bears responsibility for acts of all its departments of government, *including its judiciary*".<sup>49</sup>

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<sup>44</sup> United States' Second Written Submission, para. 64.

<sup>45</sup> United States' Second Written Submission, paras. 51-56.

<sup>46</sup> See *Anti-Dumping Agreement*, footnote 20, which refers to the possibility of delays, as a result of domestic judicial proceedings, with respect to all the deadlines in Article 9.3.

<sup>47</sup> United States' Second Written Submission, para. 51.

<sup>48</sup> In that dispute, the enforcement of the measure at issue was partially suspended pursuant to court injunctions obtained by private parties in domestic courts. The panel and the Appellate Body held that Brazil's measure could not benefit from an exception under Article XX of the GATT 1994 *because of the court injunctions*. (Appellate Body Report, *Brazil-Tyres*, para.252.) The fact that Brazil's partial suspension of the measure "arise[s] from court rulings does not exonerate Brazil from its obligation to comply with the requirements of Article XX". (Panel Report, *Brazil-Tyres*, para.7.305.)

<sup>49</sup> Appellate Body Report, *US – Shrimp*, para. 173 (emphasis added). See also Panel Report, *Brazil – Tyres*, para. 7.305, citing Article 4(1) of the *ILC Articles* (Exhibit JPN-65).

42. There is nothing frivolous about such litigation<sup>50</sup>, nor about delaying the collection of duties pending the outcome of that litigation. Interested parties incurred considerable expense in pursuing these judicial proceedings.

## 6. The ILC Articles on State Responsibility Confirm Japan's Position

43. Japan uses the *ILC Articles* to inform its interpretation of Article 19.1 of the DSU, which requires the United States to "bring the measure[s] into conformity" with its WTO obligations by the end of the RPT.<sup>51</sup>

44. The *ILC Articles* confirm that implementation action to "bring the measure[s] into conformity", with *prospective effect* from the end of the RPT, was essential to prevent *post-RPT conduct*, under the original measures, from giving rise to WTO-inconsistencies that *occurred newly or continued after the end of the RPT*. As a result, the *Articles* confirm that, absent prospective implementation action, the original reviews have ongoing legal effects after the end of the RPT, resulting in violations of WTO law at that time, with continued nullification or impairment of benefits.

45. The Appellate Body, panels and arbitrators have frequently relied on the *ILC Articles* to support the interpretation of the covered agreements. In these decisions, the *ILC Articles* have been cited as "rules of general international law",<sup>52</sup> and as reflective of "customary international law".<sup>53</sup> Arbitrators have also described the ILC's work on State responsibility as "based on relevant State practice as well as on judicial decisions and doctrinal writings, which constitute recognized sources of international law".<sup>54</sup>

46. Articles 13, 14 and 15 of the *ILC Articles* are, "rules of international law" under Article 31(3)(c) of the *Vienna Convention* that are "relevant" in interpreting Article 19.1 of the DSU. Articles 13, 14 and 15 of the *ILC Articles* could also be used to inform the "ordinary meaning" of Article 19.1 under Article 31(1) of the *Convention*, and may even be more pertinent than dictionaries.<sup>55</sup>

## 7. Japan's Interpretation Places All Duty Collection Systems on an Equal Footing

47. Whenever a WTO-inconsistent measure continues to produce legal effects after the end of the RPT, it must be brought into conformity with WTO law. This same obligation applies to all Members, irrespective of the duty collection system they operate.

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<sup>50</sup> US Court of Appeals for the Federal Circuit, *Zenith Radio Corp. v. United States*, 710 F. 2d 806 (Fed. Cir. 1983), at 809 (Exhibit JPN-70). See also Nies J., concurring, at 812.

<sup>51</sup> Japan's Second Written Submission, paras. 148-170.

<sup>52</sup> Appellate Body Report, *US – Cotton Yarn*, para. 120, and Panel Report, *Australia – Salmon (21.5)*, para. 7.12, footnote 146

<sup>53</sup> Appellate Body Report, *US – Line Pipe*, para. 259 ("Although Article 51 is part of the International Law Commission's Draft Articles, which do not constitute a binding legal instrument as such, this provision sets out a *recognized principle of customary international law*."); Panel Report, *US – Gambling*, para. 6.128; and Panel Report, *Canada – Dairy*, para. 7.77, footnote 427. See also Panel Report, *Korea – Government Procurement*, para. 7.96. ("Customary international law....applies to the extent that the WTO treaty agreements do not 'contract out' from it. ...to the extent there is no conflict or inconsistency, or an expression in a covered WTO agreement that implies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO.")

<sup>54</sup> Award of the Arbitrator, *US – FSC (22.6)*, para. 5.59, footnote 68; Award of the Arbitrator, *Brazil – Aircraft (22.6)*, para. 3.44.

<sup>55</sup> See Appellate Body Report, *US – Shrimp*, paras. 130-131, where international law norms were used in a general way to inform ordinary meaning, with reference to the *Vienna Convention*.



**8. The United States' Arguments Reduce Article 9.3 of the *Anti-Dumping Agreement* to Inutility**

48. The United States contends that effective implementation under Article 9.3 is ensured because the *cash deposit rate* established in the original reviews has been withdrawn by the cash deposit rate established in subsequent periodic reviews.<sup>56</sup> This argument is flawed for two reasons.

49. *First*, the subsequent reviews – by which the United States says "compliance was accomplished"<sup>57</sup> – are WTO-inconsistent for exactly the same reasons as the original reviews.

50. *Second*, and much more importantly, the United States argues that the importer-specific assessment rates need *never* be revised because they do not apply to new entries.

51. In any event, implementation action with respect to initial cash deposit rates can *never* secure compliance with the obligations in Article 9.3 regarding *the amount of duties finally collected* (unless no periodic review occurs). Even if a WTO-consistent cash deposit rate were to apply at the time of importation, much higher duties could be subsequently collected on the basis of a WTO-inconsistent importer-specific assessment rate.

**C. FOUR SUBSEQUENT PERIODIC REVIEWS COMPLETED BY THE UNITED STATES ARE INCONSISTENT WITH THE *ANTI-DUMPING AGREEMENT* AND THE GATT 1994**

52. In relation to the substance of Japan's claims that four subsequent periodic reviews are inconsistent with the *Anti-Dumping Agreement* and the GATT 1994, we note only that the United States' defence rests entirely on its jurisdictional arguments.<sup>58</sup> That is, the United States asserts that the Panel cannot examine these reviews. However, it does not argue that any of the reviews are consistent with its WTO-obligations; nor does it dispute that the USDOC used the zeroing procedures in any of these reviews.

**D. LIQUIDATION NOTICES AND INSTRUCTIONS ARE INCONSISTENT WITH ARTICLE II OF THE GATT 1994**

53. Japan claims that United States' liquidation notices and instructions, issued pursuant to four original periodic reviews (numbers 1, 2, 7, and 8), are inconsistent with Article II:1(a) of the GATT 1994. The United States argues that these claims should not be addressed because Japan "failed to request findings" from the Panel under Article II, and because these claims are "entirely derivative".<sup>59</sup>

54. However, *first*, there is no requirement in the DSU for a Member to "request findings" in its submissions to the Panel. In any event, if such a request is necessary, Japan hereby requests a finding under Article II of the GATT 1994.

55. *Second*, like "any act or omission" attributable to a Member,<sup>60</sup> the United States' liquidation instructions and notices are "measures".

56. Notably, whereas the four original periodic reviews were all adopted before the original panel proceedings began, the liquidation measures were all adopted after the end of the RPT. This shows that the measures involve separate acts of the United States.

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<sup>56</sup> See, e.g., United States' Second Written Submission, paras. 45 and 63.

<sup>57</sup> United States' Second Written Submission, para. 18.

<sup>58</sup> United States' Second Written Submission, para. 79.

<sup>59</sup> United States' Second Written Submission, para. 75.

<sup>60</sup> Appellate Body Report, *US – Zeroing (EC)*, para. 188.

57. Japan disagrees with the US argument that the liquidation measures do not violate Article II because liability for the duties arose at the time of importation when a cash deposit was paid.<sup>61</sup> Even if *provisional liability* for duties arose at the time of importation, the cash deposit rates did not establish the "treatment"<sup>62</sup> to which Japanese imports were ultimately subjected in connection with importation. Further, even if the periodic reviews establish the "treatment" to which imports are subsequently *liable*, the duties themselves are not *collected* or *levied* in the final results of a periodic review. Instead, the final "treatment" is made concrete only through the liquidation measures, which formally effect collection or levy of the import duties.

58. Accordingly, by adopting the liquidation measures, the United States acted inconsistently with its obligations under Article II:1(a) of the GATT 1994. Japan asks the Panel to make findings in that regard, independently of any findings it makes under the *Anti-Dumping Agreement* regarding the periodic reviews.

E. THE UNITED STATES HAS FAILED TO COMPLY WITH THE DSB'S RECOMMENDATIONS AND RULINGS REGARDING ONE SUNSET REVIEW

**1. The Panel cannot reconsider the Appellate body's finding that the USDOC's likelihood-of-dumping determination is WTO-inconsistent**

59. Japan claims that the United States has failed to implement the DSB's recommendations and rulings regarding the sunset review of 4 November 1999 concerning *Anti-Friction Bearings* (or "AFBs").<sup>63</sup> Although the United States accepts that findings of inconsistency "must be treated by the parties to [the] particular dispute as a final resolution to that dispute",<sup>64</sup> it argues that there is no resolution on the issue it raises, namely "whether the *original likelihood of dumping determination can exist on alternative grounds*".<sup>65</sup>

60. Japan disagrees. The Appellate Body's conclusion that the USDOC's likelihood-of-dumping is WTO-inconsistent represents a "final resolution" of the matter that is binding on the Parties, and that conclusion cannot be reassessed by this Panel.<sup>66</sup>

61. Japan notes that a similar finding was made in *US – OCTG from Argentina (21.5)*<sup>67</sup>

**2. The United States has not demonstrated a WTO-consistent basis for the USDOC's likelihood-of-dumping determination**

62. The Panel need go no further than to conclude that the United States has taken no implementation action to bring the 1999 AFB sunset review into conformity with Article 11.3 of the *Anti-Dumping Agreement*. Nonetheless, Japan wishes to comment on the US assertions that the USDOC's 1999 likelihood determination is WTO-consistent, despite the Appellate Body's ruling to the contrary.

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<sup>61</sup> United States' Second Written Submission, para. 76.

<sup>62</sup> Article II:1(a) of the GATT 1994.

<sup>63</sup> See Japan's First Written Submission, paras. 155 to 158.

<sup>64</sup> Appellate Body Report, *US – Shrimp (21.5)*, para. 97. See also Panel Report, *US – Gambling (21.5)*, para. 6.56.

<sup>65</sup> United States' Second Written Submission, para. 84.

<sup>66</sup> United States' Second Written Submission, para. 84.

<sup>67</sup> Appellate Body Report, *US – OCTG from Argentina (21.5)*, para. 143. ("The original panel concluded that "the USDOC's likelihood determination in the instant sunset review was inconsistent with Article 11.3 of the Anti-Dumping Agreement." It is evident from this language that the original panel's finding of WTO-inconsistency is addressed to the USDOC's likelihood-of-dumping determination. Therefore, to comply with the original panel's finding, as adopted by the DSB, the United States had to bring its determination of likelihood of dumping into conformity with Article 11.3 of the *Anti-Dumping Agreement*."")

63. The United States contends that "the *majority* of the dumping margins relied on in that determination are not WTO-inconsistent".<sup>68</sup> However, the supporting evidence it provides concerns just 10 of the 21 margins calculated in the 1996 periodic review, which is just one of nine periodic reviews covered by the 1999 sunset determination.<sup>69</sup> This is very far from a "majority" of the margins relied on by the USDOC.

64. The United States' assertion that the USDOC's 1999 likelihood determination is justified by just 10 margins determined in the 1996 review using adverse facts, suffers from other serious flaws.<sup>70</sup>

65. The picture painted today by the United States does not conform to the terms of the 1999 likelihood determination.<sup>71</sup> In fact, Japan considers that the United States is engaging in the worst form of *ex post* rationalization in an attempt to justify its inaction.

66. Although the United States now presents the 10 adverse facts margins as the *centerpiece* of the USDOC's 1999 likelihood determination, that determination curiously makes no reference whatsoever to these particular margins.

67. Even if the USDOC had expressly addressed the 10 adverse facts margins in its 1999 likelihood determination, these margins would not provide "positive evidence" for a determination regarding the likelihood of a continuation or recurrence of dumping in 1999.

68. Further, an authority cannot cherry-pick the evidence on which it chooses to rely, for example, taking account of 10 adverse facts margins to the exclusion of all other relevant evidence. Instead, it must conduct a "rigorous examination" of all relevant evidence.

69. In fact, instead of explaining how the 10 margins were weighed with "positive evidence", the 1999 determination inaccurately depicts the facts, because the USDOC impermissibly relied on many margins calculated using zeroing.<sup>72</sup>

70. The 10 adverse facts margins do not provide a WTO-consistent basis for a likelihood determination, because they were not calculated in a WTO-consistent fashion.

71. If an investigating authority relies on margins calculated in earlier proceedings, those margins must be consistent with the requirements of the *Anti-Dumping Agreement*.<sup>73</sup>

72. In selecting secondary information, Annex II(7) of the *Anti-Dumping Agreement* requires an authority to use "*special circumspection*", choosing the "most appropriate" information available,<sup>74</sup> and verifying it against information from "independent sources".

73. In the 1996 review, the USDOC relied on the *highest alleged* margin in the 1988 petition. The choice of the *most unfavourable alleged margin* does not appear to meet the requirement to use "*special circumspection*", given that there were many more "appropriate" sources of information that could have been used in place of the petitioners out-dated allegations.

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<sup>68</sup> United States' First Written Submission, paras. 3 and 75.

<sup>69</sup> United States' Second Written Submission, para. 85.

<sup>70</sup> Original Appellate Body Report, para. 182.

<sup>71</sup> The 1999 sunset review is contained in Exhibit JPN-22.

<sup>72</sup> Original Panel Report, para. 7.256; Original Appellate Body Report, para. 184.

<sup>73</sup> Original Appellate Body Report, para. 183.

<sup>74</sup> Panel Report, *Mexico – Rice*, para. 7.166.

**3. Conclusion on the 1999 likelihood-of-dumping determination**

74. In conclusion, the Panel cannot re-open the conclusion that the USDOC's 1999 likelihood-of-dumping determination is inconsistent with the *Anti-Dumping Agreement*. And, even if it could, the United States fails in its attempts to justify the 1999 determination because its *ex post* rationalization bears no relation to, and is not supported by, the terms of that determination. The US *ex post* rationalization does not show that the 1999 determination was based on a "rigorous examination" leading to a "reasoned and adequate explanation" supported by sufficient "positive evidence".

75. Finally, the arguments surrounding the US *ex post* rationalization demonstrate that the DSB's recommendations and rulings are too complex to be resolved by an *ex post* rationalization. Instead, the United States was required to revisit its 1999 determination in light of all pertinent evidence that was available at the time, but chose not to do so.

## ANNEX E-2

### EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF THE UNITED STATES

13 November 2008

1. On behalf of the US delegation, I would like to thank you for agreeing to serve on the Panel. As an initial matter, the United States would like to thank the Panel for agreeing to open the Panel's meeting to the public, including opening the third party session for those third parties willing to make their statements public. Opening this meeting to the public will have a positive impact on the perception of the WTO dispute settlement system, particularly with respect to transparency.

#### **I. SCOPE OF THIS DISPUTE**

2. The United States has requested a preliminary ruling concerning Japan's attempt to include three administrative reviews of *Ball Bearings from Japan* within the Panel's terms of reference. These reviews, identified by Japan as Review Nos. 4, 5, and 6, are not measures taken to comply with the DSB's recommendations and rulings, and the Panel should reject them as outside the scope of this proceeding under Article 21.5.

3. As an initial matter, it is important to recall that DSU Article 21.5 applies only when there is a disagreement as to the existence or consistency with a covered agreement of a measure taken to comply with the recommendations and rulings of the DSB. Therefore, the scope of an Article 21.5 compliance panel is inherently limited – it may only examine a claim that a measure taken to comply does not exist, or that a measure taken to comply is inconsistent with a covered agreement. In either case, the focus is on the DSB's recommendations and rulings.

4. Two of the administrative reviews of *Ball Bearings* challenged by Japan cannot be considered measures taken to comply because the final results in those reviews were adopted *prior* to the DSB's recommendations and rulings in the original proceeding. Measures taken by a Member prior to adoption of a dispute settlement report typically are not measures taken for the purpose of achieving compliance, and would not be within the scope of a proceeding under Article 21.5.

5. Here, the determinations from the 2003-04 and 2004-05 administrative reviews of *Ball Bearings* were issued in 2005 and 2006, respectively, which was well before the adoption of the DSB's recommendations and rulings at the end of January 2007. These administrative reviews have no connection with the DSB's recommendations and rulings and cannot logically be considered measures taken to comply. They therefore fall outside the scope of this proceeding.

6. Japan has urged this Panel to take an expansive and unwarranted view of Article 21.5. According to Japan's argument, any subsequent administrative review could fall within a compliance proceeding merely because it involved the same product exported from the same country by the same companies. However, as the Appellate Body noted in *US – Softwood Lumber IV (Art. 21.5)* ("*US – SWL IV*"), an approach where every subsequent administrative review was treated as a measure taken to comply "would be too sweeping."

7. Japan relies frequently on the Appellate Body report in *US – SWL IV* in an attempt to show the alleged "particularly close relationship" between the original *Ball Bearings* reviews and the three subsequent reviews. Japan's reliance is misplaced. Here, unlike in the *US – SWL IV* dispute, two of the three subsequent determinations were made well before the adoption of the DSB's recommendations and rulings. These subsequent determinations thus could not logically have taken into consideration the recommendations and rulings of the DSB in the original dispute.

8. As to the administrative review of *Ball Bearings* for 2005-06, Commerce issued the final results in this review after the adoption of the DSB's recommendations and rulings. However, this determination was made in 2007, long after the cash deposit rates from the administrative reviews subject to the DSB's recommendations and rulings had been withdrawn. In addition, the final results did not closely correspond to the expiration of the reasonable period of time ("RPT"). By contrast, in *US – SWL IV*, the determination in the first administrative review (the alleged measure taken to comply) was issued a few days after the Section 129 determination (the declared measure taken to comply), and both determinations closely corresponded to the expiration of the RPT. Finally, unlike the alleged measure taken to comply in *SWL IV*, the 2005-06 administrative review did not incorporate elements from a Section 129 determination "in view of" the DSB's recommendations and rulings.

9. None of these three subsequent measures is a measure taken to comply. Contrary to Japan's assertion, the United States has not asked this Panel to focus on the subjective intent of the United States in adopting the final results in the three administrative reviews. Rather, as we have just demonstrated, the three subsequent measures cannot *objectively* be considered measures taken to comply.

10. Japan also relies on the erroneous argument that the United States has declared that the three subsequent reviews of *Ball Bearings* are measures taken to comply. However, the United States has explained that the measures subject to the DSB's recommendations and rulings were eliminated as an *incidental consequence* of the US anti-dumping system when the cash deposit rate from one review was replaced by the cash deposit rate from the next review. This fact does not transform the subsequent reviews into "measures taken to comply" within the meaning of Article 21.5.

11. Japan worries that it will somehow be left without a remedy if the three subsequent reviews are excluded from this proceeding. However, the scope of a proceeding under Article 21.5 is limited by the text that Members have agreed to. The provisions of the DSU cannot be re-written just to take into account one Member's view of the way things ought to be. Article 21.5 is clear: measures that are not measures taken to comply – like those at issue here – do not fall within the scope of a compliance proceeding. Japan cannot distort the requirements of Article 21.5 so as to challenge any measure it deems related to the original *Ball Bearings* reviews.

12. The United States has also asked this Panel to reject any claims with respect to anti-dumping measures that were not specified in Japan's panel request because those measures were subsequent to that request. Japan would like to include any and all subsequent administrative reviews that it believes are "closely connected" to the DSB's recommendations and rulings, including the 2006-07 administrative review of *Ball Bearings from Japan*. However, under DSU Article 6.2, a panel request must identify the specific measures at issue, and under Article 7.1, the Panel's terms of reference are limited to those specific measures. Here, each determination that sets a margin of dumping for a defined period of time is separate and distinct. Under Article 6.2, Japan had to identify each such measure in its panel request. It did not and could not since the measures were not even in existence at the time of Japan's request for the establishment of this Panel. Accordingly, these subsequent administrative reviews cannot be subject to this compliance proceeding.

13. The United States reiterates that the 2006-07 administrative review of *Ball Bearings* should be rejected as outside the scope of this proceeding because it was not in existence at the time of panel

establishment. However, this administrative review is not within the Panel's terms of reference for another reason as well – it is not a measure taken to comply for the reasons provided in our 3 November submission.

## **II. THE UNITED STATES HAS FULLY COMPLIED WITH THE DSB'S RECOMMENDATIONS AND RULINGS WITH RESPECT TO THE FIVE ADMINISTRATIVE REVIEWS**

14. In this dispute, the Appellate Body found five anti-dumping administrative reviews inconsistent with the AD Agreement and the GATT 1994. The United States fully implemented the DSB's recommendations and rulings with respect to these administrative reviews by withdrawing the anti-dumping orders covering two of the administrative reviews and withdrawing the cash deposit rates established in the remaining three administrative reviews.

15. Japan has raised one principal argument in response. Japan asserts that implementation by the United States was insufficient because it did not undo action taken with respect to imports that entered the United States prior to the end of the RPT but that remained unliquidated after the end of the RPT – that is, "prior unliquidated entries." We recall that "liquidation" refers to the ministerial process under US law whereby the United States collects anti-dumping duties from importers. It should not be confused with the determination of final liability which occurs either through an administrative review or, automatically, if no administrative review is requested.

16. With respect to the prior unliquidated entries, Japan argues that the United States must recalculate the final anti-dumping liability established in the five administrative reviews. Japan's theory of implementation fails because: 1) the theory of implementation would create fundamental inequalities between retrospective and prospective anti-dumping systems; 2) this theory of implementation is not prospective in nature; and, 3) this theory of implementation is premised on misunderstandings of the AD Agreement.

17. The United States will first address the inequality created by Japan's theory of implementation for anti-dumping administrative reviews. Under Japan's theory, *one* implementation obligation exists for Members with prospective anti-dumping systems, but, *two* implementation obligations exist for Members with retrospective systems. For prospective systems, a Member has the obligation to revise the measure as applied to imports entering after the date of implementation – that is, future entries. For a retrospective system, a Member would similarly have the obligation to revise the measure as applied to future entries. However, *in addition*, the Member would have to recalculate final liability for any prior unliquidated entries.

18. Japan has been unable to provide any basis under the WTO agreements for establishing such radically different implementation obligations for Members with prospective and retrospective anti-dumping systems because none exists. The correct interpretative approach is to provide equal implementation obligations under either anti-dumping system.

19. The US understanding of implementation obligations creates just such equality. Under either a prospective or retrospective system, a Member has one implementation obligation – to bring that measure into conformity with the WTO agreements as applied to future entries. This is exactly what the United States has done in this dispute. The determination of the final liability in the five anti-dumping administrative reviews was not applied to any future entries. In this regard, the United States has withdrawn the five administrative reviews within the meaning of Article 3.7 of the DSU. Because these measures have been withdrawn, the United States has fully complied with its WTO obligations.

20. Japan's theory of implementation does not provide for prospective relief, but instead would require the United States to implement retroactively the DSB's recommendations and rulings in this

dispute. Japan incorrectly assumes that recalculating final liability for prior unliquidated entries is not retrospective because these entries have not been liquidated. However, Japan's theory leads to an "undoing of past acts" for these prior unliquidated entries and is, thus, *retrospective*. Under Japan's theory, the United States would have to revisit the determination of the final liability calculated for these unliquidated entries. This would undo the results of the anti-dumping administrative reviews as applied to these prior entries.

21. The correct understanding of implementation, in contrast, is unquestionably prospective. A Member need not undo any past acts, but, instead, must either withdraw the measure or revise the measure as applied to future entries. This is exactly what the United States did with respect to the five administrative reviews because it withdrew each of the challenged measures. In this way, the United States *prospectively* implemented the DSB's recommendations and rulings.

22. Japan's theory of implementation must also be rejected because it is premised on incorrect interpretations of Articles 18.3 and 9.3 of the AD Agreement. First, Japan asserts that pursuant to Article 18.3 of the AD Agreement, the AD Agreement applies to the five administrative reviews because these reviews were based on applications made after 2 January 1995. As a result, Japan incorrectly concludes that there is no manner in which applying the DSB's recommendations and rulings in this dispute to prior unliquidated entries can be viewed as retroactive.

23. Japan misapprehends Article 18.3 of the AD Agreement because this article does not address the implementation obligations of Members pursuant to the dispute settlement provisions. Additionally, Japan's argument assumes what it wants to prove. That is, Japan's argument assumes that a WTO dispute challenging a determination made after 2 January 1995, could lead to a revision of entries prior to that date. However, this is precisely the question at issue – whether WTO disputes affect prior unliquidated entries. Article 18.3 of the AD Agreement in no manner answers this question.

24. Japan's interpretation of Article 18.3 also would introduce an implausible definition of "retroactive" into WTO anti-dumping disputes. As long as a WTO dispute involves an administrative review that was based on an application received on or after 2 January 1995, under Japan's theory the dispute could result in an obligation to revise that administrative review *in any manner* irrespective of how long ago the WTO Member took action pursuant to that administrative review and how final that action was. The mere fact that Article 18.3 of the AD Agreement makes the agreement applicable to administrative reviews initiated pursuant to applications made on or after 2 January 1995, cannot support such an implausible definition of "retroactive."

25. Japan also incorrectly argues that Article 9.3 of the AD Agreement requires implementation obligations with respect to the five administrative reviews to reach prior unliquidated entries because if the obligations do not exist, Article 9.3 would be rendered a nullity. The US obligations under Article 9.3 are the same as those for Members operating prospective systems – if the results of a review are found to be WTO inconsistent, those results must not be applied to future entries. Article 9.3 does not require a WTO Member to undo results of a review as to prior unliquidated entries.

26) In addition to Japan's principal argument that implementation reaches prior unliquidated entries, Japan also has argued that – with respect to the five administrative reviews – the United States has violated various additional provisions of the WTO agreements. These additional claims are fully addressed in our written submissions, which demonstrate that these claims are premised on misunderstandings of the WTO Agreements and mischaracterizations of the US response to the DSB's recommendations and rulings in this dispute.



### **III. THE UNITED STATES HAS COMPLIED WITH THE DSB'S RECOMMENDATIONS AND RULINGS WITH RESPECT TO THE CHALLENGED SUNSET REVIEW**

27. Japan argues incorrectly that the November 1999 sunset review of *Anti-Friction Bearings* "could not, and cannot today, provide a valid legal basis under Article 11.3 for the continued maintenance of the anti-dumping order in question." To the contrary: absent a demonstration that there is no WTO-consistent basis for the likelihood of dumping determination, Japan cannot prevail upon its claim that the anti-dumping duty order should have been terminated. As the United States demonstrated in its written submissions, Japan's arguments are unfounded.

28. In the underlying dispute, both Japan's challenge and the Appellate Body's finding of WTO inconsistency were limited to the extent the United States relied on margins from previous proceedings calculated *with zeroing*. The original likelihood of dumping determination, however, did not rest exclusively upon the margins that the Appellate Body found inconsistent with Article 11.3 of the AD Agreement. The remaining margins – in fact, the *majority* of margins – cannot be characterized as inconsistent with the AD Agreement because they either *predate* the AD Agreement or did not involve the use of a zeroing methodology. Each of these two categories of margins independently supports the criterion that Commerce applied. And neither the original panel nor the Appellate Body made any adverse findings regarding these margins.

29. In response, Japan incorrectly argues that these two categories of margins cannot be relied upon to support the sunset determination. Japan's arguments are flawed procedurally. In the original proceeding, Japan did not challenge the margins that were determined *without zeroing* or the margins that predated the AD Agreement and the WTO. As such, Japan's assertions in this dispute that the United States should have presented the arguments defending its reliance upon non-zeroed margins and pre-WTO margins in the original proceeding is unfounded. The United States had no obligation to defend these aspects of the November 1999 sunset review because Japan did not challenge them at the time.

30. Second, it is incorrect to interpret the Appellate Body's findings in this dispute as prohibiting the United States from relying upon margins calculated *without zeroing*. In the fifth administrative review, for example, which covered part of the relevant sunset review period, Commerce reviewed twenty-one respondents. For ten non-cooperating respondents, Commerce applied a dumping margin based upon pricing data in the petition. This above *de minimis* rate was determined *without zeroing*. Because these respondents were not subsequently reviewed, their non-zeroed dumping margins represented their most recent dumping experience that is directly relevant to the likelihood of dumping determination for this anti-dumping duty order. This vitiates any suggestion by Japan that the anti-dumping duty order should have been terminated.

31. Third, Japan provides no textual basis for its argument that a Member cannot rely upon pre-WTO margins in making a sunset determination. This Panel should not entertain Japan's unsupported argument.

### **IV. THE UNITED STATES HAS COMPLIED WITH THE DSB'S RECOMMENDATIONS AND RULINGS CONCERNING THE "AS SUCH" INCONSISTENCY OF THE ZEROING PROCEDURES**

32. The DSB's recommendations and rulings in the original dispute applied to the *single measure* known as the "zeroing procedures," regardless of the comparison methodology used or the type of anti-dumping proceeding. Effective 22 February 2007, the United States removed that single measure by discontinuing zeroing in weighted-average to weighted-average comparisons in original investigations. Japan, however, disregards the fact that the DSB's recommendations and rulings pertained to a single measure.

33. The panel in the original proceeding was explicit that the zeroing procedures were a single measure that applied in all contexts and when using all comparison methodologies. The Appellate Body upheld the panel's conclusion, saying that the zeroing procedures "simply reflect different manifestations of a *single rule or norm*."

34. Japan took the very same position in the original proceeding, where it argued that the zeroing procedures were a *single measure*. Thus, according to Japan's own original view, the zeroing procedures were a single measure that applied in all contexts. The original panel and the Appellate Body agreed, but Japan would now like to forget that it ever made and won this argument.

35. In view of the findings of the panel and the Appellate Body, it logically follows that if the United States stopped using zeroing in any one of these different contexts, then the single measure no longer existed. Therefore, when Commerce announced that it would no longer apply the zeroing procedures in weighted-average to weighted-average comparisons in original investigations, it eliminated the single measure that was found to be "as such" inconsistent.

## ANNEX E-3

### CLOSING STATEMENT OF THE UNITED STATES

5 November 2008

Mr. Chairperson, members of the Panel:

1. On behalf of the United States delegation, I would like to thank you and the members of the Secretariat for your work on this dispute. We appreciated the opportunity to provide you with preliminary thoughts on your questions and look forward to providing you with additional comments in our written responses.

2. We would like to thank the Panel again for opening this hearing to the public. We note that three third parties took the opportunity to make public statements. WTO Members and the public have had an opportunity to see the Panel's professionalism and impartiality, which can only strengthen the credibility of the WTO dispute settlement system.

#### **Japan Misconstrues the US Argument on Measures Taken to Comply**

3. Today in our closing statement we would first like to focus on a few points raised during the course of the meeting concerning the issue of "measures taken to comply." As we have explained, the United States came into compliance with the Dispute Settlement Body's ("DSB") recommendations and rulings with respect to the Ball Bearings reviews through the incidental operation of the US anti-dumping system when the WTO-inconsistent cash deposit rates were removed. The last such removal occurred in 2005, following the 2003-04 administrative review of Ball Bearings. This was long before the adoption of the DSB's recommendations and rulings. The measure bringing the United States into compliance in each instance was the act of removing the WTO-inconsistent border measure. This removal did not transform any and all subsequent administrative reviews of the same anti-dumping order of Ball Bearings into measures taken to comply just because they allegedly bear some relationship to the same anti-dumping duty order. And the Dispute Settlement Understanding ("DSU") does not provide for such a sweeping expansion of a compliance panel's terms of reference. Moreover, contrary to Japan's assertion, the United States has never maintained that subsequent reviews are measures taken to comply.<sup>1</sup> We have always stated that it was the act of removing the WTO-inconsistent border measure that brought the United States into compliance.

4. Japan attempts to disparage the US argument by asserting that the United States views compliance prior to the DSB's recommendations and rulings as some sort of "convenient accident."<sup>2</sup> However, as we explained yesterday, 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.<sup>3</sup> (I direct the Panel to our footnote 3, which cites to DSB minutes in which Members discussed compliance occurring before adoption of the DSB's recommendations and rulings.) Nothing precludes an Article 21.5 panel from finding that a

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<sup>1</sup> Japan Opening Statement, paras. 6-7.

<sup>2</sup> Japan Opening Statement, para. 18.

<sup>3</sup> 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 Anti-Dumping Measures on Grey Portland Cement from Mexico*, paras. 42-43.

Member has come into compliance in the fashion we have described, and as the United States has done in this dispute.

5. As to the administrative reviews subject to the DSB's recommendations and rulings, this Panel should find that the United States has removed the WTO-inconsistent border measures. The Panel should also reject Japan's attempt to include subsequent reviews of Ball Bearings in the scope of this proceeding.

### **The United States Has Eliminated the Zeroing Procedures**

6. The Appellate Body and the panel in the original proceeding found the zeroing procedures to be a single measure that was applied whenever the US Department of Commerce ("Commerce") calculated margins of dumping, regardless of the comparison methodology.<sup>4</sup> It follows logically that when Commerce discontinued zeroing in one context – that is, in making W-to-W comparisons in investigations – the United States eliminated the single measure known as the zeroing procedures.

7. At yesterday's session, Japan relied on the existence of separate findings of inconsistency against the zeroing procedures in an attempt to show that the United States had not complied with the DSB's recommendations and rulings. However, the existence of separate rulings does not mean that there were also separate measures.<sup>5</sup> Rather, there was one single measure – the zeroing procedures – as Japan itself argued in the original proceeding. And the DSB's recommendations and rulings required the United States to remove that single, WTO-inconsistent measure, which it has done.

8. Japan also asserted that if the Panel finds that the single measure was withdrawn, then it should conclude that the original measure was replaced by "new zeroing procedures."<sup>6</sup> Japan, as the complaining Member, has the burden of proving the existence of such a replacement measure. The Panel must be satisfied that Japan has met this burden, and, as the Appellate Body has noted, "a panel must not lightly assume the existence of a 'rule or norm' constituting a measure of general and prospective application, especially when it is not expressed in the form of a written document."<sup>7</sup> Japan has not demonstrated the existence of a new measure, and the Panel should reject Japan's assertion of a new, WTO-inconsistent replacement measure.

### **The United States Has Complied With the DSB's Recommendations and Rulings With Respect to the Five Administrative Reviews**

9. With respect to the five administrative reviews, the United States has explained at this panel meeting and throughout its written submissions that it has prospectively complied with the DSB's recommendations and rulings in this dispute. Prospective compliance was achieved because these administrative reviews were withdrawn and no longer serve as the basis for any anti-dumping liability on entries occurring after the conclusion of the reasonable period of time ("RPT"). Because implementation obligations do not exist with respect to entries occurring prior to the conclusion of the RPT, no further action is required.

10. In its opening statement, Japan made much of liquidation instructions that Commerce issued after the conclusion of the RPT.<sup>8</sup> These liquidation instructions applied to prior entries – that is, entries occurring prior to the conclusion of the RPT. Because implementation obligations do not exist with respect to prior entries, these liquidation instructions are irrelevant to compliance with the DSB's recommendations and rulings in this dispute.

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<sup>4</sup> *US – Zeroing (Japan) (Panel)*, para. 7.58; *US – Zeroing (Japan) (AB)*, para. 88.

<sup>5</sup> Japan Opening Statement, paras. 37-40.

<sup>6</sup> Japan Opening Statement, para. 45.

<sup>7</sup> *US – Zeroing (EC) (AB)*, para. 196.

<sup>8</sup> *See, e.g., Japan Opening Statement*, para 46.

11. The importance of implementation obligations with respect to the five administrative reviews only applying to post RPT-entries is paramount. In prospective systems implementation obligations are necessarily limited to post-RPT entries. The same must be true for retrospective systems, otherwise, retrospective systems would be unfairly obligated to implement in two manners, with respect to both prior and post-RPT entries. There is no basis in the covered agreements for adding to the implementation obligations of Members operating retrospective systems. To the contrary, the Appellate Body stated in this dispute that the AD Agreement is neutral as between retrospective and prospective systems, and the AD Agreement does not favour one system or place one system at a disadvantage.<sup>9</sup>

**This Panel Should Reject Japan's Claims Concerning the Sunset Review of Anti-Friction Bearings**

12. With respect to the challenged sunset review of Anti-Friction Bearings, Japan has raised several new arguments before this Panel. Japan argues that Commerce cannot rely on certain pre-WTO margins of dumping and margins of dumping applied to Japanese respondents that refused to cooperate in certain assessment proceedings.<sup>10</sup> These arguments could have been made in the original proceeding, but were not, and in raising them now, Japan has not met its burden of establishing the WTO-inconsistency as to the new arguments.

13. It is clear from the original sunset determination that Commerce considered all dumping margins from prior reviews which were conducted after the imposition of the anti-dumping duty order.<sup>11</sup> The margins, the majority of which were calculated without zeroing, demonstrate that Japanese respondents continued to dump at above de minimis levels after the imposition of the anti-dumping order. Because Japanese respondents continued to dump, even when the anti-dumping duties were in effect, Commerce made a reasoned and adequate conclusion that dumping would continue if the anti-dumping order was revoked.

14. Mr. Chairman and members of the Panel, we appreciate this opportunity to present these closing comments and look forward to continuing to work with you on these important issues.

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<sup>9</sup> *US – Zeroing (Japan) (AB)*, para. 163.

<sup>10</sup> Japan Second Written Submission, paras. 194-95; Japan Opening Statement, paras. 118-30.

<sup>11</sup> Exh. US-A24 at n. 3.

## ANNEX E-4

### THIRD PARTY ORAL STATEMENT OF CHINA

1. Thank you, Mr. Chairman, and distinguished members of the Panel. China appreciates this opportunity to present its views on the following issues raised in this Panel proceeding.
2. **The first issue is that** the United States has not fully complied with the DSB's recommendations and rulings regarding the zeroing procedures.
3. China recalls that the DSB has ruled that "as such" measures challenged by Japan that maintaining zeroing procedure in original investigation by W-to-W, T-to-T comparison method and maintaining zeroing procedure in periodic reviews and new shipper reviews by any comparison method are inconsistent with Articles 2.4.2, 2.4, 9.3 and 9.5 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.
4. To the best information available, China understands that at the end of reasonable period of time ("RPT"), the United States only abandoned zeroing procedure in original investigation by W-to-W comparison method. Thus, China agrees with Japan that the United States' omission to take action to implement the DSB's recommendations and rulings that the zeroing procedures are WTO-inconsistent in the following situations: (i) in T-to-T comparisons in original investigations; (ii) under any comparison methodology in periodic reviews; and (iii) under any comparison methodology in new shipper reviews.
5. **The second issue is that** the United States has not taken any action to comply with the DSB's recommendations and rulings regarding the five periodic reviews.
6. China recalls that the DSB has ruled that "as applied" measures challenged by Japan that by applying zeroing procedures in the 11 periodic reviews identified in Japan's Request for the Establishment of a Panel, the United States acted inconsistently with Articles 2.4 and 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.
7. However, the United States argued that in each periodic review case, a prior periodic review determination is superseded by a subsequent review, and that since the periodic reviews challenged in the original dispute do not exist any more with new cash deposit rates, the United States is not required to do anything to implement.
8. China disagrees with the United States. Such interpretation of subsequent review would undermine the objective and purpose of the WTO dispute settlement system and would make it impossible for a Member to get remedy.
9. Further, China agrees with Japan that since after the end of the RPT, the United States would collect definitive anti-dumping duties at importer-specific assessment rates determined with zeroing in these reviews. Even the challenged measures which were WTO-inconsistent were superseded by the subsequent reviews, they continue to produce legal effects after the end of the RPT.
10. China hereby supports Japan's views that the Panel should find that the United States has not taken any action to comply with the DSB's recommendations and rulings regarding the five periodic reviews.

11. **The third issue is that** the three subsequent administrative reviews of ball bearings from Japan are within the scope of this proceeding.
12. China believes that the Panel should find that the three subsequent administrative reviews constitute "measures taken to comply" for purposes of Article 21.5 of the DSU.
13. China notes that the United States argued that the three subsequent administrative reviews are not "measures taken to comply". However, as the Appellate Body held in *US-Soft Lumber IV* (21.5) that "*An implementing Member cannot decide for itself whether or not a measure is "taken to comply"; instead, a compliance panel must objectively assess whether a challenged measure meets the requirements of Article 21.5*".
14. China agrees with Japan that the three subsequent administrative reviews have "sufficiently close links" to the recommendations and rulings of the DSB and shall be subject to review by an Article 21.5 panel, and that "*Article 21.5 must be interpreted to prevent the implementing Member from undermining the substantive disciplines in the covered agreements and also the dispute settlement mechanism in the DSU*".
15. Once again, China thanks the Panel for this opportunity and hopes that these comments will prove to be useful.

## ANNEX E-5

### EXECUTIVE SUMMARY OF THE THIRD PARTY ORAL STATEMENT OF THE EUROPEAN COMMUNITIES

5 November 2008

#### I. INTRODUCTION

1. The European Communities generally agrees with the claims and arguments raised by Japan in this case and regrets the position adopted by the United States, which still today continues taking positive acts to collect anti-dumping duties based on zeroing, despite the thousand of pages of adopted DSB reports ruling against the United States on this matter.

#### II. THE UNITED STATES HAS FAILED TO COMPLY WITH THE "AS SUCH" FINDINGS AGAINST ZEROING IN THE ADOPTED DSB REPORTS

2. With respect to the "as such" findings against the use of zeroing contained in the adopted DSB reports in the original dispute, the European Communities fails to understand the US entrenched position in this compliance proceeding. The single rule or norm subject to the original proceeding – and that the United States was obliged to bring into conformity – was the use of zeroing in *any* anti-dumping proceeding. Since the United States has merely eliminated zeroing in *one* type of anti-dumping proceedings (*i.e.*, original investigations) and with respect to *one* comparison methodology (*i.e.*, W-to-W), the European Communities agrees with Japan that the United States has failed to *fully* comply with the DSB's recommendations and rulings in the original dispute.

#### III. THE US THEORY ON IMPLEMENTATION BASED ON DATE OF ENTRY SHOULD BE REJECTED

3. In the European Communities' view, in light of the circumstances of this case, the *date of entry* for the purpose of assessing compliance by the United States with the DSB's recommendations and rulings in the original dispute is *irrelevant*. The European Communities agrees with Japan that *prompt compliance* as mandated by Article 21.1 of the DSU at least requires the United States to stop taking any positive acts providing for the final payment of duties or retention of cash deposits based on zeroing with respect to those entries not finally liquidated before the end of the reasonable period. In other words, it requires the United States, in a simple accounting exercise, to collect the proper (and WTO-consistent) amount of duties on entries pending for final liquidation *after* the end of the reasonable period of time (*i.e.*, 24 December 2007).

#### A. THE UNITED STATES MISUNDERSTANDS THE ANTI-DUMPING AGREEMENT

4. The European Communities considers that the arguments brought by the United States to support its implementation theory based on the date of entry fundamentally show its misunderstanding of the basic principles set out by the *Anti-Dumping Agreement*. Indeed, the *Anti-Dumping Agreement* disciplines *actions* taken by WTO Members against dumping. The set of *actions* which fall under the disciplines of the *Anti-Dumping Agreement* certainly include the moment when the anti-dumping duty is collected. In this respect, the European Communities observes that the *Anti-Dumping Agreement* employs different terminology in its provisions when referring to the obligations contained therein. For instance, Article 1 of the *Anti-Dumping Agreement* states that "an anti-dumping measure shall be



applied only under the circumstances provided in Article VI of the GATT 1994". The term "applied" can be understood in a broad sense, including any *actions* taken by WTO Members in the application of anti-dumping measures. Similarly, Articles 8.1, 9.1, 10.4, 11.2, 11.3, 12.2.1, 12.2.2 and 18.3 of the *Anti-Dumping Agreement* refer to general terms like "impose" or "imposition" of anti-dumping duties. When looking at the GATT 1994, Article VI:2 uses a more specific language when stating that "in order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty no greater in amount than the margin of dumping in respect of such a product". The term "levy" is defined in Footnote 12 of the *Anti-Dumping Agreement* as "the definitive or final legal assessment or collection of a duty or tax". Thus, levying anti-dumping duties includes legal assessments and collection of duties. A more specific language is also found in Article 9 of the *Anti-Dumping Agreement*. As mentioned in its title, Article 9 of the *Anti-Dumping Agreement* deals with the "*Imposition and Collection of Anti-Dumping Duties*" (*emphasis added*). Indeed, while Article 9.1 deals with the imposition of anti-dumping duties in general terms, Article 9.2 contains a more specific obligation when stating that "[w]hen an anti-dumping duty is *imposed* in respect of any product, such anti-dumping duty shall be *collected* in the appropriate amounts in each case" (*emphasis added*). It results from the language of Article 9 of the *Anti-Dumping Agreement* (and in particular its paragraphs 1 and 2) that there is a difference between imposition and collection of anti-dumping duties. In other words, the fact that the *Anti-Dumping Agreement* uses different terms implies in this particular context that each of them must have a particular meaning. Indeed, according to their *textual* meaning, "impose" means "to establish or apply by authority" whereas "collect" is "to claim as due and receive payment for".

5. More importantly, Article 9.2 of the *Anti-Dumping Agreement* establishes an obligation that any anti-dumping duty imposed on any product must "be collected in the appropriate amounts in each case". In other words, the *Anti-Dumping Agreement* clearly regulates the *actions of collection* of anti-dumping duties, specifying that in each case such collection of duties must be made in the appropriate amounts. Thus, in light of Articles 9.2 and 9.3 of the *Anti-Dumping Agreement*, any *action* of collection of anti-dumping duties (as any *decision* to assess duties at a particular amount) must not exceed the margin of dumping as established under Article 2 of the *Anti-Dumping Agreement*. The Appellate Body has also acknowledged the relevance of the term "collection" of anti-dumping duties when stating that "pursuant to Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, investigating authorities are required to ensure that the total amount of anti-dumping duties *collected* on the entries of a product from a given exporter shall not exceed the margin of dumping established for that exporter" (*emphasis added*).

6. Therefore, in the European Communities' view, the US implementation theory based on the date of entry essentially ignores that the *Anti-Dumping Agreement* comprehensively regulates how WTO Members can apply anti-dumping measures, including *actions* for collecting duties. Logically, those actions are relevant for assessing compliance with the DSB's recommendations and rulings as well as the covered agreements.

## B. MEMBERS' IMPLEMENTATION OBLIGATIONS IN LIGHT OF THE EXISTENCE OF DOMESTIC LITIGATION

7. In this case, the US obligation resulting from the DSB's recommendations and rulings in the original dispute was to stop using zeroing by the end of the reasonable period of time *at the latest*. Neither this obligation nor the WTO rights have changed as a result of domestic litigation. The fact that the United States in accordance with its municipal law could not collect those duties *before* the end of the reasonable period of time because importers have exercised their legal rights for judicial review does not imply that those actions of collection of duties based on zeroing *after* the end of the reasonable period of time can escape from the obligation to comply with the adopted DSB reports in this dispute. Otherwise, those actions disciplined by the *Anti-Dumping Agreement* would not be subject to WTO-scrutiny.

8. More fundamentally, if domestic litigation would not have any effect on the Member's implementation obligations – as the United States suggests – the obligation to provide for adequate judicial review of anti-dumping determinations pursuant to Article 13 of the *Anti-Dumping Agreement* would be meaningless. Thus, the US approach leads to absurd results and would allow Members to circumvent compliance with adopted DSB reports. Nowhere in the covered agreements it is mentioned or intended that certain "acts" of WTO Members are not subject to scrutiny under the WTO Agreements. Therefore, *regardless of the existence of domestic litigation*, the acts of collection of duties based on zeroing after the end of the reasonable period of time (as well as the US omissions in this respect) must be in conformity with the US obligations as derived from the DSB's recommendations and rulings in the original dispute and, in particular, with the *Anti-Dumping Agreement*.

#### C. COMPLIANCE AS REQUESTED BY JAPAN WOULD BE PROSPECTIVE IN NATURE

9. The European Communities agrees with Japan that the United States would comply with the DSB's recommendations and rulings in a *prospective manner* in this case if it stops taking any positive acts providing for the final payment of duties or retention of cash deposits based on zeroing with respect to those entries not finally liquidated before the end of the reasonable period.

10. The United States is not required in this case to "undo" past acts as to prior unliquidated entries, simply because the final anti-dumping liability in accordance with the US retrospective system of duty assessment is determined *at a later stage* than the time of importation. Consequently, since with respect to unliquidated entries after the end of the reasonable period of time the final amount of anti-dumping liability has not yet been established (*i.e.*, the USCBP has not liquidated the duties or such liquidation has not become final and conclusive pending the outcome of domestic litigation), the United States must in a *simple accounting exercise* make its calculations so as to properly reflect the degree of dumping that occurred *at least* with effect from the end of the reasonable period of time. Otherwise, insofar as the United States continues collecting duties based on zeroing with respect to those entries, the measure challenged in the original dispute continues *effectively* in place.

11. Finally, the European Communities would also like to add that the Panel can examine Japan's arguments relating to the *ILC Articles* in light of Article 31.3(c) of the *Vienna Convention on the Law of Treaties*.

#### D. PROSPECTIVE AND RETROSPECTIVE ANTI-DUMPING SYSTEMS LEAD TO IDENTICAL RESULTS

12. The European Communities disagrees with the unfounded statements made by the United States as regards the EC's alleged "practice" and requests the Panel to disregard them. Under both systems equality is achieved since they are subject to the obligation contained in Article 9.3 of the *Anti-Dumping Agreement* that the amount of anti-dumping duty must not exceed the margin of dumping established under Article 2. Like the United States, the European Communities is not prevented from applying the WTO-consistent methodology to previous entries pursuant to an act or decision taken *after* the end of the reasonable period of time, thereby complying with the DSB's recommendations and rulings in a prospective manner. This is precisely what the United States is refusing to do in the present case.

#### E. CONCLUSION

13. In sum, in light of the circumstances of this case, the European Communities considers that the US theory of compliance based on the date of entry must be rejected. *Immediate compliance* as mandated by Article 21.1 of the DSU implies that the United States must have stopped using zeroing

*after* the end of the reasonable period of time, including *actions* for collection of duties based on zeroing with respect to prior unliquidated entries.

#### **IV. THE UNITED STATES HAS FAILED TO COMPLY WITH THE DSB'S RECOMMENDATIONS AND RULINGS AS REGARDS THE SUNSET REVIEW AT ISSUE**

14. In the European Communities' view, in order to comply with the DSB's recommendations and rulings in the original dispute, the United States *at least* should have carried out a new determination of likelihood of recurrence of dumping in order to justify its conclusion that the sunset review at hand should remain in place. However, the United States has failed to do so. Thus, the United States cannot use this proceeding to provide the basis for the maintenance of the sunset review at hand; nor the United States can have a "second chance" in this compliance proceeding to defend a measure which was found to be inconsistent with the *Anti-Dumping Agreement*. Consequently, the European Communities considers that the original determination of recurrence of dumping still relies on the same dumping margins based on zeroing which were found to be WTO-inconsistent and, thus, the original violation of Article 11.3 of the *Anti-Dumping Agreement* also continues in light of the US omissions in the present case.

#### **V. THE SUBSEQUENT REVIEWS FALL UNDER THE SCOPE OF THIS COMPLIANCE PANEL**

15. The European Communities considers that the subsequent reviews brought by Japan in this proceeding fall under the scope of this compliance Panel. In the European Communities' view, as illustrated by the Appellate Body in *US – Softwood Lumber IV (21.5)*, when examining whether a measure can be considered as "measure taken to comply" falling under the jurisdiction of a compliance panel, the fact that such a measure was issued *before* the adoption of the DSB reports is only *one* of the elements which should be considered. However, in any case, the *effects* of the measure concerned is the relevant factor to determine whether or not that measure may be examined in proceedings under Article 21.5 of the DSU. In this respect, the *timing, direction* or *intention* of the measure as taken by the Member concerned cannot limit the scope of an Article 21.5 panel. Therefore, in the European Communities' view, the US position concerning the relevance of the *timing* of the subsequent reviews to actually break the close connexion with the DSB's recommendations and rulings in the original dispute should be rejected; more so when as in this case, the United States has admitted in its submissions the close relationship between the subsequent reviews and the original measures.

16. Even if the timing of the subsequent reviews were to be a relevant factor in determining whether or not those measures may be examined in this compliance proceeding, the European Communities considers that the US *omissions* in this case (*i.e.*, the fact that it has not stopped collecting duties based on zeroing resulting from the determinations made pursuant to those subsequent reviews) also fall under the scope of this compliance proceeding. Those are actions (and omissions) in connection with the subsequent reviews that took place *after* the end of the reasonable period of time.

17. Moreover, the Appellate Body in *US – Upland Cotton (21.5)* observed that where *a violation was found to exist* (in particular, a violation of the *SCM Agreement* arising from a subsidy which had caused serious prejudice) and the Member in question *continues violating the same relevant provisions* of the covered agreements (in that case, the same subsidy under the same conditions and criteria), then there is a particularly *close relationship* between the new measure and the DSB's recommendations and rulings in the original dispute. Otherwise, the Member concerned would not be able to obtain *adequate relief* as a result of the dispute settlement procedures, contrary to the objective of prompt settlement and prompt compliance set out in Articles 3.3 and 21.1 of the DSU. In the present case, there was a violation (*i.e.*, use of zeroing in the original measures) and the violation has

continued (since the United States has continued applying zeroing in the subsequent reviews). Therefore, it follows that those subsequent reviews (as well as US omissions) fall under the scope of this compliance Panel.

18. Finally, as regards Japan's supplemental submission, the European Communities considers that the results of a periodic review concerning ball bearings entering the United States during the period 1 May 2006 – 30 April 2007 fall under the terms of reference of this Panel. The requirement to "identify the specific measure at issue" contained in Article 6.2 of the DSU does not have a temporal scope; rather, it implies that the description of the measures at issue in the panel request must allow the Member concerned to know the precise content of those measures on a substantive basis. Since Japan identified the administrative reviews concerned in its Panel Request and the US municipal law provides for limited means to amend those measures (namely, pursuant to a new administrative review), the United States cannot argue that it fails to know the specific measures falling under the scope of this proceeding.

## ANNEX E-6

### THIRD PARTY ORAL STATEMENT OF HONG KONG, CHINA

5 November 2008

Mr. Chairman, members of the Panel:

1. Hong Kong, China welcomes this opportunity to present its views as a third party before the Panel. We have provided a written submission on certain issues regarding this dispute on 8 August 2008. It is our intention to make a brief statement today in addition to our written submission.
2. The practice of zeroing is one of the most contentious issues in anti-dumping. Hong Kong, China's position on this methodology is long standing and persistent. *Zeroing is WTO-inconsistent* and should not be used in any anti-dumping determination.
3. Yet, the present proceedings are not to consider the question of its illegality, for that has already been answered conclusively by the original Panel and the Appellate Body.
4. The focus of this Panel is on whether the recommendations and rulings of the DSB have been fully complied with. More specifically, it is to answer a basic and fundamental question: *do the WTO-inconsistent procedures of zeroing continue to be used after the end of the reasonable period of time and do they continue to produce legal effects*. With reference to our third party written submission, Hong Kong, China submits that the answer to the question is in the affirmative.
5. It is recalled that in our written submission, implementation obligations for respectively unliquidated entries and cash deposit rates have been highlighted and discussed in detail. We are not going to repeat today the arguments in our written submission. Suffice it to point out that after the reasonable period of time, the US has continued to liquidate entries and apply cash deposit rates on the basis of the zeroing procedures. In this regard, the WTO-inconsistent procedures have continued to produce legal effects on the imports concerned.
6. We would also like to take this opportunity to respond briefly to the specific contention of the US regarding the alleged "inequalities" between the implementation obligations for "retrospective" and "prospective" anti-dumping systems. Hong Kong, China submits that under both duty assessment systems, a WTO Member's fundamental obligations pertaining to implementation are the same i.e. the Member, under whatever system, is required to ensure that the actions it takes as of the end of the reasonable period of time are WTO-consistent. The question of "inequalities" does not arise. While a Member has full discretion to adopt its own duty assessment system provided that it is not inconsistent with the Member's WTO obligations, specific features of that system, for instance periodic reviews, unliquidated entries and cash deposit rates under the US' system, should not become justifications for differentiated implementation obligations after the reasonable period of time for the Member concerned. In the premises, a WTO Member should not take any actions which are contrary to the DSB's recommendations and rulings and should cease the WTO-inconsistent practice under the prospective implementation system.

7. Hong Kong, China agrees with Japan that subsequent periodic reviews should be regarded as "measures taken to comply" under Article 21.5 of the DSU. Accepting the US' argument that they are merely "incidental" under the US retrospective duty assessment system would result in an absurd situation whereby a Member could continue to use the WTO-inconsistent zeroing practice perpetually without any meaningful remedy to the complainants under the DSU.

8. Hong Kong, China therefore submits that the Panel should find that the US fails to comply with the DSB's recommendations and rulings in the original dispute and would respectfully request the Panel to take into consideration our views and arguments as set out in our written submission and this oral statement during their deliberations.

9. Thank you for your attention.

## ANNEX E-7

### THIRD PARTY ORAL STATEMENT OF THE REPUBLIC OF KOREA

5 November 2008

Mr. Chairman and members of the Panel:

1. The Republic of Korea ("Korea") appreciates this opportunity to present its views to the Panel as a third party in this important dispute. Through this statement, Korea provides an overview of the key issues included in Korea's third party submission dated August 8, 2008.

2. In Korea's view, although the Dispute Settlement Body ("DSB") unambiguously held that the application of "zeroing" by the United States Department of Commerce ("USDOC") in the original investigations, periodic reviews and sunset reviews constitutes violation of various provisions of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Anti-Dumping Agreement"), and although the United States had the benefit of an 11-month long reasonable period of time ("RPT") for the implementation of the DSB recommendations and rulings, the United States has simply failed to implement them.

3. In Korea's view, to comply with the recommendations and rulings of the DSB in this dispute, the United States would have to "withdraw" or "eliminate" the challenged measure, or take otherwise comparable action, *before* the expiration of the RPT. In this case, however, the record evidence proves that the USDOC has continued to apply the WTO-inconsistent zeroing practice in the original investigations, periodic reviews and sunset reviews even *after* 24 December 2007 when the 11-month RPT ended. Korea therefore submits that the United States has failed to implement the DSB recommendations and rulings in due course.

4. The DSB ruled that the zeroing practice is WTO-inconsistent in both W-to-W comparison methodology and T-to-T comparison methodology in original investigations. In its final notice of 27 December 2006, however, the USDOC declared that it would no longer apply the zeroing practice only in W-to-W comparisons in original investigations. Korea is not aware of any other subsequent statement of the USDOC in this regard. The statement of 27 December 2006 and the absence of subsequent statements (or action) relating to the issue should lead the Panel to find that the United States has failed to implement the decisions of the DSB with respect to the T-to-T comparison methodology in original investigations.

5. In the parties' substantive meeting held yesterday, the United States appeared to maintain the position that since the zeroing is allegedly a single measure, withdrawing the practice in W-W comparison methodology alone should be regarded as full compliance of the DSB decisions. Korea submits that this argument is illogical. In fact, the Appellate Body in the original proceeding specifically stated that:

We also consider that the Panel had sufficient evidence before it to conclude that the "zeroing procedures" under different comparison methodologies, and in different stages of anti-

dumping proceedings, do not correspond to separate rules or norms, but simply reflect different manifestations of a single rule or norm.<sup>1</sup>

The zeroing practice as a whole may be a single measure, but this does not mean that a remedial action in one aspect exonerates the implementing Member from taking all necessary actions to bring the challenged measure into full compliance. Korea submits that the DSB in the original dispute explicitly held that, to bring the measure into full compliance with the covered agreements, not only the W-W comparison methodology but also T-T comparison methodology must be addressed by the United States.

6. In addition, the United States has also failed to implement the recommendations and rulings of the DSB concerning the administrative reviews challenged by Japan in the current proceedings. In Korea's view, the United States appears to rely on unique traits of its administrative review mechanism so as to circumvent the decisions of the DSB. We are concerned that the US position would effectively insulate administrative reviews from any meaningful oversight by a panel or the Appellate Body: under that approach there would be no viable remedy available for a Member who successfully challenged an administrative review by another Member in an original panel procedure.

7. To the extent the USDOC continues to apply zeroing, after the RPT, in its administrative reviews in the course of finally liquidating the entries, Korea submits that the United States has failed to implement the recommendations and rulings of the DSB. Korea also submits that, unlike other instances where a Member's measure is officially terminated, an administrative review does not simply disappear simply because a new, subsequent review is under way or completed. The results of the previous review may still affect interested parties and subsequent, equally critical procedures. Accepting the argument that an administrative review has been terminated, hence no further action is required, simply because of the existence of a new administrative review would basically open the door for the situation where a Member revokes a WTO-inconsistent measure during the RPT and promptly introduces a new, equally inconsistent measure the whole purpose of which is to circumvent a good faith implementation obligation.

8. Therefore, by all accounts, a challenged administrative review has not been terminated yet simply because there is a new administrative review going on or completed if the new review, though technically separate, is a virtual extension of the originally challenged measure. An administrative review found to be WTO-inconsistent thus equally requires adequate implementation by the implementing Member irrespective of existence or completion of a subsequent review or reviews. Korea thus requests the Panel to hold that the United States has failed to implement the DSB recommendations and rulings in this respect.

9. Also, in the original dispute the DSB ruled that by relying on margins of dumping calculated in previous proceedings using the zeroing procedures in the two sunset reviews, the United States acted inconsistently with Article 11.3 of the Anti-Dumping Agreement. Korea understands that despite the DSB recommendations and rulings the United States has failed to take any particular action to bring its WTO-inconsistent sunset review into conformity with the Anti-Dumping Agreement and that as a result of the failure the anti-dumping order against antifriction bearings still remains in effect.

10. In Korea's view, given the way sunset reviews are conducted by the USDOC, they cannot be separated from previous anti-dumping proceedings. As the United States has not implemented the decisions of the DSB in original investigations (T-T comparisons) and periodic reviews, and continues to apply the zeroing practice in these procedures, one could reasonably argue that the subsequent sunset reviews stand to be tainted by the previous investigations and periodic reviews

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<sup>1</sup> *United States-Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R (9 January 2007), para. 88.



unless and until the zeroing practice is fully eliminated in these prior proceedings. As such, Korea submits that the United States has also failed to implement the decisions of the DSB with respect to the sunset reviews.

11. Korea respectfully submits that for the reasons stated above the Panel should hold that the United States has failed to comply with the recommendations and rulings of the DSB in the original dispute.

12. Korea appreciates this opportunity to present its views to the Panel.

## ANNEX E-8

### THIRD PARTY ORAL STATEMENT OF MEXICO

#### I. INTRODUCTION

1. Thank you, Mr Chairman and members of the Panel. I appreciate the opportunity to appear before you today to present the views of Mexico in these proceedings. The purpose of this oral statement is to offer a few brief points concerning the arguments put forward by Japan and the United States that have particular significance to Mexico as a Member likewise seeking US compliance with the reports concerning zeroing.

#### **Failure to Comply with an "As Such" Ruling**

2. Firstly, Mexico is troubled by the United States' continuing failure to comply with its obligations stemming from the DSB's "as such" findings in relation to zeroing in administrative reviews. Mexico recalls that the DSB found that zeroing is inconsistent "as such" with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 when applied in periodic reviews, regardless of the comparison methodology that is employed.<sup>1</sup> The United States, as it must, has unconditionally accepted that determination and expressly agreed with Japan to comply with its obligation to bring the inconsistent zeroing measures into compliance with its WTO obligations by 24 December 2007.

3. Clearly the only action that the United States has taken at all to comply with the DSB's rulings on an "as such" measure in this dispute has been to stop the use of zeroing in original investigations and, even then, only where comparisons are made on an average-to-average basis. In taking this inadequate action, the United States made it clear that it was taking no action to eliminate zeroing in any other context, including in the context of periodic reviews.<sup>2</sup> In fact, as Japan has indicated, notwithstanding the DSB's recommendations in this case, the United States continues to apply zeroing without exception in periodic reviews conducted after the expiration of the reasonable period of time (RPT) for compliance.<sup>3</sup>

4. The United States does not deny any of these facts but argues instead that, given that it has complied by eliminating zeroing in original investigations where comparisons are made on an average-to-average basis, the United States has "eliminated the single measure that was subject to the DSB's recommendations and rulings by the end of the RPT, and has therefore fully implemented the DSB's recommendations and rulings with respect to the zeroing procedures".<sup>4</sup> This argument is transparently false and cannot excuse the United States' failure to comply with its obligations.

5. To start with, the United States has not accurately described the DSB's recommendations on this matter. Paragraph 190(c) of the Appellate Body report, in which the relevant recommendations adopted are summarized, states as follows:

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<sup>1</sup> Appellate Body Report, *United States – Zeroing (Japan)*, para. 190(c).

<sup>2</sup> See, e.g., Second Written Submission of Japan, para. 85 (citing *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Duty Investigation*, 71 Fed. Reg. 77722, 77724 (Department of Commerce, 27 December 2006)(Exhibit JPN-35)).

<sup>3</sup> *Id.*, paras. 92-102.

<sup>4</sup> US First Written Submission, para. 77.

[The Appellate Body] finds ... that the United States acts inconsistently with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 by maintaining zeroing procedures in periodic reviews.

This language clearly indicates that the DSB found that zeroing in administrative reviews is "as such" contrary to the United States' obligations under Articles 4.2 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994. Compliance with this recommendation logically requires that the United States eliminate zeroing from periodic reviews, regardless of the comparison methodology employed.

6. The fact that the DSB found that zeroing constitutes a "single measure" does not believe the United States from the consequences of the DSB's recommendations quoted above. Even if the United States' obligations in this matter were viewed as relating to a single measure, the action taken by the United States has not **fully** eliminated the offending measure, as it is obligated to do. To comply with this obligation, the United States must eliminate zeroing in all four procedural settings on which the DSB made recommendations.

7. The United States has also misinterpreted the DSB's recommendations with respect to the substantive content of the "single measure." As Japan correctly notes<sup>5</sup>, the precise substantive content of the measure is the disregard of negative intermediate comparison results in the aggregation of an overall weighted-average dumping margin and this substantive rule is applied in the same way in different procedural settings. The United States does not, and cannot, claim that it has changed or eliminated this substantive content of the rule.

8. In this dispute, the limited action taken by the United States to restrict the scope of the measure in a single procedural context falls far short of its obligation to eliminate the measure in its entirety and has left the measure unchanged in three of the four areas in which the DSB made its rulings: (i) original investigations using transaction-to-transaction comparisons; (ii) periodic reviews; and (iii) new shipper reviews. This Panel must therefore find that the United States has failed to comply with the DSB's "as such" recommendations and rulings within the RPT.

### **Subsequent Reviews as Measures Taken to Comply**

9. With respect to the three administrative reviews completed subsequent to the establishment of the original panel, Mexico agrees with Japan that such reviews qualify as "measures taken to comply" and are necessarily within the scope of this Article 21.5 proceeding because of the substantive connections between those proceedings and the measures covered by the original proceeding. The DSB jurisprudence in this area is very clear that subsequent measures are "inextricably linked," "clearly connected," or with "sufficiently close links" to the original measures as to fall within the scope of subsequent Article 21.5 proceedings.<sup>6</sup>

10. Mexico also agrees with Japan that the United States has already effectively declared these determinations to be "measures taken to comply" by repeatedly asserting that these subsequent measures "supersede" or "withdraw" the original measures.

11. Mexico rejects the United States' claim that these reviews should not be considered "measures taken to comply" because they were issued before the adoption of the DSB recommendations and rulings in this case. As outlined in Japan's written submissions, the subjective intent or purpose of the Member required to comply is not dispositive. What is dispositive is the identification of the

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<sup>5</sup> Second Written Submission of Japan, para. 72.

<sup>6</sup> See, e.g., *Australia – Leather (21.5)*, para. 6.5; *Australia – Salmon (21.5)*, para. 7.10; and *US – Softwood Lumber IV (21.5)*, paras. 77-79.

measures through which compliance has or has not been achieved and whether these measures achieve compliance or are as such consistent with the Member's obligations to comply. Even if one accepts the United States' assertion that compliance was achieved only as an "incidental consequence" of these measures, the United States has placed these measures squarely within the scope of this Article 21.5 proceeding. The Panel must therefore examine these reviews to determine whether they are consistent with the DSB rulings and whether they have resulted in compliance. The United States cannot have it both ways.

12. Furthermore, Mexico agrees with Japan that the periodic reviews completed after the establishment of this Article 21.5 Panel come within the Panel's jurisdiction because they share the same substantive connections with the original proceedings and were identified with sufficient precision in Japan's request for establishment of this Panel. Mexico also agrees with Japan that post-establishment measures can, and must have been<sup>7</sup> accepted as properly within the scope of an Article 21.5 proceeding.

### **Periodic Reviews That Have Continuing Legal Effects**

13. The United States has also taken no action to implement the DSB's rulings and recommendations with respect to five administrative reviews found to be WTO-inconsistent on an "as applied" basis, even though those periodic reviews continue to produce legal effects after the end of the RPT.

14. Mexico agrees with Japan that recalculating the margins of dumping in those prior reviews is necessary in order to implement the DSB's rulings in this case and to bring those measures into conformity with the United States' obligations under the covered agreements.

15. While the United States asserts that these reviews have been "superseded" or "revoked" by subsequently completed administrative reviews, under the US legal system these reviews continue to have significant legal effects after the RPT. Without a recalculation by the United States, such continuing legal effects would include not only the potential application of the assessment of importer-specific duties to entries that remain unliquidated after the RPT, as identified by Japan, but also other continuing legal effects such as the use of the miscalculated exporter-specific margins of dumping in the context of subsequent five-yearly reviews and other domestic revocation proceedings. Mexico notes, for example, that under the US Department of Commerce ("USDOC") regulations, exporters may seek revocation of an anti-dumping duty order on the basis, *inter alia*, of the absence of dumping in three consecutive reviews. USDOC has taken the position that it cannot reconsider prior dumping-margin results in subsequent review determinations.<sup>8</sup> Therefore, the original review determination results have a direct continuing *prospective* legal impact on subsequent review proceedings, at least to the extent that the correctly calculated dumping margins would be zero or *de minimis*. In this respect, the exporter-specific margins of dumping at issue for Japan continue to exist and are legally operable indefinitely unless and until recalculated.

16. Mexico also agrees with Japan that the obligation to recalculate the margins of dumping in these prior administrative reviews does not constitute a "retrospective" remedy. As Japan correctly notes, the measure that the United States is obliged to implement does not require repayment of duties that have already been assessed and collected on entries finally liquidated. Instead, the compliance obligation focuses on **future** (i.e., post-RPT) actions to collect anti-dumping duties or to render revocation or future five-yearly review decisions on the basis of the margins erroneously calculated in those subsequent reviews.

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<sup>7</sup> See, e.g., *Australia – Salmon (21.5)*, para. 23 (finding that "future measures" were within the scope of panel review and that the complying Member knew that such measures could be subject to review).

<sup>8</sup> See *Stainless Steel from Mexico*.

17. Mexico agrees with Japan that the DSB cannot be reasonably interpreted to allow a Member to deliberately, and perpetually, evade its substantive obligations under the agreements. Such a result would render the substantive provisions of the agreements *inoperative*, contrary to the established principles of treaty interpretation. Moreover, such an outcome is not appropriate inasmuch as the legal effects of the five-yearly periodic reviews survive subsequent review determinations.

18. Lastly, the position adopted by Japan does not create inequality between prospective and retrospective systems. Under both systems, the obligation to remove inconsistent measures in the calculation of anti-dumping margins would be enforced. In contrast, the interpretation offered by the United States would allow Members with retrospective systems to perpetually evade their obligations to calculate margins in administrative reviews without zeroing, whereas Members with prospective systems would be required to comply with their obligations by recalculating either the original investigation margins or the margins determined in a subsequent review proceeding requested by the importers.

### **Conclusion**

Mr Chairman, members of the Panel, this concludes Mexico's oral statement. Thank you for your attention.

## ANNEX E-9

### THIRD PARTY ORAL STATEMENT OF NORWAY

5 November 2008

1. Norway would like to thank the members of the Panel for the opportunity to make a statement at this meeting, and for opening up this part of the third party session to a public viewing.

Mr. Chairman, Members of the Panel,

2. This dispute raises a myriad of interesting and important questions. As a third party, Norway does not take upon itself to address all these questions. We have already in our written submission discussed in some detail the scope of the Panel's jurisdiction. We will not repeat those arguments here today, just add that we support the claim made by Japan in its supplemental submission regarding the periodic review issued after the establishment of the Panel. It is Norway's view – for the reasons set out by Japan – that also this measure must be within the scope of the Panel's jurisdiction and therefore part of these proceedings.

3. Today we will confine ourselves to some comments on what we see to be the core of this case. Even if it raises several questions, the key issue of the case is really quite simple: It is about compliance with WTO obligations.

4. All WTO Members have agreed to a dispute settlement system where "prompt compliance with recommendations and rulings of the DSB" is viewed as "essential in order to ensure effective resolution of disputes to the benefit of all members". Under the DSU each and every Member is obliged to comply with rulings and recommendations of the DSB immediately, unless such immediate compliance is impracticable, in which case one will be allowed a reasonable period of time (RPT) for compliance. However, from the expiry of the RPT, any WTO-inconsistent measure must be withdrawn, modified or replaced so as to ensure compliance with WTO obligations.

5. The United States did not in this case ensure compliance by the end of the RPT. In Norway's view, this follows clearly from the facts and evidence presented. The only implementing action that has been put in place by the United States is the elimination of the use of zeroing procedures in weighted average-to-weighted average comparisons in original investigations. The United States has not, however, stopped using zeroing procedures in any of the other situations covered by the DSB ruling in the original dispute.

6. Specifically, Japan challenges nine periodic reviews. Five of the reviews were found to be WTO-inconsistent in the original proceedings. These five reviews still provide the basis for collecting definitive anti-dumping duties after the end of the RPT, and thereby continue to have legal effects. The United States should – as an implementing measure – have recalculated the dumping determination in those reviews without the use of zeroing methodologies. The United States did not do so, and has therefore omitted to bring about compliance with the recommendations and rulings of the DSB in a timely fashion. The omission to recalculate also means that the United States still violates Articles 2.4 and 9.3 of the Anti-Dumping Agreement as well as Article VI:2 of GATT 1994.

7. The United States claims that Japan when challenging the five periodic reviews, is requesting "retrospective" relief. In Norway's view, this is not the case. No one has requested the United States to withdraw, modify or replace anything during the RPT. However, as just submitted, from the end

point of the RPT the United States should have ensured WTO-conformity with regard to all measures that were found to be WTO-inconsistent in the original dispute. What Japan is asking, is compliance with the DSB recommendations and rulings from the end point of the RPT. The United States is requested to respect its WTO obligations and make sure that the anti-dumping duties collected after the RPT are based on WTO-consistent importer-specific assessment rates. This cannot be characterized as anything but "prospective" relief.

8. Turning now to the remaining four periodic reviews. These were issued subsequent to the original dispute, but must, nevertheless, be considered as "measures taken to comply" as they relate to the same anti-dumping orders and continue the contested anti-dumping measures. When calculating the dumping margin in the four reviews, the United States used zeroing methodologies in defiance of previous rulings by the Appellate Body. On this basis, there should be no doubt that the periodic reviews at issue are inconsistent with Articles 2.4 and 9.3 of the Anti-Dumping Agreement, as well as GATT Articles VI:1 and VI:2.

Mr. Chairman,

9. As stated in the beginning, this case is about compliance. In the original dispute the DSB ruled that the United States should bring the measures at issue into conformity with its WTO obligations. The United States has not done so – except with regard to one single situation.

10. The lack of real and good faith implementation by the United States is regrettable. It has turned dispute settlement with regard to zeroing into a never-ending story. Norway respectfully requests the Panel to make the necessary findings so as to not allow this to continue.

Thank you.

## ANNEX E-10

### THIRD PARTY ORAL STATEMENT OF THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU

5 November 2008

1. Thank you, Mr. Chairman and distinguished members of the Panel, for giving us this opportunity to present our views as a third party in this proceeding.
2. Pursuant to our systemic interest in the proper interpretation of, and practice under, Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), we are presenting a brief oral statement, which we consider would help making the correct interpretation of the term "measures taken to comply" that fall within the terms of reference of this Panel. We will address this concern by examining the term in the following two contexts: first, subsequent periodic reviews and, second, review conducted in 2006/2007 (06/07 review).
3. To analyze the term "measures taken to comply" under Article 21.5 of the DSU, we would need to first ascertain whether particular measures are within the scope of review by the Panel and Appellate Body.
4. With respect to the subsequent periodic reviews, we note that the US argued that "two of the administrative review determinations identified by Japan in its Article 21.5 panel request - Review No. 4 and No 5 - can not be considered measures taken to comply because they pre-date the adoption of the DSB's recommendations and rulings on 23 January 2007."<sup>1</sup>
5. While timing could be one of the factors Panel may consider here, we would like to draw the Panel's attention to Appellate Body's report in *US - Softwood Lumber IV (21.5)* where the AB pointed out that compliance panels are not limited to reviewing measures that "have the objective of achieving compliance."<sup>2</sup> Further, measures can not be excluded from compliance proceedings "due to the *purpose* for which they have been taken."<sup>3</sup>
6. The Appellate Body has recognized that "Article 21.5 proceedings involve, in principle, not the original measure, but a new and different measure that was not before the original panel."<sup>4</sup> Where such new measures have "a particularly close relationship to the declared 'measures taken to comply,' and to the recommendations and rulings of the DSB," or where there are "sufficiently close links" among them, the Appellate Body has concluded that those new measures are subject to review by an Article 21.5 panel.<sup>5</sup>
7. With respect to the reviews conducted in 2006 and 2007, the parties have debated in their supplementary submissions whether the 06/07 review conducted after the adoption of the Appellate Body report of the current dispute are measures included in the scope of the current proceedings.

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<sup>1</sup> First Written Submission of the United States, para. 33.

<sup>2</sup> Appellate Body Report, *US - Softwood Lumber IV (21.5)*, para. 67 (italics removed).

<sup>3</sup> Panel Report, *US - Gambling (21.5)*, para. 6.24 (emphasis in original).

<sup>4</sup> Appellate Body Report, *US - Shrimp (21.5--Malaysia)*, paras. 85-87.

<sup>5</sup> Appellate Body Report, *US - Softwood Lumber IV (21.5)*, paras. 77-79.



8. We are of the view that the 06/07 review, though happened after the panel establishment, has close relationship with the reviews challenged in the original proceedings and the steps taken to comply with the DSB rulings and recommendations that should thus be included in the scope of the current proceeding. This view can be further evidenced by the following facts:

9. First, the 06/07 review and the original reviews were all resulted from anti-dumping proceedings conducted by the same authority, the United States Department of Commerce ("USDOC"), which is endowed with the power to issue orders based on the same set of laws and regulations.<sup>6</sup> In addition, they are all in the same type of proceeding, i.e., the periodic review.

10. Secondly, those reviews were all conducted pursuant to anti-dumping order concerning "Ball Bearing and Parts Thereof from Japan."<sup>7</sup> In other words, they are the same subject product from the same exporting member. Furthermore, those reviews all concern dumping determinations made with respect to exports from the same companies.<sup>8</sup>

11. We note that Japan submitted that the Panel in *United States – Continued Existence and Application of Zeroing Methodology* ("US – Zeroing II (EC)") also examined a chain of successive periodic reviews, and reached a conclusion that relied upon the notion of the "same subject matter" and the "same dispute."<sup>9</sup> While we found that the 06/07 review in the present dispute refers to "the same subject matter" and "the same dispute" with respect to the periodic reviews for the purpose of this proceeding, that particular ruling of the US-Zeroing II (EC) Panel may not be easily applied in the current proceeding. In that dispute, the Panel was addressing the issue of whether the measures included in the panel request but not included in the consultations request fell within the scope of the panel proceeding. The issues before the Panel in the current proceeding differ in a certain degree from that context and would render an analogy difficult between that dispute and the current proceeding.

12. The United States disagrees with the inclusion of the 06/07 reviews as a "measure taken to comply" mainly for two reasons: first, the 06/07 review is not properly within the Panel's terms of reference because they were not identified in Japan's panel request with sufficient specificity, and second, the 06/07 reviews did not exist at the time of panel establishment.

13. With regard to the first reason, we note that Japan in its request for Panel establishment already identified: (i) five reviews at issue in the original proceedings; (ii) three closely connected reviews that the United States argued to have "superseded," and secured "withdrawal" of, certain measures at issue in the original proceedings; and, (iii) "any subsequent closely connected measure."<sup>10</sup> We consider the 06/07 review as a "subsequent closely connected measure" to the declared "measure taken to comply" and to the recommendations and rulings of the DSB that may be susceptible to review by an Article 21.5 panel.

14. With regard to the second reason, were the United States' claim to sustain, the DSB will require numerous panels to be established for one continuous WTO inconsistent measure. In *US – Zeroing II (EC)*, the panel recognized that, in appropriate circumstance, future measures identified in a panel request can be included within a panel's terms of reference, as long as they "constitute a measure" within the meaning of Article 6.2 of the DSU and "come into existence during the panel proceedings."<sup>11</sup> While this ruling has not been adopted, we consider the interpretation presented in this ruling the proper interpretation which can ensure that "the dispute settlement system of the WTO

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<sup>6</sup> Executive Summary of Japan's Supplemental Submission (WT/DS322(21.5)), para. 4.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Executive Summary of Japan's Supplemental Submission (WT/DS322(21.5)), para. 7.

<sup>10</sup> WT/DS322/27, para.12.

<sup>11</sup> Panel Report, *US—Zeroing II (EC)*, para. 7.59.

is a central element in providing security and predictability to the multilateral trading system" as stipulated by Article 3 of the DSU.

15. Mr. Chairman, distinguished Members of the Panel, in our view, the mandate of a compliance panel is not limited to examining whether the implementing measure fully complies with the recommendations and rulings adopted by the DSB.<sup>12</sup> For a panel "to fulfil its mandate under Article 21.5, [it] must be able to take full account of the factual and legal background against which relevant measures are taken, so as to determine the existence, or consistency with the covered agreements, of measures taken to comply."<sup>13</sup> While noting that "not...every assessment review will necessarily fall within the jurisdiction of an Article 21.5 panel,"<sup>14</sup> we would urge the Panel to consider the 06/07 measure in its totality, taking into account the factual and legal background against which a declared "measure taken to comply" is adopted, in determining whether the 06/07 review falls within its terms of reference.

16. We hope that our submissions will be helpful for the Panel's analysis of the relevant issues in this dispute, and we thank you for your attention.

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<sup>12</sup> Appellate Body Report, *Canada – Aircraft (21.5- Brazil)*, paras. 40-41; also, "panel proceedings pursuant to Article 21.5 of the DSU involve, in principle, not the original measure, but a new and different measure that was not before the original panel. Therefore, "in carrying out its review under Article 21.5 of the DSU, a panel is not confined to examining the 'measure[] taken to comply' from the perspective of the claims, arguments and factual circumstances that related to the measure that was the subject of the original proceedings." Appellate Body Report, *US - Shrimp (21.5--Malaysia)*, paras. 85-87.

<sup>13</sup> Appellate Body Report, *US - Softwood Lumber IV (Art. 21.5)*, para. 69.

<sup>14</sup> *US - Softwood Lumber IV (21.5)(AB)*, para. 93 (footnote omitted).

## ANNEX E-11

### THIRD PARTY ORAL STATEMENT OF THAILAND

5 November 2008

#### I. INTRODUCTION

1. Mr. Chairman and Members of the Panel: Thailand appreciates the opportunity to present its views to the Panel today. Thailand generally supports the arguments made by Japan in its written submissions<sup>1</sup> and will present just a few additional points this morning.

#### II. JURISDICTION OF THE PANEL

2. Firstly, regarding the jurisdiction of the Panel, in the circumstances of this case Thailand considers that all the measures brought by Japan in this proceeding, including the four subsequent reviews superseding the periodic reviews that the Dispute Settlement Body (DSB) found to be WTO-inconsistent (reviews 4, 5, 6 and the 06/07 review),<sup>2</sup> fall within the scope of this Panel's jurisdiction.

3. In this regard, Thailand agrees with the arguments put forth by Japan and Norway that it is not up to the implementing Member to decide whether a measure is "taken to comply."<sup>3</sup> The Appellate Body, in *United States – Softwood Lumber IV (21.5)*, clearly stated that: "Panels and the Appellate Body alike have found that what is a 'measure taken to comply' in a given case is not determined exclusively by the implementing Member."<sup>4</sup>

4. In addition, past compliance panels such as *Australia – Leather II (21.5)* and *Australia – Salmon (21.5)*, have also considered measures that are "inextricably linked" or "clearly connected," regardless of whether the implementing member designated such measures as having been taken to comply, to be within each panel's terms of reference.<sup>5</sup> In this connection, we find particularly persuasive Japan's arguments demonstrating that an undeniably strong link between the subsequent reviews and the original measures exists in the specific component of all these measures, i.e., the zeroing methodology used to make dumping determinations.<sup>6</sup> We think this component is sufficiently precise and would not be "too sweeping."<sup>7</sup>

5. Thailand fully supports the views of Japan and the European Communities that if the subsequent reviews were excluded, concerned Members would be forced into a "Groundhog Day"

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<sup>1</sup> First Written Submission of Japan, 30 June 2008 ("FWS") and Second Written Submission, 27 August 2008 ("SWS").

<sup>2</sup> Japan's FWS para. 53 and Japan's supplemental submission, 10 October 2008, para. 1.

<sup>3</sup> Japan's FWS para. 63 and Norway's Third Party Submission, 8 August 2008, para. 12.

<sup>4</sup> Appellate Body Report, *US – SWL IV (21.5)*, para. 73. See also Panel Report, *US – Gambling (21.5)* para. 6.24, wherein the Panel refuted the exclusion of "any potential 'measures taken to comply' due to the purpose for which they may have been taken."

<sup>5</sup> Panel Report, *Australia – Automotive Leather II (21.5)*, para. 6.5 and Panel Report, *Australia – Salmon (21.5)*, para. 7.10.

<sup>6</sup> Japan's SWS para. 42 and supplemental submission, para. 7.

<sup>7</sup> Appellate Body Report, *US – SWL IV (21.5)*, para. 87.

scenario of never-ending litigation.<sup>8</sup> As a developing country with a limited amount of resources, Thailand cannot afford to participate in never-ending litigation cycles. In this instance, we recall that Article 21.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes provides that "Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement."

6. For the foregoing reasons, we urge the Panel to consider all measures brought by Japan in this proceeding to be within its jurisdiction.

### **III. ZEROING PROCEDURES**

7. Regarding the "as such" findings against zeroing, the United States claims that it has eliminated the zeroing procedures because "zeroing is no longer used in W-to-W comparisons in anti-dumping investigations."<sup>9</sup> The United States thus views that it has complied with the recommendations and rulings on zeroing procedures in this dispute. Thailand has the opposite view. The DSB made four rulings regarding the inconsistency of zeroing procedures in the present dispute: it ruled against the use of zeroing in W-to-W and T-to-T comparisons in original investigations, and in any comparison methodology in periodic and new shipper reviews.<sup>10</sup> Like Japan, we do not agree that implementing only one of these recommendations and rulings amounts to implementing all four of them.<sup>11</sup> In addition, Japan has shown that throughout the year 2008 the United States has used zeroing procedures in more than 10 proceedings other than W-to-W comparisons.<sup>12</sup>

### **IV. PERIODIC AND SUNSET REVIEWS**

8. On the issue of periodic and sunset reviews, we generally agree with Japan's arguments and will not repeat them here. However, we would like to express our strong reservations about the "Catch-22" condition which would surely arise if the Panel accepts the argument of the United States that implementation applies only to new entries that enter the United States on or after the end of the reasonable period of time. This condition would allow implementing authorities to escape the requirements of Article 9.3 of the Anti-Dumping Agreement, and as a result, unduly leave other Members without recourse to relief when zeroing is used in administrative reviews. If this argument is accepted, there would be no effective remedy with respect to Article 9.3 review determinations taken by any Member – under either a prospective or retrospective system – with respect to any issue, not just zeroing.

### **V. CONCLUSION**

9. Thailand trusts that these views will assist the Panel in its consideration of these issues. We will be happy to respond to any questions the Panel may have, and we thank you again for this opportunity to present our views.

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<sup>8</sup> Japan's FWS para. 100 and the European Communities' Third Party Submission, 8 August 2008, para. 18.

<sup>9</sup> First Written Submission of the United States, 28 July 2008, para. 80.

<sup>10</sup> Panel Report, *US – Measures Relating to Zeroing and Sunset Reviews*, para. 7.258(a) and Appellate Body Report, paras. 190 (b) – (d).

<sup>11</sup> Japan's SWS, para. 74.

<sup>12</sup> Japan's SWS, para. 100 (exhibit JPN-46) and supplemental submission, para. 32 (exhibit JPN-68).

## ANNEX F

### REQUEST FOR THE ESTABLISHMENT OF A PANEL

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## ANNEX F-1

### REQUEST FOR THE ESTABLISHMENT OF A PANEL BY JAPAN

# WORLD TRADE ORGANIZATION

WT/DS322/27  
8 April 2008

(08-1604)

Original: English

### UNITED STATES – MEASURES RELATING TO ZEROING AND SUNSET REVIEWS

#### Recourse to Article 21.5 of the DSU by Japan

#### *Request for the Establishment of a Panel*

The following communication, dated 7 April 2008, from the delegation of Japan to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 21.5 of the DSU.

My authorities have instructed me to request the establishment of a panel pursuant to Articles 6 and 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article XXIII of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and Article 17.4 of the Agreement on Implementation of Article VI of the GATT 1994 ("*Anti-Dumping Agreement*") in connection with the United States' failure to implement the recommendations and rulings of the Dispute Settlement Body ("DSB") in this dispute.

The documentation for the panel establishment request is attached and we would like to ask you to circulate the attached document to the members.

#### **I. BACKGROUND TO THIS REQUEST**

1. On 23 January 2007, the DSB adopted the Appellate Body Report, and the Panel Report, as modified by the Appellate Body Report. The DSB ruled that:

- (i) by maintaining zeroing procedures<sup>1</sup> in original investigations when calculating margins of dumping on the basis of weighted average-to-weighted average

<sup>1</sup> The term "zeroing procedures" refers to the methodology under which the United States Department of Commerce ("USDOC") disregards intermediate negative comparison results in the process of establishing the

comparisons, the United States acts inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement*;<sup>2</sup>

- (ii) by maintaining zeroing procedures in original investigations when calculating margins of dumping on the basis of transaction-to-transaction comparisons, the United States acts inconsistently with Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement*;<sup>3</sup>
- (iii) by applying zeroing procedures in the anti-dumping investigation regarding imports of cut-to-length carbon quality steel products from Japan, the United States acted inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement*;<sup>4</sup>
- (iv) by maintaining zeroing procedures in periodic reviews, the United States acts inconsistently with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994;<sup>5</sup>
- (v) by maintaining zeroing procedures in new shipper reviews, the United States acts inconsistently with Articles 2.4 and 9.5 of the *Anti-Dumping Agreement*;<sup>6</sup>
- (vi) by applying zeroing procedures in the 11 periodic reviews identified in Japan's Request for the Establishment of a Panel<sup>7</sup>, the United States acted inconsistently with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994;<sup>8</sup> and
- (vii) by relying on margins of dumping calculated in previous proceedings using the zeroing procedures in the two sunset reviews identified in Japan's Request for the Establishment of a Panel<sup>9</sup>, the United States acted inconsistently with Article 11.3 of the *Anti-Dumping Agreement*.<sup>10</sup>

2. At the DSB meeting on 20 February 2007, the United States informed the DSB that it intended to implement the recommendations and rulings of the DSB. The United States and Japan thereafter agreed, under Article 21.3(b) of the DSU, that the reasonable period of time ("RPT") for the United States to implement the DSB's recommendations and rulings would expire on 24 December 2007.

3. On 10 March 2008, Japan and the United States decided on procedures that would apply between them under Articles 21 and 22 of the DSU for purposes of this dispute.<sup>11</sup> Paragraph 1(a) of that decision provides that Japan need not hold consultations with the United States prior to requesting the establishment of a panel; paragraph 1(b) states that the United States will accept the establishment of a panel at the first DSB meeting at which Japan's panel request appears on the agenda.

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overall dumping margin for the product as a whole for a foreign producer or exporter. See Appellate Body Report, footnote 3.

<sup>2</sup> Panel Report, para. 7.258(a).

<sup>3</sup> Appellate Body Report, para. 190(b).

<sup>4</sup> Panel Report, para. 7.258(a).

<sup>5</sup> Appellate Body Report, para. 190(c).

<sup>6</sup> Appellate Body Report, para. 190(d).

<sup>7</sup> WT/DS322/8.

<sup>8</sup> Appellate Body Report, para. 190(e).

<sup>9</sup> WT/DS322/8.

<sup>10</sup> Appellate Body Report, para. 190(f).

<sup>11</sup> WT/DS322/26.

## II. DECLARED IMPLEMENTATION ACTION AND INACTION

4. In its status report to the DSB of 8 November 2007, the United States informed the DSB that:

"On 6 March 2006, the US Department of Commerce published a notice requesting comments on its intention to no longer perform average-to-average comparisons in anti-dumping investigations without offsets. On 26 January 2007, the Department published a notice that the date after which it would no longer perform such comparisons would be 22 February 2007. Accordingly, as of 22 February 2007, the United States is no longer performing average-to-average comparisons in anti-dumping investigations without offsets."<sup>12</sup>

In the same report, the United States added that it was "continuing to consult internally on steps to be taken with respect to the other DSB recommendations and rulings."

5. On 6 December 2007, the United States provided an identical report to the DSB, with no additional information.<sup>13</sup>

6. On 27 December 2007, the United States Department of Commerce ("USDOC") announced publicly that it had taken steps to implement the DSB's recommendations and rulings with respect to the anti-dumping investigation regarding imports of cut-to-length carbon quality steel products. In particular, the USDOC recalculated the margin of dumping without zeroing.<sup>14</sup>

7. On 10 January 2008, the United States informed the DSB that:

"With respect to the assessment reviews at issue in this dispute, in each case the results were superseded by subsequent reviews. Because of this, no further action is necessary for the United States to bring these challenged measures into compliance with the recommendations and rulings of the DSB."<sup>15</sup>

8. At the DSB meeting on 21 January 2008, the United States informed the DSB of its view that the elimination of zeroing in average-to-average comparisons in anti-dumping investigations, as described in paragraph 4 above, also implemented the DSB's recommendations and rulings with respect to the maintenance of zeroing procedures in transaction-to-transaction comparisons in anti-dumping investigations, and in periodic and new shipper reviews.

## III. MEASURES AT ISSUE AND CLAIMS MADE IN THESE PROCEEDINGS

### A. ZEROING PROCEDURES

9. The DSB made four separate recommendations and rulings that the United States bring the zeroing procedures into conformity with its WTO obligations. These recommendations and rulings related to the maintenance of zeroing procedures as a general rule: (1) in weighted average-to-weighted average ("W-to-W") comparisons in original investigations;<sup>16</sup> (2) in transaction-to-

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<sup>12</sup> WT/DS322/22.

<sup>13</sup> WT/DS322/22/Add.1.

<sup>14</sup> See Issues and Decision Memorandum for the Final Results, Investigation A-588-847, Section 129 Proceeding (Dec. 27, 2007), available at <http://ia.ita.doc.gov/ia-news-2007.html>.

<sup>15</sup> WT/DS322/22/Add.2.

<sup>16</sup> Panel Report, para. 7.258(a).



transaction ("T-to-T") comparisons in original investigations;<sup>17</sup> (3) in any comparison methodology in periodic reviews;<sup>18</sup> and (4) in any comparison methodology in new shipper reviews.<sup>19</sup>

10. Although, as noted in paragraph 4, the United States informed the DSB that, with effect from 22 February 2007, it withdrew the zeroing procedures in W-to-W comparisons in original investigations, Japan is unaware of the adoption by the United States of any measures to implement the DSB's recommendations and rulings regarding the maintenance of zeroing procedures: (1) in T-to-T comparisons in original investigations; (2) in any comparison methodology in periodic reviews; and (3) in any comparison methodology in new shipper reviews.

11. By continuing to maintain zeroing procedures in these contexts, and failing to implement the DSB's recommendations and rulings, the United States acts inconsistently with Articles 17.14, 21.1 and 21.3 of the DSU and, as set forth in the DSB's recommendations and rulings, Article 2.4 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994. Additionally, as also set forth in the DSB's recommendations and rulings, in connection with T-to-T comparisons in original investigations, the United States violates Article 2.4.2 of the *Anti-Dumping Agreement*; in connection with periodic reviews, it violates Article 9.3 of the *Anti-Dumping Agreement*; and, in connection with new shipper reviews, it violates Article 9.5 of the *Anti-Dumping Agreement*.

#### B. PERIODIC REVIEWS

12. This request concerns five of the 11 periodic reviews mentioned in paragraph 1(vi), plus three closely connected periodic reviews that the United States argues "superseded" the original reviews. The United States used zeroing in each of these reviews and, despite the DSB's recommendations and rulings, has omitted to eliminate zeroing from any of them. These eight periodic reviews are identified in Annex 1 of this Request, and stem from anti-dumping duty orders on "Ball Bearings and Parts Thereof From Japan", "Cylindrical Roller Bearings and Parts Thereof From Japan", and "Spherical Plain Bearings and Parts Thereof From Japan". This request also concerns United States Government instructions and notices, issued since the end of the RPT, to liquidate entries covered by these eight reviews. Further, the request concerns any amendments to the eight periodic reviews and the closely connected instructions and notices, as well as any subsequent closely connected measures.

13. Since the end of the RPT, through the eight periodic reviews at issue, and the United States Government instructions and notices, the United States has improperly continued to impose, collect, and/or assess anti-dumping duties in excess of the proper margin of dumping, and will continue to do so. The United States thereby improperly imposes duties on the importation of Japanese goods in excess of the duties permitted under the United States' Schedule of Concessions.

14. The United States' failure to take measures to eliminate zeroing and, thereby, to bring itself into conformity with its WTO obligations, is inconsistent with Articles 17.14, 21.1 and 21.3 of the DSU. As a result of this omission, the United States continues to act inconsistently with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, as set forth in the DSB's recommendations and rulings. Further, the United States' measures taken to comply, if and to the extent they exist, are inconsistent with Articles 2.4, 9.2 and 9.3 of the *Anti-Dumping Agreement* and Articles II:1(a), II:1(b), VI:1 and VI:2 of the GATT 1994 for the reasons given in the previous paragraph.

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<sup>17</sup> Appellate Body Report, para. 190(b).

<sup>18</sup> Appellate Body Report, para. 190(c).

<sup>19</sup> Appellate Body Report, para. 190(d).

C. SUNSET REVIEWS

15. The United States has failed to take any action to bring the sunset review determination of 4 November 1999 regarding the anti-dumping duty order on Anti-Friction Bearings from Japan, covered by paragraph 1(vii) above, as well as the sunset review determination of the same order, of 4 May 2006, into conformity with its WTO obligations. Both measures are identified in Annex 2. As a result, the United States acts inconsistently with Articles 17.14, 21.1 and 21.3 of the DSU and, as set forth in the DSB's recommendations and rulings, Article 11.3 of the *Anti-Dumping Agreement*.

**IV. CONCLUSION**

16. Japan requests that a panel be established under Article 21.5 of the DSU with standard terms of reference, as set forth in Article 7.1 of the DSU, and asks that this request be placed on the agenda of the DSB meeting scheduled for 18 April 2008.

**ANNEX I: PERIODIC REVIEWS**

<b>ORDER (CASE NUMBER)</b>	<b>NO.</b>	<b>PERIODIC REVIEW (MEASURES AT ISSUE)</b>	<b>COMPANIES</b>
Ball Bearings and Parts Thereof From Japan (A-588-804)	1	1 May 1999 – 30 April 2000 (66 Fed. Reg. 36551, 12 July 2001) (As amended: 72 Fed. Reg. 67892, 3 December 2007) (NTN))	JTEKT <sup>20</sup> and NTN
	2	1 May 2000 – 30 April 2001 (67 Fed. Reg. 55780, 30 August 2002) (As amended: 73 Fed. Reg. 15481, 24 March 2008)	NTN
	3	1 May 2002 – 30 April 2003 (69 Fed. Reg. 55574, 15 September 2004)	JTEKT, NSK and NTN
	4	1 May 2003 – 30 April 2004 (70 Fed. Reg. 54711, 16 September 2005) (As amended: 70 Fed. Reg. 61252, 21 October 2005 (NSK)) (As amended: 70 Fed. Reg. 69316, 15 November 2005 (Nippon Pillow Block))	JTEKT, Nippon Pillow Block, NSK and NTN
	5	1 May 2004 – 30 April 2005 (71 Fed. Reg. 40064, 14 July 2006)	JTEKT, NSK, Nippon Pillow Block and NTN
	6	1 May 2005 – 30 April 2006 (72 Fed. Reg. 58053, 12 October 2007)	Asahi Seiko, JTEKT, NSK, Nippon Pillow Block and NTN
Cylindrical Roller Bearings and Parts Thereof From Japan (A-588-804)	7	1 May 1999 – 31 December 1999 (66 Fed. Reg. 36551, 12 July 2001)	JTEKT and NTN
Spherical Plain Bearings and Parts Thereof From Japan (A-588-804)	8	1 May 1999 – 31 December 1999 (66 Fed. Reg. 36551, 12 July 2001)	NTN

<sup>20</sup> JTEKT is formerly known as Koyo Seiko Co. Ltd.

**ANNEX 2: SUNSET REVIEWS**

<b>ORDER (CASE NUMBER)</b>	<b>NO.</b>	<b>SUNSET REVIEWS (MEASURES AT ISSUE)</b>
Antifriction Bearings from Japan (A-588-804)	9	1994 – 1999 (64 Fed. Reg. 60275, 4 November 1999)
	10	2000 – 2005 (71 Fed. Reg. 26321, 4 May 2006)

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