BEFORE THE WORLD TRADE ORGANIZATION

UNITED STATES – MEASURES RELATING TO ZEROING AND SUNSET REVIEWS

RECOURSE TO ARTICLE 21.5 OF THE DSU BY JAPAN

(WT/DS322)

FIRST WRITTEN SUBMISSION OF JAPAN

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Abbreviation	Description
Anti-Dumping Agreement	*Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*
DSB	Dispute Settlement Body
DSU	*Understanding on Rules and Procedures Governing the Settlement of Disputes*
GATT 1994	*General Agreement on Tariffs and Trade 1994*
RPT	reasonable period of time
T-to-T	transaction-to-transaction comparison
USCBP	United States Customs and Border Protection
USCIT	United States Court of International Trade
USDOC	United States Department of Commerce
USITC	United States International Trade Commission
W-to-T	weighted average-to-transaction comparison
W-to-W	weighted average-to-weighted average comparison

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.

2. The zeroing procedures were found to be WTO-inconsistent in the context of weighted average-to-weighted average ("W-to-W") and transaction-to-transaction ("T-to-T") comparisons in original investigations, and under any comparison methodology in new shipper and periodic reviews. Yet, the United States has eliminated the zeroing procedures solely with respect to W-to-W comparisons in original investigations. Japan contests the United States' failure to eliminate the zeroing procedures in all other situations in which they were found to be inconsistent with its WTO obligations.

3. The picture of non-compliance is even more striking with respect to particular periodic reviews that were declared by the DSB to be WTO-inconsistent. By its own admission, the United States has taken no action whatsoever to implement the DSB's recommendations and rulings regarding these periodic reviews, taking the view that the original measures have been "superseded" by subsequent periodic reviews.[1] Yet, the United States applied the zeroing procedures in making its determinations in these replacement measures. Thus, these replacement measures perpetuate the WTO-inconsistency at issue in this dispute and undermine the United States' compliance with the DSB's recommendations and rulings. Japan challenges these replacement measures as "measures taken to comply" that are inconsistent with the *Anti-Dumping Agreement* and the GATT 1994.

[1] United States statement to the DSB on 10 January 2008, WT/DS322/22/Add.2.

4. Japan also disagrees with the United States' assertion that the original periodic reviews have been entirely "superseded". In fact, following the end of the reasonable period of time ("RPT") for implementation, the United States has taken, or will take, action to enforce the WTO-inconsistent duty rates established in five of the 11 original periodic reviews. As a result, these five reviews continue to produce legal effects, and the United States was obliged to take steps by the end of the RPT to revise the WTO-inconsistent rates established in the original reviews. Yet, it has failed to do so. Japan, therefore, brings claims regarding this omission under the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").

5. Finally, with respect to the two sunset reviews that were found to be WTO-inconsistent in the original proceedings, the United States has failed to provide any information to the DSB on the status of its implementation actions. The United States has taken no action to implement the DSB's recommendations and rulings regarding these measures. Japan contests these omissions.

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

6. 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*."[2] The relationship between original and compliance proceedings informs the way in which a compliance panel assesses the matter before it in the compliance proceedings. As the Appellate Body has explained in several disputes, given the "continuum of events", a compliance panel's examination of the matter cannot "be undertaken in abstraction from the findings by the original panel and the Appellate Body adopted by the DSB."[3]

7. In *Mexico – Corn Syrup (21.5)*, the Appellate Body noted that Article 21.5 panels can be expected to refer to their original panel reports, "particularly in cases where the

[2] Appellate Body Report, *Chile – Price Band System (21.5)*, para. 136, *citing* Appellate Body Report, *Mexico – Corn Syrup (21.5)*, para. 121 (emphasis added).
[3] Appellate Body Report, *Chile – Price Band System (21.5)*, para. 136, *citing* Appellate Body Report, *U.S. – Softwood Lumber VI (21.5)*, para. 102 and Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, para. 77.

implementing measure is closely related to the original measure, and where the claims made in the proceeding under Article 21.5 closely resemble the claims made in the initial panel proceedings."[4] Further, in *U.S. – 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."[5]

8. If a compliance panel were to "deviate" from the original panel's findings on a "specific issue", without a change in the domestic legal framework and/or facts warranting this deviation, it would suggest that the compliance panel is acting in an arbitrary fashion that does not meet the requirements of an "objective assessment" under Article 11 of the DSU. Accordingly, in the progression of "events" within a single dispute, it is naturally required for a compliance panel to respect its findings in the original proceedings. To borrow from the Appellate Body, "[t]his is a consequence of the mandate of an Article 21.5 panel, namely, to examine whether recommendations and rulings from the original dispute have been implemented consistently with the covered agreements."[6]

9. Legal interpretations of relevant provisions offered by the Appellate Body in previous disputes enjoy a particular position in the "hierarchical structure" of the DSU.[7] The Appellate Body recently confirmed, in *U.S. – Stainless Steel (Mexico)*, that panels are not "free to disregard the legal interpretations and the *ratio decidendi* contained in previous Appellate Body reports that have been adopted by the DSB."[8] According to the Appellate Body, a panel's "failure to follow previously adopted Appellate Body reports addressing the same issues undermines the development of a coherent and predictable

[4] Appellate Body Report, *Mexico – Corn Syrup (21.5)*, para. 109.
[5] Appellate Body Report, *U.S. – Softwood Lumber VI (21.5)*, para. 103 (emphasis added).
[6] Appellate Body Report, *U.S. – Softwood Lumber VI (21.5)*, para. 103. *See also* Appellate Body Report, *U.S. – Stainless Steel (Mexico)*, para. 158, note 309 ("[T]he mandate of an Article 21.5 panel includes the task of assessing whether the measures taken to comply with the rulings and recommendations adopted by the DSB in the original proceedings achieve compliance with those rulings.").
[7] Appellate Body Report, *U.S. – Stainless Steel (Mexico)*, para. 161.
[8] Appellate Body Report, *U.S. – Stainless Steel (Mexico)*, para. 158.

body of jurisprudence clarifying Members' rights and obligations under the covered agreements as contemplated under the DSU".[9]

10. These considerations apply with all the more force in compliance proceedings under Article 21.5 of the DSU, which form part of a "continuum of events" following from the original proceedings.[10] Under Article 17.14 of the DSU, an Appellate Body report must be "unconditionally accepted" by the respondent following adoption by the Membership. By implication, a compliance panel must, therefore, also accept the original Appellate Body report; otherwise the respondent would be excused by the compliance panel of its "unconditional" obligation to accept that report. Also, as a servant of the DSB, constituted to examine compliance with the DSB's recommendations and rulings, a compliance panel cannot willfully depart from those rulings. In this vein, in *U.S. – Stainless Steel (Mexico)*, the Appellate Body recently observed that Article 21.5 panels "are *bound* to follow the legal interpretation contained in the original panel *and Appellate Body reports* that were adopted by the DSB."[11]

11. In these proceedings, several aspects of the matter before this Panel are closely related to aspects of the matter at issue in the original proceedings. Both proceedings concern the United States' maintenance and application of "zeroing procedures,"[12] which the original panel and the Appellate Body found apply under any comparison method in original investigations, periodic reviews, and new shipper reviews. These compliance proceedings do not provide the United States with another chance to dispute the existence, scope of application, or the WTO-consistency of the zeroing procedures, because these matters were definitively resolved in the original proceedings.[13] The issue in these

[9] Appellate Body Report, *U.S. – Stainless Steel (Mexico)*, para. 161.
[10] Appellate Body Report, *Chile – Price Band System (21.5)*, para. 136, *citing* Appellate Body Report, *U.S. – Softwood Lumber VI (21.5)*, para. 102 and Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, para. 77.
[11] Appellate Body Report, *U.S. – Stainless Steel (Mexico)*, para. 158, note 309 (emphases added).
[12] 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 overall dumping margin for the product as a whole for a foreign producer or exporter. *See* Appellate Body Report, *U.S. – Zeroing (Japan)*, para. 2, note 3.
[13] Appellate Body Report, *Mexico – Corn Syrup (21.5)*, paras. 78-80; Appellate Body Report, *EC – Bed Linen (21.5)*, paras. 94-95.

proceedings is whether the United States has fully complied with the DSB's recommendations and rulings regarding the zeroing procedures.

12. Also, as discussed in Section III of this submission, these compliance proceedings concern the United States' failure to bring certain periodic and sunset reviews into conformity with its obligations under the *Anti-Dumping Agreement*. These measures were found to be WTO-inconsistent because of the application of the zeroing procedures. Again, the WTO-inconsistency of these measures was definitively established in the original proceedings. The United States, therefore, is not entitled to ask this Panel to conclude that measures found to be WTO-inconsistent in the original proceedings are WTO-consistent, despite its failure to change those measures. The same holds true with respect to the Panel's assessment of the WTO-consistency of "measures taken to comply".

13. Similarly, in assessing the WTO-consistency of "measures taken to comply" with the DSB's recommendations and rulings, the Panel must accept the interpretations of the covered agreements on which those recommendations and rulings are based.

III. FACTUAL ASPECTS

A. *The Original Proceedings*

14. On 24 November 2004, Japan requested consultations with the United States with regard to the United States' maintenance and application of zeroing procedures in a variety of anti-dumping proceedings.[14] Consultations failed to achieve a mutually agreed solution to the dispute and, on 4 February 2005, Japan requested the establishment of a panel.[15] On 20 September 2006, the panel circulated its report in the original proceedings.[16] Following appeals by both Japan and the United States, the Appellate Body circulated a report on 9 January 2007, modifying the panel report.[17]

[14] WT/DS322/1.
[15] WT/DS322/8. For additional information on the measures subject to Japan's claims in the original proceeding, and a detailed explanation of the United States' zeroing procedures, *see* First Written Submission of Japan, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322, 9 May 2005, sections II, III, and IV.
[16] Panel Report, *U.S. – Zeroing (Japan)*.
[17] Appellate Body Report, *U.S. – Zeroing (Japan)*.

15. On 23 January 2007, the DSB adopted the Appellate Body Report and the original panel report, as modified by the Appellate Body Report.[18] 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.[19]

16. With regard to the "as such" measures challenged by Japan, the DSB ruled as follows:

- by maintaining zeroing procedures in original investigations when calculating margins of dumping on the basis of W-to-W comparisons, the United States acts inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement*;[20]
- by maintaining zeroing procedures in original investigations when calculating margins of dumping on the basis of T-to-T comparisons, the United States acts inconsistently with Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement*;[21]
- by maintaining zeroing procedures in periodic reviews under any comparison method, 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;[22] and
- by maintaining zeroing procedures in new shipper reviews under any comparison method, the United States acts inconsistently with Articles 2.4 and 9.5 of the *Anti-Dumping Agreement*.[23]

17. With regard to the "as applied" measures challenged by Japan, the DSB ruled as follows:

- 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*;[24]

[18] WT/DSB/M/225, para. 96.
[19] *See* Appellate Body Report, *U.S. – Zeroing (Japan)*, para. 191.
[20] Panel Report, *U.S. – Zeroing (Japan)*, para. 7.258(a).
[21] Appellate Body Report, *U.S. – Zeroing (Japan)*, para. 190(b).
[22] Appellate Body Report, *U.S. – Zeroing (Japan)*, para. 190(c).
[23] Appellate Body Report, *U.S. – Zeroing (Japan)*, para. 190(d).
[24] Panel Report, *U.S. – Zeroing (Japan)*, para. 7.258(b).

- by applying zeroing procedures in the 11 periodic reviews identified in Japan's Request for the Establishment of a Panel,[25] 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;[26] and

- 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,[27] the United States acted inconsistently with Article 11.3 of the *Anti-Dumping Agreement*.[28]

18. 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 "shall be 11 months, expiring on 24 December 2007".[29]

B. *The United States' Declared Implementation Action and Inaction*

19. In this sub-section, Japan describes the United States' declared implementation action and inaction in connection with the measures challenged in these proceedings, namely, the zeroing procedures, and certain periodic and sunset reviews.

(i) Zeroing Procedures

20. The original panel found that the zeroing procedures apply whenever the United States determines dumping, under any comparison methodology, in: (i) original investigations; (ii) periodic reviews; and (iii) new shipper reviews.[30] On appeal in the original proceedings, the United States argued that the original panel erred in finding that zeroing procedures apply to T-to-T and W-to-T comparisons in original investigations. However, the United States did *not* contest the panel's findings that zeroing procedures apply to W-to-W comparisons in original investigations and, under any comparison

[25] WT/DS322/8.
[26] Appellate Body Report, *U.S. – Zeroing (Japan)*, para. 190(e).
[27] WT/DS322/8.
[28] Appellate Body Report, *U.S. – Zeroing (Japan)*, para. 190(f).
[29] WT/DS322/20.
[30] Panel Report, *U.S. – Zeroing (Japan)*, paras. 7.50-7.57.

method, to periodic and new shipper reviews.[31] The Appellate Body rejected the United States' appeal, and upheld the original panel's finding.[32]

21. 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.

22. 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)]".[33] In that dispute, the zeroing procedures were found to be WTO-inconsistent, as such, in W-to-W comparisons in original investigations; 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.

23. The USDOC March 2006 notice sought public comments on its plan to abandon zeroing in W-to-W comparisons in original investigations, as well as on "appropriate methodologies to be applied in future antidumping duty investigations".[34]

24. 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

[31] Appellate Body Report, *U.S. – Zeroing (Japan)*, para. 77.
[32] Appellate Body Report, *U.S. – Zeroing (Japan)*, para. 88.
[33] 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-34).
[34] 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-34).

notice announcing that it would no longer apply the zeroing procedures in W-to-W comparisons in original investigations.[35] The 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.[36]
>
> …
>
> 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*.[37]

25. In other words, 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.

26. Nevertheless, the United States informed the DSB[38] that the United States' elimination of zeroing in *W-to-W comparisons in anti-dumping investigations* in *U.S. – Zeroing (EC)* constituted full implementation of the DSB's recommendations and rulings in this dispute with respect to the maintenance of the zeroing procedures in T-to-T

[35] 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).
[36] 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).
[37] 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) (emphasis added) (Exhibit JPN-35).
[38] WT/DSB/M/245.

comparisons in original investigations, and, under any comparison methodology, in periodic and new shipper reviews.

(ii) Periodic Reviews

27. 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 allegedly "supersede" the WTO-inconsistent periodic reviews. In particular, on 10 January 2008, the United States informed the DSB in a status report 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.[39]

28. In these proceedings, Japan challenges five of the 11 periodic reviews that were at issue in the original proceedings and that the United States alleges were superseded, as well as three of the subsequent periodic reviews that allegedly superseded the original reviews.[40] The eight challenged periodic reviews are identified in Annex 1 of Japan's request for the establishment of this compliance Panel.

(iii) Sunset Reviews

29. 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. At the DSB meeting on 21 January 2008, Japan noted to the DSB that the United States had not taken any implementation action regarding the individual sunset reviews. The United States did not contradict this view. At the DSB meeting on 19 February 2008, Japan formally requested

[39] WT/DS322/22/Add.2. Emphasis added.
[40] Japan reserves the rights to address any other subsequent closely connected measures.

the United States to clarify its position on the status of implementation of the DSB's recommendations and rulings regarding the two sunset reviews.[41] The United States noted, in reply, that one of the orders in question has been revoked and the other extended through a subsequent sunset review. At the DSB meeting on 14 March 2008, Japan invited the United States to elaborate on how it had implemented the DSB's recommendations and rulings. However, to date, the United States has made no pronouncements concerning the status of its implementation action in connection with these measures.

30. 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. *Overview of the Imposition and Collection of Anti-Dumping Duties in the United States*

(i) The Imposition of Anti-Dumping Duties Under an Anti-Dumping Order

31. Under U.S. law, the USDOC and the United States International Trade Commission ("USITC") are responsible for conducting investigations into whether to impose anti-dumping duties on foreign products sold in the United States.[42] When the USDOC determines that an imported product is being dumped, and the USITC determines that the domestic industry producing the like product has been injured, or threatened with injury, as a result of the importation of that product, the USDOC will publish an anti-dumping order imposing anti-dumping duties on the product subject of the original investigation.[43]

32. An anti-dumping order directs U.S. Customs and Border Protection ("USCBP") to "assess" anti-dumping duties on subject goods, based on the dumping margins calculated

[41] WT/DSB/M/245, paras. 27, 29.
[42] *See generally* 19 U.S.C. § 1673 (Exhibit JPN-36).
[43] 19 U.S.C. §§ 1673d(c)(2), 1673e(a) (Exhibit JPN-36).

by the USDOC, at a time when USCBP has sufficient information to enable assessment to occur.[44] Because that information is not available at the time of importation, the final liability for duties is not assessed at that time. Instead, on importation, importers are required by U.S. law to make cash deposits of the estimated anti-dumping duties due on the entry, and liquidation of the entry is suspended.[45]

(ii) Periodic Reviews

33. The final assessment and collection by the United States of the anti-dumping duties do not occur until some time after importation. Specifically, pursuant to U.S. law, interested parties may request that the USDOC conduct a "periodic review", typically during the anniversary month of the order, of the amount of any anti-dumping duty.[46]

34. During a periodic review, the USDOC makes determinations of dumping in connection with the entries that occurred during the review period. Specifically, the USDOC makes two different determinations: it calculates, *first*, an exporter-specific cash deposit rate; and, *second*, an importer-specific assessment rate for each company that imports the subject product from an exporter for which a cash deposit rate is calculated. Japan outlines, below, the methodology that the USDOC applies to calculate these rates, before considering the legal purpose served by each of these rates in U.S. law.

(a) *Methodology for Determining Dumping in a Periodic Review*

35. The calculation of an exporter-specific cash deposit rate and an importer-specific assessment rate both involve dumping determinations, albeit that the methodology by which the United States makes those determinations is not WTO-consistent. To make these determinations, the USDOC proceeds in three steps.

[44] 19 U.S.C. § 1673e(a)(1) (Exhibit JPN-36); *see also id.*, 19 U.S.C. § 1673d(c)(1)(B)(i) (Exhibit JPN-36).
[45] 19 U.S.C. §§ 1673d(c)(1)(B)(ii), 1673e(a)(3) (Exhibit JPN-36).
[46] 19 U.S.C. § 1675(a) (Exhibit JPN-36). Where a periodic review is not requested, the cash deposit rate for future entries remains the same. Moreover, the cash deposits collected on entries in the previous year are assessed as the definitive anti-dumping duties.

36. *First*, it compares the prices of individual export transactions with a weighted average normal value, calculated on a monthly basis.[47] In the case of an exporter-specific cash deposit rate, a separate comparison is made for each individual export transaction originating from a particular exporter. In the case of an importer-specific assessment rate, a separate comparison is made for each individual export transaction originating from a particular exporter and imported by a particular importer.

37. The outcome of each transaction-specific comparison is a price difference between the individual export price and normal value. Three outcomes are possible: (i) the normal value may exceed the export price for a particular transaction, in which case the price difference is positive; (ii) the export price may exceed normal value, in which case the difference is negative; and (iii) the normal value and the export price may be equal, in which case the difference is zero.[48]

38. *Second*, to derive the cash deposit rate and the importer-specific assessment rate, the USDOC aggregates the results of the multiple comparisons undertaken, expressing the result as a fraction. In each case, in the aggregation process, the USDOC sums the price differences exclusively for those comparisons for which there was a positive price difference. All comparisons with negative differences are purposefully disregarded. As a result, the sum total of the price differences in the numerator of the overall fraction is inflated by an amount equal to the excluded negative differences.[49] In calculating the denominator of the fraction, the USDOC retains the total sales value of all comparable export transactions.

39. *Third*, and finally, the USDOC expresses the fraction as a percentage. Both the cash deposit rate and the importer-specific assessment rate may be zero. Further, an

[47] 19 U.S.C. § 1677f-1(d)(2) (Exhibit JPN-36).
[48] *See* Owenby Statement (Exhibit JPN-1); Supplemental Owenby Statement (Exhibit JPN-37).
[49] The USDOC relies on a standard computer program – the Standard AD Margin Calculation Program – to conduct and manage the entire process of calculating margins of dumping in anti-dumping proceedings. *See* Standard AD Margin Calculation Program (for Periodic Reviews) (Exhibit JPN-7). The program contains computer code that executes every procedure and/or combination of procedures applicable to an anti-dumping proceeding. Through a specific line of programming code – *i.e.*, "WHERE EMARGIN GT 0;" – the computer program ignores all negative dumping amounts in calculating the numerator. *See* Owenby Statement (Exhibit JPN-1); Supplemental Owenby Statement (Exhibit JPN-37).

importer-specific assessment rate may be equal to, or greater or less than, the cash deposit rate.

(b) *Legal Purposes Served by Determinations in a Periodic Review*

40. The determinations made by the USDOC in a periodic review serve two legal purposes – namely, establishing a new cash deposit rate that applies prospectively to future entries of the subject product, and assessing the amount of definitive anti-dumping duties for the previous entries that were imported during the review period.

41. *First*, where the cash deposit rate is greater than zero, "estimated"[50] anti-dumping duties are collected prospectively on all future entries of the subject product at the cash deposit rate, pending the completion of the next periodic review. When the next periodic review is completed, the cash deposit rate determined in the previous review ceases to operate, and is replaced by the new cash deposit rate that applies prospectively to entries occurring after that time.

42. *Second*, the periodic review provides the legal basis for the United States to take action to liquidate the entries covered by the review, with definitive anti-dumping duties assessed at the importer-specific assessment rate. In addition to an exporter-specific cash deposit rate, a single importer-specific assessment rate is calculated for, and thereafter applied to, each entry covered by the latter rate. In other words, the definitive amount of anti-dumping duties due on any particular entry is governed by a single importer-specific assessment rate. For a given entry, the importer-specific assessment rate replaces the cash deposit rate that was imposed at the time of importation.

43. With respect to the entries covered by the importer-specific assessment rate, that rate does not cease to operate when a further importer-specific assessment rate is determined in a subsequent review. Instead, the first importer-specific assessment rate continues to operate until liquidation of each entry covered by that rate is complete, and the definitive amount of duties due on those entries is assessed. When all the entries

[50] 19 U.S.C. § 1675(a)(2)(C) (Exhibit JPN-36).

covered by an importer-specific assessment rate have been liquidated, the rate effectively expires.

(c) *Collection of Definitive Anti-Dumping Duties and Liquidation of Entries*

44. After the final results of a periodic review are published, the USDOC issues "instructions" to the USCBP authorizing the liquidation of the entries based on the difference between the importer-specific assessment rate and the initial cash deposit rate.[51] The USCBP, in turn, is required to liquidate the entries, "to the greatest extent practicable", within 90 days of receiving the USDOC's liquidation instructions.[52]

45. 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.[53] 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 check 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. Moreover, decisions by the USCBP to liquidate entries are "final and conclusive" as to all parties, including the United States, with limited exceptions.[54] While limited grounds are available to an importer to protest USCBP's liquidation notice, an importer cannot protest the determination of the dumping margin.[55]

[51] If no periodic review takes place, the USDOC issues instructions for the USCBP to liquidate entries at the cash deposit rate that applied at the time of importation, and the cash deposit rate remains unchanged. 19 U.S.C. § 1504(a) (Exhibit JPN-36).
[52] 19 U.S.C. § 1675(a)(3)(B) (Exhibit JPN-36).
[53] 19 U.S.C. § 1673f(b) (Exhibit JPN-36).
[54] 19 U.S.C. § 1514(a) (Exhibit JPN-36). Under U.S. law, an importer wishing to protest USCBP's liquidation notice for entries made prior to 18 December 2004 must do so within 180 days; for entries made after that date, an importer has 90 days after the date of liquidation to file a protest with the USCBP. *See* 19 U.S.C. § 1514(c)(3) (Exhibit JPN-36). If the USCBP approves the protest, it revises the liquidation result. *See* 19 U.S.C. § 1515 (Exhibit JPN-36). If the USCBP denies the protest, an importer may challenge certain aspects of the denial in U.S. courts. *Id*. (Exhibit JPN-36). *See also* 28 U.S.C. § 1581(a) (Exhibit JPN-36); 19 C.F.R. § 174.11 (Exhibit JPN-38).
[55] The following decisions by Customs may be protested: "(a) The appraised value of merchandise; (b) The classification and rate and amount of duties chargeable; (c) All charges or exactions of whatever character including the accrual of interest within the jurisdiction of the Secretary of the Treasury; (d) The exclusion

46. The liquidation process may be delayed by domestic litigation brought by an importer to contest the final results of the periodic reviews. In that event, the U.S. Court of International Trade ("USCIT") may issue an injunction suspending liquidation, pending the outcome of the litigation.[56]

47. If a domestic challenge to a periodic review is successful, the court remands the final results to the USDOC for it to reconsider its initial determination in light of the decision of the domestic court. Thereafter, if no further challenge is made to the final results, or if the challenge to the final results is rejected by the U.S. courts, the USDOC issues instructions to USCBP, which in turn issues liquidation notices to importers on the basis of the difference between the final importer-specific assessment rate and the initial cash deposit rate.

D. *Measures at Issue and Claims Made in These Proceedings*

48. Given the United States' limited action to implement the DSB's recommendations and rulings, Japan's panel request identifies several measures that are at issue in these proceedings.

(i) Zeroing Procedures

49. 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 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.[57]

50. The United States' omission is inconsistent 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

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of merchandise from entry or delivery under any provision of the Customs laws; (e) The liquidation or reliquidation of an entry, or any modification thereof; (f) The refusal to pay a claim for drawback; and (g) The refusal to reliquidate an entry under section 520(c), Tariff Act of 1930, as amended (19 U.S.C. 1520(c))." 19 C.F.R. § 174.11 (Exhibit JPN-38).

[56] The rules governing the issuance of injunctions in the course of litigation challenging the final results of periodic reviews are specified in 19 U.S.C. § 1516a(c)(2) (Exhibit JPN-36).

[57] Japan's Panel Request, paras. 10-12.

settlement of the matter. Further, by continuing to maintain the zeroing procedures in these contexts, the United States still acts inconsistently with Article 2.4 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, as set forth in the DSB's recommendations and rulings. Additionally, as also set forth in the DSB's recommendations and rulings, with respect to the T-to-T comparisons in original investigations, the United States is in violation of Article 2.4.2 of the *Anti-Dumping Agreement*; with respect to the periodic reviews, the United States is in violation of Article 9.3 of the *Anti-Dumping Agreement*; and with respect to new shipper reviews, the United States is in violation of Article 9.5 of the *Anti-Dumping Agreement*.[58]

(ii) Periodic Reviews

51. 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 53 below).

52. Japan also challenges three subsequent periodic reviews, numbered (4), (5), and (6) in paragraph 53 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.[59] 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.[60]

53. The periodic reviews at issue in these proceedings are:[61]

(1) Ball Bearings and Parts Thereof From Japan (1 May 1999 through 30 April 2000) ([62] and);[63]

[58] Japan's Panel Request, para. 12.
[59] WT/DS322/22/Add.2.
[60] Japan's Panel Request, paras. 13-15 and Annex 1.
[61] Japan's Panel Request, Annex 1.

(2) Ball Bearings and Parts Thereof From Japan (1 May 2000 through 30 April 2001) ( );[64]

(3) Ball Bearings and Parts Thereof From Japan (1 May 2002 through 30 April 2003) (, , and);[65]

(4) Ball Bearings and Parts Thereof From Japan (1 May 2003 through 30 April 2004) (, , , and);[66]

(5) Ball Bearings and Parts Thereof From Japan (1 May 2004 through 30 April 2005) (, , , and);[67]

(6) Ball Bearings and Parts Thereof From Japan (1 May 2005 through 30 April 2006) (, , , , and);[68]

(7) Cylindrical Roller Bearings and Parts Thereof From Japan (1 May 1999 through 31 December 1999) (and);[69] and,

(8) Spherical Plain Bearings and Parts Thereof From Japan (1 May 1999 through 31 December 1999) ( ).[70]

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[62] As of 1 January 2006, changed its name to . For the purposes of this submission and the accompanying exhibits, we refer to the company as " ".

[63] *See* Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from Japan, final results for the period 1 May 1999 through 30 April 2000 (USDOC annual review of ball bearings in case number A-588-804), 66 Fed. Reg. 36551 (12 July 2001) ( ) (Exhibit JPN-16); Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from Japan, amended final results for the period 1 May 1999 through 30 April 2000 (USDOC annual review in case number A-588-804), 72 Fed. Reg. 67892, 3 December 2007 ( ) (Exhibit JPN-39).

[64] *See* Ball Bearings and Parts Thereof from Japan, amended final results for the period 1 May 2000 – 30 April 2001 (USDOC annual review in case number A-588-804), 73 Fed. Reg. 15481, 24 March 2008 ( ) (Exhibit JPN-40).

[65] *See* Ball Bearings and Parts Thereof from Japan, final results for the period 1 May 2002 – 30 April 2003 (USDOC annual review in case number A-588-804), 69 Fed. Reg. 55574, 15 September 2004 (Exhibit JPN-21).

[66] *See* Ball Bearings and Parts Thereof from Japan, final results for the period 1 May 2003 – 30 April 2004 (USDOC annual review in case number A-588-804), 70 Fed. Reg. 54711, 16 September 2005 (Exhibit JPN-42); Ball Bearings and Parts Thereof from Japan, amended final results for the period 1 May 2003 – 30 April 2004 (USDOC annual review in case number A-588-804), 70 Fed. Reg. 61252, 21 October 2005 ( ) (Exhibit JPN-42.A); Ball Bearings and Parts Thereof from Japan, amended final results for the period 1 May 2003 – 30 April 2004 (USDOC annual review in case number A-588-804), 70 Fed. Reg. 69316, 15 November 2005 ( ) (Exhibit JPN-42.B).

[67] *See* Ball Bearings and Parts Thereof from Japan, final results for the period 1 May 2004 – 30 April 2005 (USDOC annual review in case number A-588-804), 71 Fed. Reg. 40064, 14 July 2006 (Exhibit JPN-43).

[68] *See* Ball Bearings and Parts Thereof From Japan, final results for the period 1 May 2005 – 30 April 2006 (USDOC annual review in case number A-588-804), 72 Fed. Reg. 58053, 12 October 2007 (Exhibit JPN-44).

[69] *See* Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from Japan, final results for the period 1 May 1999 through 31 December 1999 (USDOC annual review of cylindrical roller bearings in case number A-588-804), 66 Fed. Reg. 36551 (12 July 2001) (Exhibit JPN-17).

54. 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.

55. The United States' omission to eliminate zeroing from the periodic reviews challenged in the original proceedings, resulting in WTO-inconsistent liquidations after the RPT, is inconsistent 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 continues to violate Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994. By relying upon zeroing in adopting the subsequent periodic reviews, the United States acts inconsistently with Articles 2.4, 9.2, and 9.3 of the *Anti-Dumping Agreement*, and VI:1 and VI:2 of the GATT 1994.

(iii) Sunset Reviews

56. 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.[71] This omission results in inconsistencies 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 a continued violation of Article 11.3 of the *Anti-Dumping Agreement*.[72]

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

57. The scope of these proceedings is governed by Article 21.5 of the DSU, which provides, in pertinent part, as follows:

> 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

[70] *See* Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from Japan, final results for the period 1 May 1999 through 31 December 1999 (USDOC annual review of spherical plain bearings in case number A-588-804), 66 Fed. Reg. 36551 (12 July 2001) (Exhibit JPN-18).
[71] Japan's Panel Request, para. 16 and Annex 2.
[72] Japan's Panel Request, para. 16 and Annex 2.

> shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. …

58. Japan notes that the United States, as respondent, has routinely argued in previous compliance proceedings that measures challenged by the complainant were not "measures taken to comply" within the meaning of Article 21.5 of the DSU.[73] For that reason, Japan establishes, at the outset, that the various actions and omissions that it challenges in these proceedings fall within the scope of Article 21.5 of the DSU.

A. *The Panel Has Jurisdiction over an Implementing Member's Actions and Omissions*

59. As Japan has described in Section III.D above, 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.

60. For example, in *U.S. – Softwood Lumber IV (21.5)*, the Appellate Body confirmed that "[t]he word 'existence' suggests that measures falling within the scope of Article 21.5 encompass not only positive acts, but also *omissions*."[74] Likewise, in *U.S. – FSC II (21.5)*, the Appellate Body found that an Article 21.5 panel may be required to "examine either the 'existence' of 'measures taken to comply' with DSB recommendations and rulings, or when such measures exist, the 'consistency' of those measure with the covered agreements, or a combination of both, in situations where the measures taken to comply, *through omissions* or otherwise, may achieve only partial compliance."[75]

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[73] *See*, for example, United States First Written Submission, *U.S. – Zeroing (EC) (21.5)*, paras. 36 ff (8 February 2008), *available at* http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file283_7156.pdf (last visited 27 June 2008).
[74] Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, para. 67 (emphasis in original).
[75] Appellate Body Report, *U.S. – FSC II (21.5)*, para. 60 (emphasis added).

61. Thus, the United States' omissions to implement the DSB's recommendations and rulings regarding the zeroing procedures, periodic reviews and sunset review, as discussed in more detail below, fall within the scope of Article 21.5 of the DSU.

B. *The Three Subsequent Periodic Reviews Are Within the Scope of Article 21.5 of the DSU*

(i) Review of the case-law on the interpretation of Article 21.5 of the DSU

62. 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 53.

63. 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.[76] Indeed, as noted by the panel in *U.S. – Gambling (21.5)*, measures cannot be excluded from the scope of compliance proceedings "due to the *purpose* for which they have been taken".[77]

64. 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". Indeed, 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*."[78]

65. 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*

[76] Appellate Body Report, *U.S. – 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 *U.S. – 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 *U.S. – Softwood Lumber IV (21.5)*, para. 73, note 111.
[77] Panel Report, *U.S. – Gambling (21.5)*, para. 6.24 (emphasis in original).
[78] Appellate Body Report, *Canada – Aircraft (21.5)*, para. 41 (emphasis added).

relationship to the DSB's recommendations and rulings regarding the original measures and because the new measures *undermine compliance* with those recommendations and rulings.

66. In *Australia – Salmon (21.5)*, Australia unsuccessfully argued that a Tasmanian ban on salmon imports challenged by Canada was not a "measure taken to comply" with the DSB's recommendations and rulings. The DSB's recommendations and rulings had 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 thereafter imposed a new import ban on salmon. The Article 21.5 panel found that the Tasmanian ban was "so *clearly connected* to the panel and Appellate Body reports concerned" that it was a measure taken to comply within the meaning of Article 21.5.[79] Given the close substantive relationship between the measures, the replacement ban imposed by Tasmania had the potential to undermine Australia's compliance with the DSB's recommendations and rulings.

67. Similarly, in *Australia – Leather (21.5)*, the United States argued that Australia had failed to comply with the DSB's recommendations and rulings when it granted a new subsidy to the same group of companies, after securing partial repayment of an original prohibited subsidy. Australia, in turn, disputed that the new subsidy was within the scope of the Article 21.5 proceeding, because it was not taken for the purpose of complying with the DSB's recommendations and rulings.[80]

68. The Article 21.5 panel, however, rejected Australia's argument, finding that the new subsidy was "*inextricably linked*" to the DSB's recommendations and rulings, and that to exclude the new subsidy from its jurisdiction would "severely limit[]" the panel's ability to determine whether Australia had complied with the DSB's recommendations and rulings.[81] In other words, in order to assess whether Australia had complied with the DSB's recommendations and rulings regarding one subsidy, the panel was entitled to

[79] Panel Report, *Australia – Salmon (21.5)*, para. 7.10 (sub-para. 22) (emphasis added).
[80] Panel Report, *Australia – Leather (21.5)*, para. 6.1.
[81] Panel Report, *Australia – Leather (21.5)*, para. 6.5 (emphasis added).

examine a replacement subsidy to the same corporate entity. The grant of such a replacement subsidy could, after all, undermine compliance.

69. In *U.S. – 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.

70. 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.[82] After reviewing the approach taken by the panels in *Australia – Salmon (21.5)* and *Australia – Leather (21.5)*,[83] 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.[84]

71. In conducting that analysis, the Appellate Body held that a panel must employ a "nexus-based test"[85] 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."[86]

72. With respect to measures that the implementing Member denies are taken to comply, the Appellate Body emphasized that a compliance panel must examine these measures "in their full context, including *how such measures are introduced* into, and *how they function* within, the particular system of the implementing Member."[87]

[82] Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, para. 68.
[83] Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, paras. 73-76.
[84] Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, para. 77 (emphasis added).
[85] Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, para. 79.
[86] Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, para. 77.
[87] Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, para. 67 (emphasis added).

73. The Appellate Body's analysis in *U.S. – Softwood Lumber IV (21.5)* of the "nature" or "subject matter"[88] of the "new" measures challenged in Article 21.5 proceedings is important to these proceedings given the underlying similarities between the measures at issue in the respective proceedings. Japan therefore provides a more detailed discussion.

74. Specifically, three measures were at issue in *U.S. – Softwood Lumber IV (21.5)*: (i) the original investigation that was the subject of the DSB's recommendations and rulings; (ii) a "Section 129 determination" replacing the original investigation; and, (iii) the first periodic review that the United States argued was not a measure taken to comply under Article 21.5 of the DSU.

75. In assessing the "nature" of these measures, the Appellate Body 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, an aspect of the USDOC's subsidy calculation methodology.[89]

76. The Appellate Body also found that a substantive connection existed among the three measures because they provided succeeding bases for the "continued imposition" of countervailing duties on imports of the subject product.[90] In this sense, the original investigation measure was "superseded"[91] by the Section 129 re-determination, which was, in turn, "superseded" by the periodic review.

77. 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. Recalling its finding in *EC – Bed Linen (21.5)* that "certain parts of a measure may fall within the scope of Article 21.5 proceedings when other, separate elements of the same

[88] Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, para. 83.
[89] Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, para. 83.
[90] Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, para. 83.
[91] Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, para. 85.

measure do not",[92] the Appellate Body emphasized that Canada was challenging "a specific component" of each measure, namely a calculation methodology.[93] 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.[94]

78. The Appellate Body, like the compliance panel, also examined the "effects" of the periodic review on the United States' compliance with the DSB's recommendations and rulings. 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.[95]

79. The Appellate Body similarly found that the periodic review "directly affected" the United States' implementation action by, in effect, replacing the Section 129 re-determination.[96] According to the Appellate Body,

> 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*.[97]

80. Because the First Assessment "directly affected" the Section 129 Determination – a declared compliance measure – it necessarily also had an impact on whether the United States had fully complied with, or instead circumvented, the DSB's recommendations and rulings. Thus, to borrow from the compliance panel in *Australia – Leather (21.5)*, declining to examine the First Assessment Review would have "severely limit[ed]" the

[92] Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, para. 76.
[93] Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, para. 83.
[94] Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, para. 81.
[95] Panel Report, *U.S. – Softwood Lumber IV (21.5)*, para. 4.41.
[96] Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, para. 85.
[97] Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, para. 85 (internal citation omitted) (emphasis in original).

ability to assess whether the United States had complied with DSB's recommendations and rulings.[98]

81. In *U.S. – Upland Cotton (21.5)*, the Appellate Body upheld the compliance panel's findings that various new measures, not at issue in the original proceedings and not recognized by the United States as "taken to comply", were nonetheless subject to Article 21.5. In particular, the Appellate Body upheld the panel's finding that individual export credit guarantees issued after the end of the implementation period to support the export of pig meat and poultry meat were "measures taken to comply".[99] In a situation where there was no declared compliance measure, the Appellate Body also agreed that new subsidy payments made after the end of the implementation period were "taken to comply" with DSB recommendations and rulings regarding original subsidy payments of the same nature and statutory provenance.[100]

82. In commenting on its findings in *U.S. – Softwood Lumber IV (21.5)*, the Appellate Body in *U.S. – Upland Cotton (21.5)* noted that the First Assessment Review was a "measure taken to comply" because of its particularly close relationship to the Section 129 determination.[101] 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.[102]

83. This interpretation flows from the text of Article 21.5, which mandates an examination whether the implementing Member's measures have, in fact, achieved compliance. The text of Article 21.5, therefore, shows that "measures taken to comply" might not move in the direction of, or have the objective of achieving, compliance,[103] much less actually comply with a Member's WTO obligations. Thus, measures that

[98] Panel Report, *Australia – Leather (21.5)*, para. 6.5.
[99] Appellate Body Report, *U.S. – Upland Cotton (21.5)*, para. 213.
[100] Appellate Body Report, *U.S. – Upland Cotton (21.5)*, para. 249.
[101] Appellate Body Report, *U.S. – Upland Cotton (21.5)*, para. 205.
[102] Appellate Body Report, *U.S. – Upland Cotton (21.5)*, para. 205.
[103] Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, para. 67.

undermine or circumvent compliance may be "taken to comply" for purposes of Article 21.5 of the DSU.

84. The Appellate Body in *U.S. – 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.[104] 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.[105]

85. 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."[106]

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

(ii) The Three Subsequent Periodic Reviews Are "Measures Taken To Comply"

87. In the present proceedings, the three subsequent periodic reviews (numbered (4), (5), and (6) in paragraph 53 above) involve action by the United States to replace the original WTO-inconsistent periodic reviews concerning ball bearings (numbered (1), (2),

[104] Appellate Body Report, *U.S. – Upland Cotton (21.5)*, paras. 245-246.
[105] Appellate Body Report, *U.S. – Upland Cotton (21.5)*, paras. 245-246.
[106] Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, para. 72. *See also* Appellate Body Report, *U.S. – OCTG from Argentina (21.5)*, para. 151.

and (3) in paragraph 53 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.

88. Subjecting the subsequent reviews to Article 21.5 ensures that these replacement measures do not undermine compliance, and are not a convenient vehicle for the United States to circumvent the DSB's recommendations and rulings regarding the original reviews.

89. 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*

90. 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 *U.S. – 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;[107] and,

- the original and subsequent "ball bearing" reviews concern dumping determinations made with respect to exports from the same companies.

91. Moreover, like the measures at issue in *U.S. – 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.

92. Again like the measures at issue in *U.S. – Softwood Lumber IV (21.5)*, with respect to each of the periodic reviews, Japan contests "a specific component" of the review, namely, the zeroing methodology used to make the dumping determinations.[108] This specific component of the three subsequent reviews – and not other aspects of those measures – is within the scope of these proceedings.

93. 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.

[107] 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.
[108] Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, para. 83.

(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*

94. To borrow from the words of the Appellate Body in *U.S. – Upland Cotton (21.5)*, the three subsequent reviews have "the effect of undermining compliance", and "circumvent[ing]" the DSB's recommendations and rulings.[109] 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 87, 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.

95. 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. Thus, in these two respects, the original reviews were effectively withdrawn, and replaced, by new WTO-inconsistent rates determined in the subsequent reviews.

96. The United States itself has recognized that the subsequent reviews replace the original reviews. On 10 January 2008, it 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".[110] 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

[109] Appellate Body Report, *U.S. – Upland Cotton (21.5)*, para. 205.
[110] WT/DS322/22/Add.2 (emphasis added).

DSB."[111] 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.

97. The United States' position before the DSB, therefore, confirms and supports Japan's argument that the three subsequent periodic reviews are measures taken to comply. One periodic review can only "supersede" the preceding one because, substantively, the measures have precisely the same subject-matter and provide successive bases for the continued imposition of anti-dumping duties on the subject product. If the measures were not substantively related, they could not "supersede" one another. Thus, as acknowledged by the United States, the challenged periodic reviews are substantively related, creating an unbroken chain of measures in which the newest measure supersedes the previous one.

98. In essence, the United States informed the DSB that it had withdrawn the original measures by replacing them with the "supersed[ing]" subsequent reviews. In view of the action it had taken to replace the original measures, it asserted that it was otherwise absolved of its duty to take "further action" to bring the original measures into conformity with its obligations. As discussed in paragraphs 65 to 84, previous panel and Appellate Body rulings show that replacement measures are covered by Article 21.5 of the DSU to ensure that such a measure does not undermine or circumvent compliance, thereby securing the prompt settlement of disputes.

99. The same reasoning dictates that the replacement measures at issue in these proceedings are also "measures taken to comply". 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".[112] 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.

[111] WT/DS322/22/Add.2 (emphasis added).
[112] Appellate Body Report, *U.S. – Upland Cotton (21.5)*, paras. 246.

100. In sum, if the subsequent reviews are excluded, WTO dispute settlement dissolves into a "Groundhog Day",[113] condemned to repeat itself endlessly and uselessly until the complainant gives up on its rights. Thus, a first periodic review is subject to original dispute settlement proceedings. By the end of the RPT following successful original proceedings, the original review, and the rates it established, have been superseded by a series of subsequent reviews involving exactly the same WTO-inconsistent methodology; yet, these subsequent reviews could only be challenged in another original panel process, the outcome of which would then be superseded by yet more subsequent reviews. The process could continue forever, with the successive reviews always being declared to be WTO-inconsistent. However, the DSB's recommendations and rulings would be purely declaratory in nature, and the complainant could never reach Article 21.5, and could never take action under Article 22 of the DSU – despite an endless stream of substantively-related reviews always involving the same WTO-inconsistent methodology.

101. This situation is very similar to the one described by the Appellate Body in *U.S. – Upland Cotton (21.5)*.[114] The Appellate Body rejected the United States' approach to the interpretation of Article 21.5 of the DSU – *i.e.*, that replacement payments cannot be compliance measures – taking the view that this interpretation would "compromise the effectiveness" of the disciplines in the covered agreements and is "difficult to reconcile with objectives of the DSU".[115] It said that "[r]equiring a WTO Member to initiate new proceedings to challenge the same type of recurrent subsidies that were found to result in adverse effects, simply because the subsidies were provided subsequent to the original proceedings, does not promote 'prompt settlement' nor 'prompt compliance'."[116]

102. The position advocated by the United States to the DSB in these proceedings has very similar consequences. The disciplines in Article 9.3 of the *Anti-Dumping Agreement* would be reduced to a nullity. A respondent could simply disregard its obligations under that provision in conducting a periodic review provided that it adopted

[113] Panel Report, *U.S. – Softwood Lumber IV (21.5)*, para. 4.30.
[114] Appellate Body Report, *U.S. – Upland Cotton (21.5)*, para. 245.
[115] Appellate Body Report, *U.S. – Upland Cotton (21.5)*, para. 246, *citing* to Articles 3.3 and 21.1 of the DSU.
[116] Appellate Body Report, *U.S. – Upland Cotton (21.5)*, para. 246.

a subsequent review. In that case, there would be no need to revise the rates established in the first review because they would have been superseded; and the second review would not be subject to compliance proceedings, but could only be challenged in fresh original proceedings. Ultimately, no periodic review could ever be the object of action under Article 22 of the DSU, because each review would be superseded by a subsequent review. Instead of annually recurring subsidies compromising the objectives of the DSU, annually recurring periodic reviews would have the same consequences.

103. In short, the importing Member would be freed from the obligations in Article 9.3. This approach does not further the "prompt settlement" of disputes, nor does it promote "prompt" – or, indeed, any form of – compliance with the DSB's recommendations and rulings.

104. Instead of complying with the DSB's recommendations and rulings, the United States would move in the opposite direction with each successive subsequent review. Excluding these reviews from this Panel's jurisdiction would "severely limit" the Panel's ability to evaluate the United States' alleged compliance through the adoption of these measures that it asserts "supersede" the original measures.[117]

105. In these circumstances, because of the substantive relationship between the original and subsequent reviews, and because the subsequent reviews supersede the original reviews – thereby undermining compliance with the DSB's recommendations and rulings – they are subject to Article 21.5.

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

106. 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 U.S. 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. Japan examines these issues in turn.

[117] United States statement to the DSB on 10 January 2008, WT/DS322/22/Add.2.

A. *The United States Has Failed to Comply Fully with the DSB's Recommendations and Rulings with Respect to the Zeroing Procedures*

107. The DSB ruled that the United States' zeroing procedures are WTO-inconsistent in (i) original investigations under a W-to-W comparison method, (ii) original investigations under a T-to-T comparison method, (iii) periodic reviews under any comparison method, and (iv) new shipper reviews under any comparison method.

108. At the 21 January 2008 DSB meeting, the United States reported that "it had complied with [all of] the DSB recommendations and rulings" in this dispute.[118] Yet, contrary to the United States' status report, it has so far taken action to implement the DSB's recommendations and rulings *solely* with respect to the zeroing procedures *in original investigations under a W-to-W comparison*. 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*.[119]

109. As discussed in paragraphs 20 to 26 above, following the circulation of the panel report in *U.S. – Zeroing (EC)*, the USDOC requested comments on 6 March 2006 on its proposal to abandon the zeroing procedures in W-to-W comparisons in original investigations, which it noted had been found to be WTO-inconsistent "as such" in that dispute.[120] In *U.S. – Zeroing (EC)*, unlike in this dispute, no findings were made regarding the WTO-inconsistency of the zeroing procedures in situations other than W-to-W comparisons in original investigations. On 6 March 2006, the original panel in this dispute had not yet circulated its report, and the Appellate Body had not yet ruled that the zeroing procedures were WTO-inconsistent in other situations.

110. On 27 December 2006, two weeks before the Appellate Body Report in the current dispute was circulated, the USDOC published a final notice announcing that it

[118] WT/DSB/M/245, para. 26.
[119] In that regard, Japan recalls that the Appellate Body affirmed the original panel's finding that a "rule or norm exists providing for the application of zeroing whenever [the] USDOC calculates margins of dumping or duty assessment rates". Appellate Body Report, *U.S. – Zeroing (Japan)*, para. 75, *quoting* Panel Report, *U.S. – Zeroing (Japan)*, para. 7.50; *see also id.*, paras. 76-88.
[120] 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) (Exhibit JPN-34).

would no longer apply the zeroing procedures in W-to-W comparisons in original investigations. The USDOC again emphasized that its action was taken in response to the findings in *U.S. – Zeroing (EC)*.[121]

111. In its final notice, the USDOC noted that several commentators had proposed that, in addition to abandoning zeroing in W-to-W comparisons in original investigations, it also abandon zeroing "in all types of anti-dumping proceedings".[122] Among others, the Government of Japan commented that the zeroing procedures are WTO-inconsistent in "any form of comparison methodologies in any anti-dumping proceedings".[123] Japan, therefore, "strongly urge[d]" the USDOC to abandon the zeroing procedures generally "once and for all" – action that would have achieved compliance with the DSB's recommendations and rulings regarding the zeroing procedures in this dispute. However, other commentators noted that, if the USDOC wished to abandon the zeroing procedures in other situations, "it would need to provide a specific proposal and solicit further comments".[124]

112. In its final notice, the USDOC declined to abandon the zeroing procedures in any situation other than in W-to-W comparisons in original investigations:

> In its [*i.e.*, the USDOC's] 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*

[121] 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) (Exhibit JPN-35).
[122] 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).
[123] Japan's comments are available at: http://ia.ita.doc.gov/download/zeroing/cmts/goj-zeroing-cmt.pdf (last visited 27 June 2008) (Exhibit JPN-41).
[124] Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation; Final Modification, 71 Fed. Reg. 77724 (Dep't of Comm., 27 December 2006) (Exhibit JPN-35).

> *to adopt any such modifications concerning those other methodologies in this proceeding*.[125]

113. Thus, the United States expressly stated that it was not abandoning the zeroing procedures or, therefore, its "deliberate [zeroing] policy"[126] in any situation other than in W-to-W comparisons employed in original investigations, as the USDOC had originally proposed. In the USDOC's own words, under its limited rule change, the United States did not make "*any . . . modifications*" to its calculation methodologies in 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. In other words, other than with respect to W-to-W comparisons in original investigations, the zeroing procedures have not been subject to "*any . . . modifications*" that would render them WTO-consistent.

114. As a result, by failing to implement the DSB's recommendations and rulings within the reasonable period of time allotted to it, the United States has acted 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. Specifically, the acts of the United States are contradicting the requirement of Article 17.14 of the DSU providing that "[t]he Appellate Body report shall be adopted by the DSB and *unconditionally accepted* by the parties to the dispute". Nor has the United States satisfied the requirement in Article 21.1 of the DSU of "prompt compliance" with the DSB's recommendations and rulings. Finally, by failing to comply by the end of the RPT, the United States acts inconsistently with Article 21.3 of the DSU.

[125] Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation; Final Modification, 71 Fed. Reg. 77724 (Dep't of Comm., 27 December 2006) (emphasis added) (Exhibit JPN-35).
[126] Original Panel Report, paras. 6.104, 7.52, 7.54 and 7.57.

115. Additionally, because of its omission to take action to implement the DSB's recommendations and rulings, the United States remains in violation of its obligations under:

- Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement*, as set forth in the DSB's recommendations and rulings,[127] because of the United States' continued maintenance of zeroing procedures in T-to-T comparisons in original investigations;

- 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,[128] because of the United States' continued maintenance of zeroing procedures in periodic reviews; and,

- Articles 2.4 and 9.5 of the *Anti-Dumping Agreement*, as set forth in the DSB's recommendations and rulings,[129] because of the United States' continued maintenance of zeroing procedures in new shipper reviews.

B. *The United States Has Failed to Comply Fully with the DSB's Recommendations and Rulings with Respect to Eight Periodic Reviews*

116. Japan submits that the United States has failed to comply with the DSB's recommendations and rulings regarding the United States' application of the zeroing procedures in eight periodic reviews challenged by Japan.

117. *First*, Japan challenges the United States' omission to take any action to bring into conformity with WTO law five periodic reviews that were found to be WTO-inconsistent in the original proceedings, and that continue to produce legal effects after the end of the RPT (reviews (1), (2), (3), (7), (8) in paragraph 53 above). Because these periodic reviews provide the legal basis under U.S. law for the collection of definitive anti-dumping duties after the end of the RPT, the United States was obliged during the RPT to recalculate the dumping determinations in those reviews in a WTO-consistent manner – that is, without zeroing. This implementation action is required to prevent the United States from taking WTO-inconsistent actions to liquidate entries after the end of the RPT. By omitting to take such action, the United States failed to comply with the DSB's

[127] Appellate Body Report, *U.S. – Zeroing (Japan)*, para. 190(b).
[128] Appellate Body Report, *U.S. – Zeroing (Japan)*, para. 190(c).
[129] Appellate Body Report, *U.S. – Zeroing (Japan)*, para. 190(d).

recommendations and rulings, and it continues to violate Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.

118. *Second*, Japan challenges three subsequent periodic reviews in which the United States again applied the zeroing procedures. As a result, these "measures taken to comply"[130] are inconsistent with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.

119. Japan discusses each of its claims in greater detail below.

(i) The United States Has Failed to Implement the DSB's Recommendations and Rulings with Respect to Five WTO-Inconsistent Periodic Reviews that Were Found To Be WTO-Inconsistent in the Original Proceedings

120. In the compliance proceedings in *U.S. – Zeroing (EC)*, in which Japan is a third party, the United States has argued that it does not have an obligation to recalculate dumping margins without zeroing in order to bring WTO-inconsistent periodic reviews into conformity with its WTO obligations. The United States contends that such an obligation would constitute a "retrospective" remedy.[131]

121. In this section, Japan therefore outlines that: (1) the United States was subject to the WTO obligations at issue as from 1 January 1995; (2) it was required to bring the periodic reviews at issue in these proceedings into conformity with those 'pre-existing' obligations by the end of the RPT, because the reviews continue to produce legal effects after the end of the RPT; (3) the United States failed to do so; and, (4) bringing the five periodic reviews into conformity with WTO law involves prospective relief against the nullification or impairment resulting from the continued enforcement of the measures after the end of the RPT.

[130] *See supra* paras. 87-105.
[131] United States Rebuttal Submission, *U.S. – Zeroing (EC) (21.5)*, paras. 37 ff (7 March 2008), *available at* http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file207_7156.pdf (last visited 27 June 2008).

(a) *The United States Was Subject to the Obligations in Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 with Effect from 1 January 1995*

122. Japan begins by recalling that the WTO obligations at issue applied to the United States as from 1 January 1995. The temporal scope of the obligations in the *Anti-Dumping Agreement* is addressed in Article 18.3, which provides that the *Agreement* applies to "investigations, and reviews of existing measures" that were initiated pursuant to applications made on or after the date of entry into force of the covered agreements on 1 January 1995.[132] Thus, the applicability of the *Anti-Dumping Agreement* turns on the date that an *application for the initiation of a proceeding was made*, and *not* on the date on which an import enters the importing Member.

123. For example, if an application for a periodic review had been made on 2 January 1995 in connection with entries into the United States that occurred in 1993 and 1994, that review would have been subject to the obligations in Article 9.3 of the *Anti-Dumping Agreement*, even though the *Agreement* was not in force when the entries occurred.

124. In these proceedings, all of the periodic reviews at issue were initiated pursuant to applications made long after 1 January 1995. Thus, at the time the United States initiated and conducted these reviews, it was subject to "pre-existing" obligations in Article 9.3. The DSB's recommendations and rulings in this dispute did not, therefore, impose *new* treaty obligations on the United States, but simply triggered a duty for the United States to modify its periodic reviews so that, by the end of the RPT, they adhere to the WTO obligations that the United States was obliged to respect *when it originally performed the reviews*.

[132] In *U.S. – AD Duty on DRAMS*, the United States and the panel accepted that a periodic review constitutes a "review" for purposes of Article 18.3. Panel Report, *U.S. – AD Duty on DRAMS*, para. 6.15.

(b) *Implementation Action Is Required When WTO-Inconsistent Measures Continue to Produce Legal Effects After the End of the RPT*

125. 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 *Anti-Dumping Agreement* and with the GATT 1994.[133]

126. In terms of *when* the United States must implement the DSB's recommendations and rulings, Article 21.1 of the DSU provides that "*prompt* compliance" is "essential".[134] 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.

127. In terms of *what* the implementing Member must achieve by the end of the RPT, 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.[135] However, Article 19.1 of the DSU formulates recommendations and rulings in terms of "bring[ing]" a WTO-inconsistent measure into conformity with WTO law. 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*."[136]

128. Thus, 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. Put differently, although a WTO-inconsistent measure may remain, unchanged, during the RPT, the implementing Member must bring that measure into conformity with its "pre-existing" WTO obligations by the end of the RPT.

[133] *See* Appellate Body Report, *U.S. – Zeroing (Japan)*, para. 191.
[134] Emphasis added.
[135] Emphasis added.
[136] Appellate Body Report, *U.S. – OCTG from Argentina (21.5)*, para. 173, note 367 (emphasis added).

129. 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*. Thus, for example, in *EC – Commercial Vessels*, the panel observed that the EC was obliged to take action to implement the DSB's recommendations and rulings with respect to measures found to be WTO-inconsistent "to the extent that [they] *continue to be operational*".[137]

130. In the case of an "operational" measure that still *produces legal effects* after the end of the RPT, the measure must be brought into conformity with the covered agreements to ensure that a Member's violation of its WTO obligations, and the resulting nullification or impairment, cease after the end of the RPT.

131. This approach is fully consistent with the object and purpose of WTO dispute settlement. The purpose of seeking consultations, and of pursuing dispute settlement, is to secure the withdrawal (or modification or replacement) of a WTO-inconsistent measure. If the measure continues to operate in a WTO-inconsistent fashion after the end of the RPT, the dispute has not been "resolved"; the implementing Member continues not to meet its WTO obligations regarding the measure; nullification or impairment continues; and, ultimately, dispute settlement has failed.

(c) *The Importer-Specific Assessment Rates in the Five WTO-Inconsistent Periodic Reviews Continue To Exist and Operate Until Definitive Duties Are Collected*

132. In paragraph 34 above, Japan explained that a periodic review establishes: *first*, a cash deposit rate that applies prospectively to future entries pending the determination of a new cash deposit rate in a subsequent periodic review; and, *second*, an importer-specific assessment rate that provides the legal basis for the collection of definitive anti-dumping duties on the entries covered by that review. This section of Japan's submission concerns the United States' failure to bring into conformity with WTO law the importer-specific assessment rates determined in five of the periodic reviews found to be WTO-

[137] Panel Report, *EC – Commercial Vessels*, para. 8.4 (emphasis added).

inconsistent in the original proceedings. These reviews are numbered (1), (2), (3), (7) and (8), in paragraph 53 above.

133. As discussed in paragraphs 33 to 47, in general terms, an importer-specific assessment rate continues to be legally operational until definitive anti-dumping duties are finally collected pursuant to that rate. In U.S. law, this occurs through the liquidation of all imports of the subject merchandise that entered the United States during the review period. In this process, the importer-specific assessment rate serves as the legal basis for the USDOC to issue liquidation instructions to the USCBP and for the USCBP to issue liquidation notices to importers. In other words, a periodic review continues to operate long after the periodic review is completed.

134. In circumstances where the United States will take action after the end of the RPT to collect anti-dumping duties pursuant to a periodic review found to be WTO-inconsistent, 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 is because any actions it takes after the end of the RPT, pursuant to periodic reviews found to be WTO-inconsistent, must be fully WTO-consistent.

135. Otherwise, the WTO-inconsistent periodic review continues to be inconsistent with the United States' "pre-existing" obligations under, among others, Article 9.3 of the *Anti-Dumping Agreement*, and the United States continues to nullify or impair benefits accruing under that provision since 1995.[138] In that event, the United States' continued enforcement of the importer-specific assessment rate renders the DSB's recommendations and rulings purely "declaratory in nature", which undermines the objectives of the DSU.[139]

136. In these proceedings, with respect to the five periodic reviews found to be WTO-inconsistent in the original proceedings, the importer-specific assessment rates continue to be legally operational because, by the end of the RPT, the United States had not

[138] Appellate Body Report, *U.S. – Zeroing (EC)*, para. 130; Appellate Body Report, *U.S. – Zeroing (Japan)*, para. 155; Appellate Body Report, *U.S. – Stainless Steel (Mexico)*, paras. 102, 139.
[139] Appellate Body Report, *U.S. – Upland Cotton (21.5)*, para. 245.

collected definitive anti-dumping duties on certain entries covered by these reviews.[140] Thus, definitive duties will be collected on these entries after the end of the RPT *pursuant to the five periodic reviews at issue*.

137. Yet, the United States has taken no action to ensure that the importer-specific assessment rates incorrectly determined in those reviews have been rendered consistent with its "pre-existing" WTO obligations. Instead, the United States behaves as if the DSB had not directed it to bring the WTO-inconsistent measures into conformity with WTO law, and appears to believe that it can continue to apply the measures as if no WTO dispute settlement proceedings had ever occurred. The United States' inaction is in flagrant disregard of its obligations under the *Anti-Dumping Agreement* and the GATT 1994, and of the DSB's recommendations and rulings.

138. As a result of the failure to bring the measures into conformity with WTO law, the importer-specific assessment rates continue to be inflated as a result of zeroing, and the amount of definitive duties continues to exceed the properly determined margin of dumping under Article 9.3 of the *Anti-Dumping Agreement*. Since the end of the RPT, the United States has taken, and will continue to take, action to collect these excessive duties, by issuing liquidation instructions and notices on the basis of WTO-inconsistent importer-specific assessment rates.

139. Specifically, 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 four of the original periodic reviews (numbered (1), (2), (7) and (8) in paragraph 53 above).[141] If the United States had implemented the DSB's recommendations and rulings by the end of the RPT, its post-RPT actions would have been WTO-consistent and, therefore, rather different. Specifically, the importer-specific assessment rates would have been zero in each case, and the United States would have refunded all of the cash deposits collected on importation. Instead, the United States

[140] The periodic reviews in question are numbered (1), (2), (3), (7), and (8) in paragraph 53 above.
[141] *See*, *for example*, the USDOC's instructions to USCBP, of 17 April 2008, to liquidate entries by covered by the 2000/2001 periodic review in ball bearings (numbered (2) in paragraph 53 above). Exhibit JPN-40.A.

ignored the DSB's recommendations and rulings, and issued liquidation instructions and notices at assessment rates it knew were WTO-inconsistent. These 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, it collects import duties in excess of the bound tariff that applies to the products concerned.[142]

140. Accordingly, 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*[143]and Article VI:2 of the GATT 1994.

[142] In its Schedule of Concessions, the United States agreed not to impose customs duties on ball bearing products in excess of a specified level. On importation, the entries at issue were subject to ordinary customs duties at a rate shown in Exhibit JPN-45. In addition, pursuant to liquidation action taken subsequent to the end of the RPT, the United States collected definitive (WTO-inconsistent) anti-dumping duties on the same entries. For all of the post-RPT liquidation actions, Exhibit JPN-45 also identifies, by company, the duty assessment rate applied by the United States to these entries; it also shows that the cumulative *ad valorem* duty rate applied to these imports (*i.e.*, ordinary customs duties plus WTO-inconsistent anti-dumping duties) exceed the bound rate that applied at the time of importation. By imposing import duties in excess of the bound rate, the United States acted inconsistently with its obligations under Articles II:1(a) and II:1(b) of the GATT 1994.

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 *Anti-Dumping Agreement*. However, the four original periodic reviews, which serve as the legal basis for the liquidation actions in question, were found to be in violation of Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.

Japan also notes that Article II:1 of the GATT 1994 entered into force for the United States on 1 January 1995, and not 13 years later when the RPT expired on 24 December 2007. At the time the entries in question were imported – the earliest occurred on or around 1 May 1999 – the United States was obliged by Article II:1(a) to accord to imports from Japan treatment no less favorable than that provided for in its Schedule of Concessions, and by Article II:1(b) not to impose customs duties or other charges on or in connection with importation besides those contained in the United States' Schedule.

[143] According to the Appellate Body, "pursuant to Article 9.3 of the *Anti-Dumping Agreement* and Article IV 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 … shall not exceed the margin of dumping." (Emphasis added) Appellate Body Report, *U.S. – Zeroing (EC)*, para. 130.

(d) *Japan's Interpretation Provides for Prospective Relief Against the Continued Enforcement of WTO-Inconsistent Periodic Reviews After the End of the RPT*

141. Japan begins by noting that the terms "retrospective" and "prospective" remedies, or relief, are not treaty terms. Instead, they are merely labels sometimes used to describe the nature of the relief available in WTO law. However, these labels do not supplant the treaty language to which Members have agreed. The task of this compliance Panel is to give effect to the words used by the Members in the covered agreements.

142. In the light of treaty language, reflected in Article 19.1 of the DSU, the United States must "bring the measure [found to be WTO-inconsistent] into conformity" with its WTO obligations by the end of the RPT. As discussed in paragraph 127, the verb in this phrase – "bring" – envisages action on the part of the implementing Member that will achieve a defined result, namely "conformity" of the measure with WTO law.

143. This ensures that when the implementing Member takes any action after the end of the RPT, pursuant to a formerly WTO-inconsistent measure (or a replacement measure), both the measure and its actions under that measure are WTO-consistent, and do not nullify or impair benefits. The relief afforded by this remedy is prospective in character because the implementing Member is obliged to ensure that its *future* actions under the measure, *subsequent* to the end of the RPT, are WTO-consistent; the Member is not, however, obliged to "undo" *past* actions it has already completed pursuant to the measure prior to the end of the RPT.

144. Accordingly, 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. That is because, in these proceedings, Japan 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.

145. Japan seeks to ensure that the United States' future actions to collect definitive anti-dumping duties on the basis of the five periodic reviews concerned conform fully, after the end of the RPT, to the obligations in the *Anti-Dumping Agreement* and the GATT 1994 that *applied to the United States when the periodic reviews were performed*. Thus, Japan is *not* asking that *new* WTO obligations be imposed retrospectively on the United States.

146. 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 that applied when the periodic reviews were originally conducted. As noted in paragraph 135, this renders the DSB's recommendations and rulings "declaratory"[144] and reduces dispute settlement to a never-ending, but ultimately useless, cycle of litigation.

147. In short, the position defended by the United States in other *Zeroing* proceedings has the following perverse consequences:

- On 1 January 1995, the United States assumed an obligation to other WTO Members, under Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, that the amount of definitive anti-dumping duties would not exceed the "margin of dumping".
- In contravention of this obligation, the United States adopted, among others, a series of five periodic reviews that included improperly inflated importer-specific assessment rates.
- Following WTO dispute settlement proceedings, the DSB ruled that these measures are contrary to the United States' obligations under, among

[144] Appellate Body Report, *U.S. – Upland Cotton (21.5)*, para. 245.

others, Article 9.3 and Article VI:2 – obligations that applied when the periodic reviews were performed.

- The United States was required to bring these periodic reviews into conformity with its long-standing WTO obligations by 24 December 2007, but did nothing whatsoever to change the measures.

- Instead of modifying the WTO-inconsistent measures to make them consistent with its "pre-existing" obligations, the United States seeks the right to continue enforcing them with a view to collecting excessive anti-dumping duties.

148. In sum, with respect to the five periodic reviews, the United States seeks a *permanent derogation* from WTO obligations it assumed more than a decade ago, thereby attempting to transform a "reasonable period" intended to allow "prompt compliance" into an endless period of non-compliance. Needless to say, Japan rejects this absurd interpretation of WTO law.

(ii) Three Subsequent Periodic Reviews Completed by the United States Are Inconsistent with the *Anti-Dumping Agreement* and with the GATT 1994

149. Japan challenges three subsequent periodic reviews that were not part of the original proceedings and in which the United States employed zeroing (*see* reviews (4), (5), and (6) in paragraph 53 above).[145] These "measures taken to comply" with the DSB's recommendations and rulings[146] are inconsistent with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.

150. Japan pursues claims against these reviews, among others, because the United States will take action, pursuant to the WTO-inconsistent importer-specific assessment rates determined in these reviews, after the end of the RPT to collect definitive duties on entries covered by the reviews.

151. In the three subsequent periodic reviews, the USDOC calculated: (1) a margin of dumping for each exporter that became the cash deposit rate for all future entries of the

[145] With respect to these three subsequent periodic reviews, the United States had not, by the end of the RPT, liquidated all entries covered under those reviews.
[146] *See supra* paras. 87-105.

product exported to the United States by that exporter pending completion of the next review; 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.

152. In each periodic review, the United States applied the zeroing procedures as part of its flawed "dumping" determination for purposes of calculating the cash deposit rates and the importer-specific assessment rates determined in those reviews.[147]

153. The Appellate Body has now 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.[148]

154. For the reasons given by the Appellate Body in these three disputes, Japan submits that the three subsequent periodic reviews at issue are 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 three periodic reviews are also inconsistent with the "fair comparison" obligation of Article 2.4.[149]

[147] *See* Computer Program Excerpts: Ball Bearings and Parts Thereof From Japan (2003-2004) (, , ,) (Exhibits JPN-42.C, JPN-42.D, JPN-42.E, JPN-42.F); Computer Program Excerpts: Ball Bearings and Parts Thereof From Japan (2004-2005) (, , ,) (Exhibits JPN-43.A, JPN-43.B, JPN-43.C, JPN-43.D); Computer Program Excerpts: Ball Bearings and Parts Thereof From Japan (2005-2006) (, , , ,) (Exhibits JPN-44.A, JPN-44.B, JPN-44.C, JPN-44.D, JPN-44.E). These computer programs contain a line of computer code, as identified in the exhibits, that implement the zeroing procedures. The mechanics of the computer program are explained in Exhibit JPN-1, the Owenby Statement, which was submitted in the original proceedings, together with a supplement to that statement attached as Exhibit JPN-37.

[148] Appellate Body Report, *U.S. – Zeroing (EC)*, para. 263(a)(i) (Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994); Appellate Body Report, *U.S. – Zeroing (Japan)*, para. 190(c),(e) (Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994); Appellate Body Report, *U.S. – Stainless Steel (Mexico)*, para. 165(a)-(b) (Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994).

[149] Appellate Body Report, *U.S. – Zeroing (Japan)*, para. 168.

C. *The United States Has Failed to Comply with the DSB's Recommendations and Rulings with Respect to One of the Sunset Reviews*

155. The United States has also failed to implement the DSB's recommendations and rulings with respect to the sunset review, of 4 November 1999, in relation to Anti-Friction Bearings that the DSB found to be WTO-inconsistent. As noted in paragraphs 29 and 30 above, Japan is unaware of any actions taken by the United States to bring this sunset review into conformity with its WTO obligations, as required by Articles 17.14, 21.2 and 21.3 of the DSU. Moreover, as noted in those paragraphs, the United States has even failed to respond to Japan's requests at the DSB for information on the implementation action taken by the United States regarding the DSB's recommendations and rulings concerning the sunset review.

156. Under Article 11.3 of the *Anti-Dumping Agreement*, a WTO-*consistent* sunset review provides the legal basis for a Member to maintain an anti-dumping measure that shall, in the absence of such a review, automatically be "terminate[d]". 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.

157. However, because the sunset review is WTO-*inconsistent*, it 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. The United States did not establish, as Article 11.3 required it to do, that it was entitled to maintain the order as from 4 November 1999. 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.

158. The United States' omission to take any action to implement the DSB's recommendations and rulings with respect to the sunset review 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. Because of its omission, the United States also remains in violation of its obligations under Article 11.3 of the *Anti-Dumping Agreement*, as set forth in the DSB's recommendations and rulings.[150] Furthermore, since 4 November 1999, the United States' imposition of anti-dumping duties on ball bearings has been bereft of legal basis in WTO law.

VI. CONCLUSION

159. For the foregoing reasons, Japan respectfully requests that the compliance Panel make the following findings:

(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, 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, 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 *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994; as well as Article 2.4.2 of the *Anti-Dumping 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:

(i) in the case of the five periodic reviews (reviews (1), (2), (3), (7), and (8) in paragraph 53 above) that were found to be WTO-inconsistent in the original proceedings:

[150] Appellate Body Report, *U.S. – Zeroing (Japan)*, para. 190(f).

- the United States has failed to implement the DSB's recommendations and ruling, 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 *Anti-Dumping Agreement*, and Article VI:2 of the GATT 1994;

(ii) in the case of three subsequent periodic reviews (reviews (4), (5), and (6) in paragraph 53 above), which are measures taken to comply, the United States has acted inconsistently with its obligations under Articles 2.4 and 9.3 of the *Anti-Dumping Agreement*, and Articles VI:1 and VI:2 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, that:

- the United States has failed to bring its WTO-inconsistent measure into confirmation 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 *Anti-Dumping Agreement*.