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)

SECOND WRITTEN SUBMISSION OF JAPAN

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TABLE OF ABBREVIATIONS

Abbreviation	Description
AFB	Anti-Friction Bearings
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*
ILC	International Law Commission
ILC Articles	International Law Commission's *Articles on Responsibility of States for Internationally Wrongful Acts*
RPT	Reasonable period of time
SCM Agreement	*Agreement on Subsidies and Countervailing Measures*
T-to-T	Transaction-to-transaction comparison
USCBP	United States Customs and Border Protection
USDOC	United States Department of Commerce
Vienna Convention	*Vienna Convention on the Law of Treaties*
W-to-W	Weighted average-to-weighted average comparison
Zeroing Notice	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)

I. INTRODUCTION

1. The United States' First Written Submission highlights four areas of disagreement between the Parties in these proceedings:

(1) whether the three subsequent periodic reviews challenged by Japan are "measures taken to comply";

(2) whether the United States is entitled to take no implementation action with respect to the importer-specific assessment rates established in five of the original periodic reviews found to be WTO-inconsistent;

(3) whether the United States is entitled to take no implementation action with respect to a sunset review found to be WTO-inconsistent; and,

(4) whether the United States is entitled to continue applying the zeroing procedures in three of the four situations in which they were found to be WTO-inconsistent.

2. Despite the differences among these four issues, many of the United States' rebuttal arguments share a common consequence: they undermine the disciplines in the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("*Anti-Dumping Agreement*") and they compromise the effectiveness of dispute settlement under the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").

3. With respect to the first issue, the United States requests that the Panel find that the three subsequent periodic reviews are *not* "measures taken to comply". Japan disagrees, and considers that the United States' rebuttal arguments actually confirm Japan's position that the three subsequent reviews *are* "measures taken to comply".

4. The United States argues that it has fully implemented with respect to the three original *Ball Bearing* reviews by adopting new cash deposit rates in the subsequent reviews, which it says "withdraw" and "replace" the original cash deposit rates.[1] In making this argument, the United States expressly refers to the subsequent reviews as "measures taken to comply".[2] The United States also confirms the existence of the many substantive connections between the original and subsequent reviews relied upon by Japan. Even in the absence of the United States' declaration that the subsequent reviews are "measures taken to comply",

[1] United States' First Written Submission, paras. 3, 39, 44, 52, 54, 58, 65, 66 and 67.
[2] United States' First Written Submission, para. 51.

these connections establish that the subsequent reviews are undeclared "measures taken to comply".

5. If the three subsequent reviews are not "measures taken to comply", the recommendations and rulings of the Dispute Settlement Body ("DSB") with respect to the three original *Ball Bearing* reviews are entirely circumvented, and dispute settlement under the DSU is rendered ineffective. As the United States' arguments show, it could very easily evade the DSB's recommendations and rulings regarding a periodic review by adopting a subsequent review that suffers from exactly the same WTO inconsistencies. Each subsequent review could only be challenged in a new WTO dispute, and no relief would ever be available under the DSU.

6. The United States' arguments regarding the five original periodic reviews similarly seek to nullify its WTO obligations. The United States contends that it need *never* take action to revise a WTO-inconsistent importer-specific assessment rate because that rate concerns entries that occurred before the end of the reasonable period of time ("RPT"), whereas the remedies available under the DSU can address solely new entries occurring on or after the end of the RPT. The consequence of this argument is that the protection afforded by Article 9.3 of the *Anti-Dumping Agreement* is entirely nullified. An importing Member can totally ignore the constraints in that provision, safe in the knowledge that its WTO-inconsistent margin determination always relates to entries pre-dating the end of the RPT, and that no relief is available in implementation proceedings.

7. Accordingly, the consequences of the United States' arguments regarding the five original and three subsequent reviews are that its cash deposit and importer-specific assessment rates are always shielded from the disciplines in the *Anti-Dumping Agreement* and the remedies in the DSU.

8. Turning to the third issue, the United States argues that it need not bring its sunset review into consistency with the covered agreements because that review is *already* WTO-consistent[3] – even though the DSB's recommendations and rulings found otherwise.[4] Thus, although the facts have not changed since the original proceedings, the United States seeks to re-litigate the consistency of the sunset review in another attempt to evade the DSB's

[3] United States' First Written Submission, paras. 73 and 75.
[4] *See* Appellate Body Report, *US – Zeroing (Japan)*, para. 190(f).

recommendations and rulings in this dispute. However, absent a change in the underlying facts, the Panel is not entitled to reverse the conclusion reached in the original proceedings that the sunset review is WTO-inconsistent.

9. Finally, with respect to the zeroing procedures, the United States asserts that it has eliminated the zeroing procedures entirely, simply because it has ceased to apply those procedures in one of the four situations in which they were found to be WTO-inconsistent.[5] In this submission, Japan submits overwhelming evidence to demonstrate the fallacy of the United States' assertions. Despite informing the Panel that it has fully implemented the DSB's recommendations and rulings, the United States maintains the zeroing procedures unchanged in three of the four situations in which they were found to be WTO-inconsistent. Its argument that it has fully implemented, therefore, seeks to evade three of the DSB's four recommendations and rulings regarding the zeroing procedures.

II. THE UNITED STATES' PRELIMINARY RULING REQUEST SHOULD BE REJECTED

10. The United States requests the Panel to rule that: the three subsequent reviews (nos. 4, 5 and 6[6]) are not "measures taken to comply" under Article 21.5 of the DSU;[7] and that the Panel cannot examine any "subsequent closely connected" measures.[8] By letter of 30 July 2008, the Panel invited Japan to present its response by 27 August 2008. Japan requests that the Panel reject the United States' request, and find that the three subsequent reviews are measures taken to comply subject to Article 21.5 of the DSU.

11. Before turning to its specific arguments, Japan notes that the United States bears the burden of proving that the three subsequent periodic reviews are excluded from the scope of these Article 21.5 proceedings.[9]

[5] United States' First Written Submission, para. 79.
[6] In this submission, Japan uses the same numbering of the eight original and subsequent periodic reviews set forth in paragraph 53 of its First Written Submission.
[7] United States' First Written Submission, para. 28.
[8] United States' First Written Submission, para. 50.
[9] Panel Report, *EC – Bananas III (21.5 – U.S.)*, para. 7.79.

A. *The Panel Has Jurisdiction over the Three Subsequent Reviews Challenged in These Proceedings*

(i) The United States Treats the Three Subsequent Reviews As Declared Compliance Measures

12. Japan is surprised by the terms of the United States' request regarding the three subsequent reviews. In its submission, the United States repeatedly argues that the original *Ball Bearing* periodic reviews (nos. 1, 2, and 3), and the cash deposit rates they establish, were "withdrawn",[10] "superseded",[11] "eliminated"[12] and "replaced"[13] by the three subsequent reviews. In the United States' view, therefore, the subsequent reviews are replacement measures that secure the withdrawal of the original measures found to be WTO-inconsistent.

13. The United States makes a considerable virtue of this fact in reply to Japan's claim that it has not taken appropriate measures to comply with the DSB's recommendations and rulings regarding the original periodic reviews. In particular, its defence to this claim in connection with the three original *Ball Bearing* reviews rests entirely on the fact that the subsequent reviews are "measures taken to comply" because they effect the "withdrawal" of the original reviews. Indeed, the United States expressly asserts:

> In the underlying dispute, Japan obtained DSB recommendations and rulings with respect to Commerce determinations in eleven administrative reviews, including the five at issue here. For the reasons set forth in this section, *the United States has taken measures to comply with those recommendations and rulings*.[14]

14. In the remainder of that section of its submission, the United States explains that, with respect to the three original *Ball Bearing* reviews, the relevant "measures taken to comply" are the three subsequent reviews. In particular, it argues that it "has withdrawn" the original reviews "within the meaning of DSU Article 3.7"[15] by "put[ting] in place new cash deposits for the companies examined" in the three subsequent reviews.[16] In footnote 114, the United

[10] United States' First Written Submission, paras. 39, 52, 54, 58, 65, 66 and 67.
[11] United States' First Written Submission, paras. 3 and 44.
[12] United States' First Written Submission, paras. 44 and 54.
[13] United States' First Written Submission, para. 44.
[14] United States' First Written Submission, para. 51 (emphasis added).
[15] United States' First Written Submission, para. 52.
[16] United States' First Written Submission, para. 67. *See also* para. 44 ("*[t]he original reviews were superceded by subsequent reviews because the cash deposit rate from one review was replaced by the cash deposit rate from the next review*."), para. 65 ("in each of the five challenged administrative reviews that were the subject of the DSB's recommendations and rulings in the original dispute, *the United States has withdrawn the cash*

States explicitly identifies the subsequent reviews that withdraw and replace the original reviews as reviews nos. 4, 5, and 6. As a result of its adoption of these three subsequent reviews, the United States requests the Panel to find that it has complied fully with the relevant DSB recommendations and rulings regarding the three original *Ball Bearing* reviews.

15. The United States, therefore, expressly declares that the three subsequent reviews are *measures taken to comply* with the DSB's recommendations and rulings regarding the three original *Ball Bearing* reviews.

16. Yet, although the United States declares that the three subsequent reviews implement the DSB's recommendations and rulings, and are "measures to comply",[17] elsewhere it contends that they are not "measures taken to comply". The justification for this startling argument is that the United States did not *intend* to comply with the DSB's recommendations and rulings when it adopted the three subsequent reviews.

17. In particular, the United States argues that the *timing*[18] of the three subsequent reviews shows that they were not taken "*for the purpose of*" complying with (or undermining) the DSB's recommendations and rulings.[19] Instead, absent any intent to comply, the original reviews were brought into compliance merely as an "*incidental consequence*" of the subsequent reviews.[20] As a result, although the subsequent reviews are declared to be the measures that bring the original measures into conformity, the United States contends that their "*consistency*" cannot be examined under Article 21.5.

18. On this interpretation, even if the *objective effects* of a measure are alleged to secure compliance, a Member's *intent* to comply is decisive in establishing whether a measure is subject to Article 21.5 or not. As outlined below, Japan strongly disagrees with the United

deposit rate resulting from the challenged review and calculated new cash deposit rates pursuant to separate and distinct administrative reviews."), and para. 67 ("In these subsequent determinations, Commerce . . . *put in place new cash deposits for the companies examined*" and, as a consequence, "*the former cash deposit rate is terminated* . . . Thus, the United States has complied with the recommendations and rulings of the DSB by withdrawing the challenged measures.") (emphasis added).

[17] United States' First Written Submission, para. 67. *See also* paras. 44 and 65.

[18] Japan notes that this iteration of the United States' "timing" argument does not apply to subsequent review no. 6, which was adopted on 16 November 2007, several months after the adoption of the DSB's recommendations and rulings on 23 January 2007, and shortly before the end of the RPT on 24 December 2007.

[19] United States' First Written Submission, paras. 33, 39 and 43.

[20] United States' First Written Submission, para. 44. The United States similarly states that the subsequent reviews were not "voluntary action" taken by the United States, but instead occurred "on a schedule that is established without regard to dispute settlement proceedings . . ." United States' First Written Submission, para. 43.

States' interpretation of Article 21.5, not least because it has profoundly prejudicial effects on the effectiveness of compliance proceedings.

(ii) The Implementing Member's Intent to Comply Is Not Decisive under Article 21.5 of the DSU

19. Panels and the Appellate Body have consistently rejected an interpretation of Article 21.5 that focuses on the intent of the implementing Member. In *U.S. – Gambling (21.5)*, the panel expressly addressed the relevance of intent:

> Nor does the Panel exclude any potential "measures taken to comply" due to the *purpose* for which they may have been taken. In this regard, the Panel recalls the following view of the Appellate Body in *US – Softwood Lumber IV (Article 21.5 – Canada)*:
>
> > "The fact that Article 21.5 mandates a panel to assess 'existence' and 'consistency' tends to weigh against an interpretation of Article 21.5 that would confine the scope of a panel's jurisdiction to measures that *move in the direction of*, or *have the objective of achieving*, compliance."[21]

20. In *U.S. – Softwood Lumber IV*, the United States unsuccessfully made arguments similar to those it makes in these proceedings. As it does in these proceedings, it argued that a periodic review could not be a "measure taken to comply" because it:

> … was initiated pursuant to domestic law requirements, eight months before, and independent of any consideration of, the rulings and recommendations of the DSB in *US – Softwood Lumber IV*.[22]

21. The Appellate Body explicitly recognized that the periodic review at issue "was not initiated *in order to* comply with the recommendations and rulings of the DSB, and that it operated under its own timelines and procedures".[23] Despite this recognized lack of intent, the Appellate Body held that the periodic review was a "measure taken to comply" because of its "multiple and specific links" to the dispute. The Appellate Body emphasized that "an

[21] Panel Report, *U.S. – Gambling (21.5)*, para. 6.24, quoting Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, para. 67.
[22] Panel Report, *U.S. – Softwood Lumber IV (21.5)*, para. 4.43.
[23] Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, para. 88.

examination of the *effects* of a measure" is pertinent under Article 21.5.[24] In that regard, the Appellate Body expressly noted that the United States itself "agree[d] that the *effects* of measures taken by an implementing Member can be relevant to determining whether or not that measure may be examined in proceedings under Article 21.5 of the DSU."[25]

22. There is, therefore, no basis for the United States' argument that the three subsequent reviews cannot be "measures taken to comply" on the grounds that, simply because of their timing, they were not adopted *in view*, or with the *purpose* or *intent*, of complying with the DSB's recommendations and rulings.

23. An important reason for not giving decisive weight to the implementing Member's intent is that an implementing Member cannot decide for itself whether a measure is "taken to comply". An approach focused on the subjective intent of the implementing Member, rather than the objective effects of its measure, would give the implementing Member very considerable control over the measures that may be treated as "taken to comply".[26]

24. The text of Articles 3.7 and 19.1 of the DSU also suggests that an examination of a measure's compliance effects is critical.[27] A Member complies fully with the DSB's recommendations and rulings when it has "secure[d] withdrawal of the measures concerned", pursuant to Article 3.7. Under Article 19.1, a panel or the Appellate Body recommends that an implementing Member "*bring* the measure into conformity" with its obligations. These provisions focus on the *end result* – or *objective effects* – of a measure, and not on the implementing Member's purpose or intent in adopting a measure. Thus, under Articles 3.7 and 19.1, a measure may achieve compliance, even if that was not the measure's purpose, and even if the measure was taken *before* the adoption of the DSB's recommendations and rulings.

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[24] Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, para. 67.
[25] Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, footnote 107.
[26] Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, footnote 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)*, footnote 111.
[27] The United States argues that it has complied with the DSB's recommendations and rulings by "withdraw[ing]" the original periodic reviews "within the meaning of DSU Article 3.7". *See* United States' First Written Submission, paras. 52, 54, and 66.

25. Articles 3.7, 19.1 and 21.5 of the DSU must be interpreted harmoniously.[28] Thus, under Article 21.5, an implementing Member must be able to rely on a measure that, in effect, "secure[s] withdrawal", and/or "bring[s]" an original measure into conformity, to rebut a claim that no "measure taken to comply" is in "*existence*". Neither the implementing Member's intent nor its adoption of the measure prior to the DSB's recommendations and rulings preclude it from asserting such a defence. A compliance panel must equally be able to examine the "consistency" with the covered agreements of any measure that allegedly "secure[s] withdrawal" of an original measure and/or "bring[s" it into conformity with its obligations.

26. Thus, given that a Member's purpose or intent in adopting a measure is not decisive, nothing precludes "measures taken to comply" from being taken before the date of the DSB's recommendations and rulings. Article 21.5 is premised on the *existence* of recommendations and rulings of the DSB, but does not prescribe that "measures taken to comply" must come into existence *after* such recommendations and rulings are made.

27. The Panel should, therefore, reject the United States' arguments that the three subsequent reviews cannot be "measures taken to comply" simply because the USDOC had no intention of complying with the DSB's recommendations and rulings when it adopted the measures.

(iii) The United States Declares that the Three Subsequent Reviews Are "Measures Taken to Comply" with the DSB's Recommendations and Rulings Regarding Original Periodic Reviews

28. The United States' arguments regarding the status of the three subsequent reviews are tainted by a fundamental inconsistency. Japan claims that the United States has not adopted appropriate compliance measures that bring the five original measures into conformity with WTO law. This aspect of Japan's claim concerns a disagreement over the "*existence*" of "measures taken to comply". In response, the United States contends that Japan's claim is groundless because, with respect to the three original *Ball Bearing* reviews (nos. 1, 2, and 3), the three subsequent reviews "withdraw" the original measures "within the meaning of DSU

[28] Appellate Body Report, *Korea – Dairy*, paras. 80-81; Appellate Body Report, *Argentina – Footwear (EC)*, para. 81; *see also* Appellate Body Report, *U.S. – Offset Act (Byrd Amendment)*, para. 271; Appellate Body Report, *U.S. – Gasoline*, p. 23; Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 12; and Appellate Body Report, *India – Patents*, para. 45.

Article 3.7".[29] It is worth recalling that, in light of the three subsequent reviews, the United States expressly declares that it "*has taken measures to comply with [the] recommendations and rulings*" regarding the three original *Ball Bearing* reviews.[30]

29. Thus, in reply to Japan's non-"*existence*" claims, the United States contends that "measures taken to comply" do exist within the meaning of Article 21.5, namely, the three subsequent reviews. In arguing that these reviews secure compliance, the United States relies heavily on the *effects* of the reviews, excluding the USDOC's *intent* in adopting them.

30. Simultaneously, in reply to Japan's claim concerning the "*consistency*" of the three subsequent reviews with the covered agreements, the United States contends that these measures are *not* "measures taken to comply" within the meaning of Article 21.5. Its argument that these measures are *not* "taken to comply" relies heavily on the USDOC's *intent* in taking them, excluding the *effects* of the three subsequent reviews.

31. These arguments are manifestly contradictory. The United States treats the very same measures as "taken to comply" for purposes of assessing the "*existence*" of such measures, but *not* as "taken to comply" for purposes of assessing their "*consistency*" with WTO law. The contradictory positions are based on divergent legal standards. In particular, the United States applies an *effects*-based approach in assessing the "*existence*" of "measures taken to comply"; yet, when it comes to "*consistency*", it rejects an effects-based approach in favor of an *intent*-based approach. The inconsistencies in the United States' position render it untenable.

32. Through these divergent legal standards and contradictory interpretive outcomes, the United States seeks to shield measures it treats as "taken to comply" from an examination of their "consistency" with the covered agreements. If successful, this approach would undermine a crucial part of the purpose of Article 21.5, which provides a comprehensive mechanism for the resolution of "disagreements" regarding *both* the "existence" *and* "consistency" of "measures taken to comply". On the United States' view, an asymmetry would infect Article 21.5. The provision would permit an examination of the "*existence*" of any measure whose *effect* is to secure compliance; however, the "*consistency*" of such a measure could be reviewed solely if the measure was adopted for the *purpose* of complying.

[29] *See* United States' First Written Submission, paras. 44, 52, 54, 65 and 67.
[30] United States' First Written Submission, para. 51.

33. Japan rejects this asymmetrical interpretation because it would seriously undermine the utility of Article 21.5. In Japan's view, Article 21.5 applies fully to any measure that the implementing Member declares secures the withdrawal of the original measures, within the meaning of Article 3.7 of the DSU. A compliance panel is, therefore, entitled to review, among others, the "existence" of such a declared compliance measure; whether it does indeed fully "secure withdrawal" of the original measure; and also whether it is "consisten[t]" with the covered agreements.

34. The United States must, therefore, accept the consequences of its own declaration that the three subsequent reviews are "measures taken to comply" that "withdraw" the original *Ball Bearing* periodic reviews.[31] As a result, the Panel can examine these measures in assessing Japan's claims regarding *both* the "existence" *and* "consistency" of "measures taken to comply".

(iv) The United States' Arguments Demonstrate that the Three Subsequent Periodic Reviews Are Measures Taken to Comply Because They Are Closely Connected to the DSB's Recommendations and Rulings

(a) *The Panel Need Not Rely on the Close Connections to Establish that the Three Subsequent Reviews Are "Measures Taken to Comply"*

35. In its First Written Submission, Japan presented arguments outlining that the three subsequent reviews are "measures taken to comply" on the basis of their extremely close connections to the DSB's recommendations and rulings.[32] This argument was advanced because, in previous disputes, panels and the Appellate Body have relied on the existence of such connections to find that measures are "taken to comply", *even though the implementing Member does not recognize the measures as "taken to comply"*. Japan's arguments built, among others, on the findings regarding so-called "*undeclared*" "measures taken to comply" that were made in *Australia – Leather (21.5)*, *Australia – Salmon (21.5)*, *U.S. – Softwood Lumber IV (21.5)*, and *U.S. – Upland Cotton (21.5)*.

36. The United States' First Written Submission shows that reliance on this line of cases is not necessary in these proceedings. As described in the previous section, in rebutting Japan's claim on the non-"existence" of "measures taken to comply", the United States

[31] United States' First Written Submission, paras. 51, 52, 54, 65 and 67.
[32] Japan's First Written Submission, paras. 62-105.

declares that the three subsequent reviews are "measures taken to comply" that allegedly secure withdrawal of the original *Ball Bearing* reviews.[33] The United States also informed the DSB that the subsequent measures were its compliance measures.[34]

37. Thus, these compliance proceedings involve a *declared* – and not an undeclared – "measure taken to comply". There is, therefore, no reason for the Panel to enquire into the existence of the substantive connections that, absent such a declaration, can bring a measure within the scope of Article 21.5.

(b) *The United States Misrepresents the Connections between the Original and Subsequent Reviews*

38. Nonetheless, Japan wishes to comment on the United States' arguments regarding the existence and importance of the connections between the three subsequent reviews and the three original *Ball Bearing* reviews subject to the DSB's recommendations and rulings.

39. The United States' arguments are beset with contradictions. On the one hand, it asserts that two of the three subsequent reviews (nos. 4 and 5) "have *no* connection with the DSB's recommendations and rulings".[35] Yet, on the other hand, it argues that these same reviews (and review no. 6) bring about compliance with the DSB's recommendations and rulings regarding reviews nos. 1, 2, and 3.[36] Specifically, the United States asserts that these three subsequent periodic reviews allegedly "withdraw",[37] "supersede",[38] "eliminate"[39] or "replace"[40] the original *Ball Bearing* reviews, and allegedly secure full compliance with the DSB's recommendations and rulings "within the meaning of DSU Article 3.7".[41]

40. It is absurd to suggest that such measures have "no connection with the DSB's recommendations and rulings".[42] To the contrary, they have obvious and important connections to the recommendations and rulings that they allegedly implement.[43] In light of

[33] United States' First Written Submission, paras. 51, 52, 54, 65 and 67.
[34] WT/DSB/M/245.
[35] United States' First Written Submission, para. 34.
[36] United States' First Written Submission, para. 67.
[37] United States' First Written Submission, paras. 39, 52, 54, 58, 65, 66 and 67.
[38] United States' First Written Submission, paras. 3 and 44.
[39] United States' First Written Submission, paras. 44 and 54.
[40] United States' First Written Submission, para. 44.
[41] United States' First Written Submission, paras. 52 and 54.
[42] United States' First Written Submission, para. 34.
[43] For Japan's description of these connections, *see further* Japan's First Written Submission, paras. 90-93.

these connections, the subsequent reviews are "measures taken to comply", irrespective of the United States' explicit recognition of that fact.

41. The United States also omits to mention certain of the specific substantive connections relied upon by Japan. The United States argues that the three subsequent reviews cannot be "measures taken to comply" "just because they are administrative reviews involving the same product exported from Japan by the same companies".[44] It adds that, if measures with these connections were "measures taken to comply", "every administrative review would fall within the jurisdiction of an Article 21.5 panel".[45]

42. In formulating this argument, the United States overlooks additional connections between the three subsequent reviews and the three original measures. In particular, the United States does not mention that a strong link exists between these reviews in terms of the "*specific component*" of the measures that was found to be WTO-inconsistent in the original proceedings, and that is challenged in these proceedings. That "specific component" is, of course, the zeroing methodology used to make the dumping determinations.

43. Japan argues that *solely this specific component* of the three subsequent reviews – and not other aspects of those measures – is within the scope of these compliance proceedings. Thus, contrary to the United States' suggestion, neither every periodic review nor every aspect of every review is subject to these compliance proceedings.

44. The Appellate Body reached the same conclusion in *U.S. – Softwood Lumber IV (21.5)*, finding that "a specific component" of a subsequent review was a "measure taken to comply" in circumstances where the same "specific component" was found to be WTO-inconsistent in an original measure concerning the same anti-dumping order, affecting the same product, exported by the same companies, from the same country.[46] Other components of the subsequent measure were not found to be subject to Article 21.5. The Appellate Body disagreed with the United States that this standard subjects either every review or every aspect of every review to Article 21.5.[47]

[44] United States' First Written Submission, para. 37.
[45] United States' First Written Submission, para. 37.
[46] Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, para. 83.
[47] Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, paras. 87 and 93.

(c) *The United States Fails to Show that Previous Panel and Appellate Body Rulings Are Irrelevant*

45. The United States' efforts to distinguish the circumstances of this dispute from the circumstances of *Australia – Leather (21.5)*, *Australia – Salmon (21.5)*, *U.S. – Softwood Lumber IV (21.5)*, and *U.S. – Upland Cotton (21.5)* are also unavailing.

46. *First*, as noted, the United States treats the three subsequent reviews at issue in these proceedings as "measures taken to comply" for purposes of Japan's non-"existence" claims. As a result, the three subsequent reviews are "measures taken to comply", with no examination of the substantive connections between the subsequent and original measures being necessary. In contrast, the four previous disputes involved measures that were *not* declared to be "taken to comply". In consequence, an examination of the substantive connections between the subsequent and original measures was necessary in the previous disputes to establish that the undeclared measures were "taken to comply".

47. *Second*, with respect to *Australia – Leather (21.5)*, *Australia – Salmon (21.5)*, and *U.S. – Softwood Lumber IV (21.5)*, the United States argues that the crucial fact in these earlier disputes was that the undeclared measure "undermine[d] the *declared measure taken to comply*".[48] It appears to believe that because the present proceedings do not involve an undeclared measure undermining a declared compliance measure, the earlier disputes are not relevant.

48. Naturally, where an undeclared measure undermines a declared compliance measure, the undeclared measure is a "measure taken to comply". However, Japan disagrees that an undeclared measure can be a "measure taken to comply" *solely* when there is a declared "measure taken to comply". In WTO law, an implementing Member is required to comply with *the DSB's recommendations and rulings*, and *not* with its own declared compliance measure. The crucial issue is, therefore, whether the implementing Member has complied with – or undermined compliance with – *the DSB's recommendations and rulings*, and not whether the implementing Member has undermined its own *declared compliance measure*.

49. In consequence, whether or not there is a declared compliance measure, a subsequent closely connected measure that undermines or circumvents compliance with the DSB's recommendations and rulings, is a "measure taken to comply".

[48] United States' First Written Submission, paras. 40 ff.

50. In these proceedings, even if the three subsequent periodic reviews are not declared compliance measures, they are undeclared "measures taken to comply" because: they have very close substantive links to the original reviews, including in relation to the "specific" zeroing "component";[49] according to the United States, they withdraw and replace the original measures; and, they undermine compliance with the DSB's recommendations and rulings through the continued use of zeroing in the replacement measures.

51. In fact, the DSB's recommendations and rulings would be wholly circumvented if examination of the "consistency" of the three subsequent reviews were excluded from the scope of these proceedings. The United States has, by its own admission, simply replaced the original *Ball Bearing* reviews with a series of subsequent reviews in a continuing chain of substantively very similar measures, each of which includes exactly the same WTO-inconsistency. As the Appellate Body put it in *U.S. – Upland Cotton (21.5)*, the DSB's recommendations and rulings would be rendered "essentially declaratory in nature" if the replacement measures were excluded from Article 21.5.[50]

52. On the United States' view, an endless cycle of never-ending litigation would ensue, with no remedy ever available to the complainant under Article 22 of the DSU. Indeed, although the United States asserts that implementation should bring the "border measure"[51] – the cash deposit rate – into consistency with its obligations, the effect of its argument is that the original WTO-inconsistent "border measure" is simply replaced with a new WTO-inconsistent border measure, which is excluded from the scope of Article 21.5 and from any remedy under Article 22. Thus, there is no way for complainants to secure relief against the United States' cash deposit rates.

53. *Third*, and finally, Japan is puzzled by the United States' assertion that, in *U.S. – Upland Cotton (21.5)*, the Appellate Body "did not consider certain subsequent payments to be 'measures taken to comply'".[52] In *U.S. – Upland Cotton (21.5)*, the compliance panel examined a preliminary objection by the United States that certain new subsidy payments were not subject to Article 21.5.[53] The compliance panel rejected this argument, finding that

[49] *See further* Japan's First Written Submission, paras. 90-93.
[50] Appellate Body Report, *U.S. – Upland Cotton (21.5)*, paras. 245 and 246.
[51] United States' First Written Submission, heading V.A.1 (preceding para. 52) and para. 67.
[52] United States' First Written Submission, para. 45.
[53] Panel Report, *U.S. – Upland Cotton (21.5)*, para. 9.73.

the new payments were subject to Article 21.5.[54] The Appellate Body upheld this finding.[55] Both the compliance panel and the Appellate Body ruled on the "consistency" of the new payments.[56] If the new payments had not been "measures taken to comply", it is not clear to Japan on what jurisdictional basis the United States considers the panel and the Appellate Body could have ruled that these new payments violated the *Agreement on Subsidies and Countervailing Measures* ("*SCM Agreement*").

54. In its First Written Submission, Japan explained that the situation in these proceedings is very similar to the one described by the Appellate Body in *U.S. – Upland Cotton (21.5)*.[57] In those proceedings, the Appellate Body accepted that new payments withdrawing and replacing the original payments on an annually-recurring basis were "measures taken to comply". It held that excluding the new payments from the scope of Article 21.5 proceedings would "compromise the effectiveness" of the disciplines in the covered agreements, and would be "difficult to reconcile with objectives of the DSU".[58]

55. The position advocated by the United States in these proceedings with respect to annual periodic reviews has very similar consequences.[59] If its position prevailed, the disciplines in Article 9.3 of the *Anti-Dumping Agreement* would be reduced to a nullity.[60] A respondent could disregard its obligations under that provision in conducting a periodic review, provided that it adopted a subsequent review, which withdrew and replaced the original 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. 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.

56. The United States suggests that *U.S. – Upland Cotton (21.5)* is not similar to these proceedings because it is subject to the obligations in Article 7.8 of the *SCM Agreement* to

[54] Panel Report, *U.S. – Upland Cotton (21.5)*, paras. 9.73 and 15.1(a).
[55] Appellate Body Report, *U.S. – Upland Cotton (21.5)*, para. 249.
[56] Panel Report, *U.S. – Upland Cotton (21.5)*, paras. 10.256 and 15.1(a); Appellate Body Report, *U.S. – Upland Cotton (21.5)*, paras. 447 and 448(c)(i).
[57] Japan's First Written Submission, paras. 101 and 102.
[58] Appellate Body Report, *U.S. – Upland Cotton (21.5)*, para. 246, *citing* to Articles 3.3 and 21.1 of the DSU.
[59] United States' First Written Submission, para. 8. Periodic reviews are similar to the annually-recurring payments at issue in *U.S. – Upland Cotton (21.5)*, in the sense that they too recur on an annual basis, where requested by an interested party.
[60] *See also* European Communities' Third Party Submission, paras. 17 and 18.

"*withdraw* the subsidy". However, in this dispute, the United States itself asserts that it has satisfied Article 3.7 of the DSU by securing the "*withdrawal*" of the original periodic reviews, and it agrees with Japan that "withdrawal of a measure is one way for a Member to bring a measure into conformity with a Member's WTO obligations."[61] Thus, the analogy Japan draws with *U.S. – Upland Cotton (21.5)* remains pertinent.

57. In any event, even under Article 19.1 of the DSU, where a Member alleges that it has brought a WTO-inconsistent original measure into conformity by withdrawing and replacing that measure with a new measure, the "existence" and "consistency" of the new measure may be examined under Article 21.5.

(v) Conclusion

58. For all these reasons, as well as those set forth in Japan's First Written Submission, Japan submits that the three subsequent reviews fall within the scope of these proceedings.

B. *Future Closely Connected Measures May Fall within the Scope of These Proceedings*

59. The United States objects to Japan's reservation of the right to challenge future periodic reviews that are closely connected to the DSB's recommendations and rulings.[62] It argues that Japan fails to identify a specific measure, and seeks to include "future, indeterminate measures" to be adopted after the date of the Panel's establishment. Japan requests that the Panel reject the United States' request.

60. In *Australia – Salmon (21.5)*, the Panel held that its terms of reference included a Tasmanian import ban, "even though the ban was only introduced subsequent to this Panel's establishment and therefore not *expressis verbis* mentioned in Canada's Panel request."[63] In that dispute, the new ban was adopted *after* the parties had filed their first written submissions in the compliance proceedings. The panel found as follows:

> What is referred to this Article 21.5 Panel is basically a disagreement as to implementation. … *We do not consider that measures taken subsequently to the establishment of an Article 21.5 compliance panel should per force be excluded from its mandate*. Even before an original panel such

[61] United States' First Written Submission, paras. 52 and 54, and footnote 101.
[62] United States' First Written Submission, para. 50.
[63] Panel Report, *Australia – Salmon (21.5)*, para. 7.10 (sub-para. 24).

> measures were found to fall within the panel's mandate because, in that specific case, the new measures did not alter the substance – only the legal form – of the original measure that was explicitly mentioned in the request. In compliance panels we are of the view that there may be different and, arguably, even more compelling reasons to examine measures introduced during the proceedings. As noted earlier, *compliance is often an ongoing or continuous process and once it has been identified as such in the panel request, as it was in this case, any "measures taken to comply" can be presumed to fall within the panel's mandate*, unless a genuine lack of notice can be pointed to. …[64]

61. Japan agrees fully with this reasoning, which supports its inclusion of future closely connected compliance measures. Japan also observes that, in *EC – Bananas III (21.5 – U.S.)*, the compliance panel agreed with the United States, as complainant, that a measure adopted many years after the end of the RPT could be a "measure taken to comply", even though not recognized as such by the implementing Member.[65] This ruling also supports the view of the panel in *Australia – Salmon (21.5)* that implementation is "an ongoing" process that can extend over many years.

62. This interpretation also promotes the "prompt" settlement of disputes, consistent with Articles 3.3 and 21.1 of the DSU. Otherwise, complainants would be required to initiate a second set of compliance proceedings to address compliance measures adopted during the panel proceedings. This second compliance proceeding would needlessly delay settlement of the dispute.

63. The scope of Japan's panel request is circumscribed to include solely specific measures that are "closely connected" to the original measures and that are "measures taken to comply".[66] The United States itself recognizes, based on the panel request and Japan's arguments, that the measures in question may be subsequent *Ball Bearing* reviews "related to the eight identified in [Japan's] panel request".[67] Japan agrees with this view, which demonstrates that the Panel's terms of reference are sufficiently specific for the United States to identify exactly the measures concerned.

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[64] Panel Report, *Australia – Salmon (21.5)*, para. 7.10 (sub-paras. 28 and 29) (emphasis added).
[65] Panel Report, *EC – Bananas III (21.5 – U.S.)*, para. 7.493.
[66] WT/DS322/27, para. 12.
[67] United States' First Written Submission, para. 50.

64. Finally, Japan considers that the United States' request is not ripe unless and until Japan seeks to include a future periodic review within the scope of these proceedings.

65. For all these reasons, Japan considers that there is no reason for the Panel to exclude the possibility for Japan to challenge subsequent closely connected "measures taken to comply". Japan, therefore, asks the Panel to reject this part of the United States' request.

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

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

(i) The United States Offers No Evidence to Support Its Argument that Eliminating Zeroing in One Setting Eliminates It in All Other Settings

66. The DSB made four separate rulings of WTO-inconsistency regarding the zeroing procedures, addressing the application of these procedures in four different settings. It ruled that they are WTO-inconsistent in: (1) weighted average-to-weighted average ("W-to-W") comparisons in original investigations;[68] (2) transaction-to-transaction ("T-to-T") comparisons in original investigations;[69] (3) any comparison methodology in periodic reviews;[70] and (4) any comparison methodology in new shipper reviews.[71]

67. The United States has taken very limited action to implement these four rulings. Specifically, it has narrowed the scope of application of the zeroing procedures to exclude W-to-W comparisons in original investigations. Japan, therefore, claims that the United States has failed to comply with the DSB's recommendations and rulings regarding the zeroing procedures in the three other situations in which they were found to be inconsistent with the United States' obligations.

68. In response, the United States relies on a litigation strategy that hinges more on semantics than substance. It argues that eliminating the use of zeroing in *one* narrow situation results in the elimination of the zeroing procedures in *all* the other situations in which they were found to be WTO-inconsistent. Specifically, the United States argues that by announcing that it "would no longer apply the zeroing procedures in W-to-W comparisons

[68] Panel Report, *U.S. – Zeroing (Japan)*, para. 7.258(a).
[69] Appellate Body Report, *U.S. – Zeroing (Japan)*, para. 190(b).
[70] Appellate Body Report, *U.S. – Zeroing (Japan)*, para. 190(c).
[71] Appellate Body Report, *U.S. – Zeroing (Japan)*, para. 190(d).

in original investigations", it has "eliminated the single measure that Japan had challenged and that was found to be 'as such' inconsistent".[72] According to the United States, "[n]ow that zeroing is no longer used in W-to-W comparisons in antidumping investigations, the single measure that was subject to the DSB's recommendations and rulings has been withdrawn".[73]

69. In making this argument, the United States teases unwarranted conclusions from wordplay rather than fact. Ignoring the evidence contradicting its position, the United States' argument rests on a fallacious construction of the original panel's and the Appellate Body's conclusions that the zeroing procedures involve a "single rule or norm" challengeable "as such".

70. In the original proceedings, the debate over the singularity of the zeroing procedures concerned the substantive distinction, if any, between so-called "model" and "simple" zeroing: did these terms refer to *two rules* with *differing substantive content*, or did they refer to a *single rule* with *uniform substantive content*? The original panel ruled that the two terms referred to a single rule:

> … the terms "model zeroing" and "simple zeroing" used by Japan do not correspond to two different rules or norms but simply refer to different manifestations of a single rule or norm – not allowing non-dumped export sales to offset margins on export prices below the normal value.[74]

71. The Appellate Body upheld the original panel's conclusion "that the 'zeroing procedures' under different comparison methodologies, and in different stages of anti-dumping proceedings, do not correspond to separate rules or norms, but simply reflect different manifestations of a single rule or norm".[75]

72. For the original panel and the Appellate Body, therefore, the zeroing procedures involved a single rule that derived from the unvarying *precise substantive content* of the rule, which was identified as the disregard of negative intermediate comparison results in the

[72] United States' First Written Submission, para. 79.
[73] United States' First Written Submission, para. 80.
[74] Panel Report, *U.S. – Zeroing (Japan)*, footnote 688.
[75] Appellate Body Report, *U.S. – Zeroing (Japan)*, para. 88.

aggregation of an overall weighted average dumping margin.[76] This single substantive rule applied in the same way in several different procedural settings.

73. Indeed, the Appellate Body expressly said that the single rule did not become multiple rules simply because it applied "under different comparison methodologies, and in different stages of anti-dumping proceedings".[77] The Appellate Body found that the application of the single rule in different procedural settings merely "reflect[ed] different manifestations" of the rule.[78]

74. The United States does not assert that, since the original proceedings, the *precise substantive content* of the "single rule or norm"[79] has been changed in any way. Instead, the United States contends that it has eliminated the use of zeroing in one procedural setting such that the *scope of application* of the single zeroing rule has been narrowed to exclude W-to-W comparisons in original investigations. However, a small limitation to the scope of application of a general rule does not eliminate the rule itself. Equally, implementing one of the DSB's recommendations and rulings regarding the zeroing procedures does not amount to implementation of all four of those recommendations and rulings.

75. The United States also offers no evidence whatsoever to demonstrate that it has, in fact, eliminated the "single rule or norm"[80] in the various "manifestations" and situations in which it was found to be WTO-inconsistent. This is unsurprising, because all available evidence confirms that the "single rule or norm" has not been eliminated, but is very much "alive and kicking" in all situations, except in W-to-W comparisons in original investigations.

76. As described in more detail below, the evidence shows that the United States: (1) expressly decided to limit its change of zeroing policy to W-to-W comparisons in original investigations; (2) expressly decided to maintain zeroing procedures in all other situations; and, (3) has consistently applied the zeroing procedures in all other situations since the end of the RPT.

77. In assessing the evidence, Japan recalls that "Article 21.5 proceedings do not occur in isolation from the original proceedings, but that both proceedings *form part of a continuum of*

[76] *See* Panel Report, *U.S. – Zeroing (Japan)*, footnote 688.
[77] Appellate Body Report, *U.S. – Zeroing (Japan)*, para. 88.
[78] Appellate Body Report, *U.S. – Zeroing (Japan)*, para. 88.
[79] Panel Report, *U.S. – Zeroing (Japan)*, footnote 688.
[80] Panel Report, *U.S. – Zeroing (Japan)*, footnote 688.

events."[81] Given the "continuum of events", it is well-established that 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."[82]

78. 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."[83] In the present proceedings, there is no relevant change to the underlying evidence that justifies the compliance Panel concluding that the United States has eliminated the WTO-inconsistent "single rule or norm" that was found to apply in T-to-T comparisons in original investigations, and in new shipper and periodic reviews under any comparison method.

79. For its part, the United States offers not a single shred of evidence to support its contention that the "single rule or norm" has been withdrawn in all four of the situations addressed by the DSB's recommendations and rulings. Following *U.S. – Softwood Lumber VI (21.5)*, in the absence of such evidence, an objective assessment of the "continuum" of the evidence in the original and compliance proceedings supports Japan's claim that three of the four separate DSB recommendations and rulings have not been implemented.

80. The available evidence points uniformly and unambiguously to the conclusion that the United States has maintained the same "single rule or norm", with the same precise substantive content, for general and prospective application in all situations other than one "manifestation" of that rule – W-to-W comparisons in original investigations.

81. As outlined below, the evidence includes the USDOC's 27 December 2006 decision in formal rule-making that, although it was abandoning zeroing in W-to-W comparisons in original investigations, it was not changing its policies in any other settings (the "*Zeroing Notice*").[84] The USDOC's express decision in the *Zeroing Notice* to maintain zeroing

[81] Appellate Body Report, *Chile – Price Band System (21.5)*, para. 136, *citing* Appellate Body Report, *Mexico – Corn Syrup (21.5)*, para. 121 (emphasis added). *See further* Section II, paras. 6-10, of Japan's First Written Submission.
[82] 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.
[83] Appellate Body Report, *U.S. – Softwood Lumber VI (21.5)*, para. 103 (emphasis added).
[84] 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).

procedures in all other settings is confirmed by: (1) a string of dumping determinations made by the USDOC since the end of the RPT that apply the zeroing procedures; and (2) decisions of United States domestic courts since the end of the RPT.

(ii) The Evidence Shows that the United States Expressly Decided in the Zeroing Notice to Maintain the Zeroing Procedures in All Situations except W-to-W Comparisons in Original Investigations

82. In paragraphs 22 to 25, and 109 to 113, of its First Written Submission, Japan outlined the circumstances surrounding the USDOC's decision in the *Zeroing Notice*, taken on 27 December 2006, to abandon zeroing in W-to-W comparisons in original investigations. The *Zeroing Notice* directly contradicts the United States' argument that its abandonment of the zeroing rule in this one situation means that the zeroing procedures no longer exist in the three other situations that were the subject of the DSB's recommendations and rulings in this dispute.

83. *First*, when the USDOC announced in March 2006 a forthcoming change to the application of its zeroing rule, it proposed to abandon the use of zeroing solely in W-to-W comparisons in original investigations.[85] The USDOC did not state that it proposed to modify the zeroing procedures in any other situation. The limited scope of the USDOC's proposal is confirmed by the authority's statement that its planned action was proposed "in light of the panel's report in *US – Zeroing [(EC)]*".[86] The DSB's recommendations and rulings in this dispute addressed the zeroing procedures solely in W-to-W comparisons in original investigations, and not in the three other situations covered by the DSB's recommendations and rulings in this dispute.

84. *Second*, the USDOC's final rule change in the *Zeroing Notice*, on 27 December 2006, explicitly states that the authority had not proposed to modify its margin calculation procedures in any situation other than in W-to-W comparisons in original investigations, and therefore the USDOC expressly "decline[d]" to alter its policies in any other situation.[87] In

[85] 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).
[86] 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).
[87] 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).

fact, the USDOC noted that several parties, including Japan,[88] had requested that it abandon zeroing generally.[89] However, other commentators had noted that, if the USDOC wished to abandon the zeroing procedures in situations other than W-to-W comparisons in original investigations, "it would need to provide a specific proposal and solicit further comments".[90]

85. Addressing these comments, the USDOC expressly declined to modify the zeroing procedures in any situation other than in W-to-W comparisons in original investigations:

> 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*.[91]

86. The USDOC's pronouncements could not be clearer. The USDOC's announcements in March and December 2006 stated expressly that: (1) it was proposing to change its policies solely in W-to-W comparisons in original investigations; (2) it was doing so in response to the DSB's recommendations and rulings in *U.S. – Zeroing (EC)*, which required a change only in that one situation; (3) it had made no proposals to change its policies in any other situation; and, (4) it "decline[d]" to modify its policies in any other situation.[92]

87. To assess the significance of the USDOC's decision as "a change in the underlying evidence",[93] that decision must be considered in light of the evidence in the original proceedings. In those proceedings, the panel found that the USDOC had a "long-standing"[94]

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[88] Japan's comments are available at: http://ia.ita.doc.gov/download/zeroing/cmts/goj-zeroing-cmt.pdf (last visited 19 August 2008) (Exhibit JPN-41).
[89] 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).
[90] Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin during an Antidumping Duty Investigation; Final Modification, 71 Fed. Reg. 77722, 77724 (Dep't of Comm., 27 December 2006) (Exhibit JPN-35).
[91] 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) (emphasis added).
[92] 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) (emphasis added).
[93] Appellate Body Report, *U.S. – Softwood Lumber VI (21.5)*, para. 103.
[94] Panel Report, *U.S. – Zeroing (Japan)*, paras. 6.104 and 7.54.

and "deliberate policy"[95] to use zeroing under any comparison method, in any type of anti-dumping proceeding.[96] Those findings were confirmed by the Appellate Body.[97]

88. The findings in the original proceedings regarding the nature and scope of the zeroing procedures, and the breadth of the United States' "deliberate" zeroing "policy", cannot be re-litigated in these proceedings. Instead, the issue is what policy changes have been made by the United States to abandon the zeroing rule in the four situations in which it was found to be WTO-inconsistent. The USDOC itself answered this question in its 27 December 2006 decision, when it expressly "decline[d]" to modify its calculation methodologies in any situation other than W-to-W comparisons in original investigations.[98]

89. Thus, the only change in the underlying evidence is that the USDOC has now excluded W-to-W comparisons in original investigations from the scope of application of the "single rule or norm" known as the zeroing procedures. This change does not alter the precise substantive content of the zeroing procedures which, in all other situations, continue to provide for the disregard of negative intermediate comparison results in calculating an overall weighted average dumping margin.

90. In dumping margin determinations made after the end of the RPT, the USDOC has expressly emphasized that abandoning zeroing in one situation does not alter the application of the zeroing procedures in all other situations. Specifically, in rejecting requests by respondents' to abandon the use of the zeroing procedures in situations other than W-to-W comparisons in original investigations, the USDOC has consistently stated that:

> While the Department has modified its calculation of weighted-average dumping margins when using average-to-average comparisons in antidumping investigations [in the Zeroing Notice], *the Department has not adopted any other modifications concerning any other methodology or type of proceeding, such as administrative reviews*.[99]

[95] Panel Report, *U.S. – Zeroing (Japan)*, para. 7.52.
[96] Panel Report, *U.S. – Zeroing (Japan)*, para. 7.53.
[97] Appellate Body Report, *U.S. – Zeroing (Japan)*, paras. 86 and 88.
[98] 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) (emphasis added).
[99] (1) USDOC I&D Memo: Certain Frozen Warmwater Shrimp from Ecuador (3 July 2008), at Comment 1, p. 4 (internal citation omitted) (Exhibit JPN-56.B); (2) USDOC I&D Memo: Certain Frozen Warmwater Shrimp from India (7 July 2008), at Comment 1, p. 5 (internal citation omitted) (Exhibit JPN-57.B); *See also, e.g.*, (3) USDOC I&D Memo: Stainless Steel Sheet and Strip in Coils from Mexico (undated), at Comment 2, p. 7

91. Moreover, according to the USDOC,

> [A]s part of the URAA [*i.e.*, the Uruguay Round Agreements Act] process, Congress has provided a procedure through which the Department may change a regulation or practice in response to WTO reports. *With regard to the denial of offsets in administrative reviews, the United States has not employed this statutory procedure.* With regard to *US - Zeroing (Japan)*, it is the position of the United States that appropriate steps have been taken in response to that report and *those steps do not involve a change to the Department's approach of calculating weighted-average dumping margins in the instant administrative review*.[100]

92. Thus, the USDOC has confirmed on numerous separate occasions that it has only abandoned the use of zeroing in W-to-W comparisons in original investigations, and continues to apply zeroing procedures in all other situations.

93. Japan's assessment of the *Zeroing Notice – i.e.*, that the USDOC has continued to maintain zeroing procedures in all situations other than in W-to-W comparisons in original investigations – is further confirmed by evidence from decisions of United States domestic courts.

94. In several recent decisions, United States courts have confirmed that, in the *Zeroing Notice*, the United States only abandoned the use of zeroing in W-to-W comparisons in

(internal citation omitted) (Exhibit JPN-50.B); (4) USDOC I&D Memo: Carbon and Certain Alloy Steel Wire Rod from Mexico (6 March 2008), at Comment 1, p. 3 (internal citation omitted) (Exhibit JPN-51.B); (5) USDOC I&D Memo: Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea (10 March 2008), at Comment 1, p. 4 (internal citation omitted) (Exhibit JPN-52.B); (6) USDOC I&D Memo: Certain Cut-to-Length Carbon-Quality Steel Plate Products From the Republic of Korea (undated), at Comment 2, p. 5 (internal citation omitted) (Exhibit JPN-53.B); (7) USDOC I&D Memo: Carbon and Certain Alloy Steel Wire Rod from Canada (undated), at Comment 5 (internal citation omitted) (Exhibit JPN-55.B); (8) USDOC I&D Memo: Certain Orange Juice from Brazil (5 August 2008), at Comment 1, p. 5 (internal citation omitted) (Exhibit JPN-58.B); and (9) USDOC I&D Memo: Polyethylene Terephthalate Film, Sheet, and Strip from the Republic of Korea (undated), at Comment 6, p. 14 (internal citation omitted) (Exhibit JPN-59.B).

[100] (1) USDOC I&D Memo: Certain Frozen Warmwater Shrimp from Ecuador (3 July 2008), at Comment 1, p. 4 (internal citation omitted) (emphasis added) (Exhibit JPN-56.B); (2) USDOC I&D Memo: Certain Orange Juice from Brazil (5 August 2008), at Comment 1, p. 6 (internal citation omitted) (emphasis added) (Exhibit JPN-58.B); *See also, e.g.*, (3) USDOC I&D Memo: Carbon and Certain Alloy Steel Wire Rod from Mexico (6 March 2008), at Comment 1, p. 4 (Exhibit JPN-51.B); (4) USDOC I&D Memo: Certain Cut-to-Length Carbon-Quality Steel Plate Products From the Republic of Korea (undated), at Comment 2, pp. 5-6 (Exhibit JPN-53.B); (5) USDOC I&D Memo: Carbon and Certain Alloy Steel Wire Rod from Canada (undated), at Comment 5 (Exhibit JPN-55.B); (6) USDOC I&D Memo: Certain Frozen Warmwater Shrimp From India (7 July 2008), at Comment 1, p. 5 (Exhibit JPN-57.B); and (7) I&D Memo: Polyethylene Terephthalate Film, Sheet, and Strip from the Republic of Korea (undated), at Comment 6, p. 14 (Exhibit JPN-59.B).

original investigations. In *Corus Staal BV v. United States*, the United States Court of Appeals for the Federal Circuit observed that:

> When Commerce announced the elimination of zeroing in conjunction with the use of average-to-average comparisons to calculate dumping margins in antidumping investigations, *it stated that the new policy did not apply to any other type of proceeding, including administrative reviews*.[101]

95. Likewise, in a different case brought by Corus Staal BV against the United States, the United States Court of International Trade found that:

> Corus points to no authority for the proposition that Commerce is not allowed to use zeroing in administrative reviews. The Section 123 Determination [*i.e.*, the *Zeroing Notice*] only changes Commerce's practice with respect to antidumping investigations, not administrative reviews…. Therefore, unless and until Commerce changes its policy, Commerce's use of zeroing in administrative reviews is valid under U.S. law.[102]

96. In *NSK Ltd. v. United States*, the United States Court of Appeals for the Federal Circuit explained that the USDOC "contends that it only plans to discontinue zeroing in investigations, not in administrative reviews… ."[103]

97. There is, therefore, abundant evidence that, in the "continuum" of events following the original proceedings, no changes have been made by the United States to the zeroing policies and procedures as they apply to the three situations in which they were found to be WTO-inconsistent, other than W-to-W comparisons in original investigations. There is, therefore, no change in the underlying evidence since the original proceedings that would justify a conclusion that the zeroing procedures, as they apply to these three situations, have been altered.

[101] *Corus Staal BV v. United States*, 502 F.3d 1370, 1374 (Fed. Cir. 2007) (Exhibit JPN-61) (emphasis added).
[102] *Corus Staal BV v. United States*, 493 F. Supp. 2d 1276, 1288 (Ct. Int'l Trade 2007) (Exhibit JPN-62).
[103] *NSK Ltd. v. United States*, 510 F. 3d 1375, 1380 (Fed. Cir. 2007) (Exhibit JPN-63).

(iii) The Evidence Shows that the USDOC Has Continued to Apply Zeroing Procedures in Dumping Determinations Made since the End of the RPT

98. The United States' assertion that it has entirely eliminated the zeroing procedures is further contradicted by extensive evidence of the USDOC's continued use of zeroing procedures in dumping determinations since the end of the RPT.

99. In the original proceedings, both the panel and the Appellate Body relied on the fact that the United States was unable to identify a single instance in which the USDOC had not used the zeroing procedures in a dumping determination.[104] One might, therefore, expect the United States to support its argument in these proceedings with examples of determinations since the end of the RPT, other than in the context of W-to-W comparisons in original investigations, in which the USDOC calculated dumping margins *without* zeroing. However, the United States has failed to offer any such evidence to support its contentions. This failure constitutes another feature of the underlying evidence that is unchanged since the original proceedings.

100. A review of the USDOC's dumping margin determinations since the end of the RPT reveals that the zeroing procedures continue to be an integral part of the USDOC's calculation methodologies. In Exhibit JPN-46, Japan presents a table summarizing evidence showing that, in the short time between 1 January 2008 and 11 August 2008, the United States has used the zeroing procedures in at least 13 anti-dumping proceedings other than W-to-W comparisons in original investigations. These include: 11 periodic reviews, one changed circumstances review, and one new shipper review.

101. The USDOC's continued use of the zeroing procedures is evident in three of these determinations from the public version of the computer program used to calculate the dumping margins. The programs in question contain a specific line of programming code that implements the zeroing procedures, as discussed in Japan's exhibits.[105] In the other ten determinations, the USDOC's continued use of zeroing is expressly acknowledged by the USDOC in its Issues and Decision memoranda. As discussed in paragraphs 90 and 91, in response to arguments made by respondents, the USDOC stated in these Issues and Decision

[104] Panel Report, *U.S. – Zeroing (Japan)*, para. 7.51, and Appellate Body Report, para. 84.
[105] Second Supplemental Statement of Valerie Owenby (Exhibit JPN-49). *See generally* Statement of Valerie Owenby (Exhibit JPN-1) and Supplemental Statement of Valerie Owenby (Exhibit JPN-37).

memoranda that it was continuing to apply zeroing procedures other than in W-to-W comparisons in original investigations.

102. In sum, the evidence overwhelmingly shows that the United States has eliminated zeroing solely in the context of W-to-W comparisons in original investigations, and that the United States continues to apply the zeroing procedures, without change, in all other situations. This evidence demonstrates that the United States' assertion that it has complied with the DSB's four recommendations and rulings regarding the zeroing procedures is incorrect.[106]

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

103. In these proceedings, Japan makes claims of non-compliance concerning five original periodic reviews (nos. 1, 2, 3, 7, and 8), and three subsequent periodic reviews (nos. 4, 5 and 6). The United States suggests that, in its claims regarding these measures, "Japan is taking mutually exclusive positions" by challenging both omissions and actions.[107] Japan disagrees.

104. With respect to the five original reviews, Japan claims that the United States failed to revise the *importer-specific assessment rates* determined in the original reviews, even though the rates continue to be legally operational after the end of the RPT.[108] Japan's claims regarding these measures, therefore, involve an *omission* to take compliance measures. Separately, Japan claims that the three subsequent periodic reviews are "measures taken to comply".[109] Japan's claims regarding these measures, therefore, involve *action* through the adoption of these compliance measures. Far from being "mutually exclusive positions",[110] these claims address different aspects of the United States' failure to implement the DSB's recommendations and rulings.

[106] Even if the Panel were to find that the United States had eliminated the original zeroing procedures, the evidence shows that the original zeroing procedures have been replaced by new zeroing procedures that apply in all situations, except W-to-W comparisons in original proceedings.
[107] United States' First Written Submission, para. 49.
[108] Japan's First Written Submission, paras. 120-148.
[109] Japan's First Written Submission, paras. 87-105 and 149-154.
[110] United States' First Written Submission, para. 49.

(i) Japan Pursues Prospective Relief against the Continued Application of WTO-Inconsistent Importer-Specific Assessment Rates

105. In reply to Japan's claim that no action has been taken to revise the *importer-specific assessment rates* in the five original reviews, the United States' primary rebuttal is that it "has withdrawn these five administrative reviews within the meaning of DSU Article 3.7".[111] It emphasizes that it has "removed the border measure [*i.e.*, the *cash deposit rate*] for entries occurring on or after the date of implementation".[112]

106. Specifically, the United States argues that it has implemented the DSB's recommendations and rulings regarding the five original periodic reviews by withdrawing the *cash deposit rates* determined in those reviews.[113] In the case of the three original *Ball Bearing* reviews (nos. 1, 2, and 3), it argues that the cash deposit rate was withdrawn and replaced by new cash deposit rates determined in the three subsequent reviews,[114] which the United States argues are excluded from these proceedings.[115] As regards the two reviews of, respectively, *Cylindrical Roller Bearings* and *Spherical Plain Bearings* (nos. 7 and 8), the United States contends that the cash deposit rates determined in the two reviews have been withdrawn, that the anti-dumping orders have been revoked, and that cash deposits are no longer collected on entries of these products.[116]

107. The United States' argument that it has implemented the DSB's recommendations and rulings by withdrawing the *cash deposit rates* in the five original reviews overlooks that those recommendations and rulings also apply to the *importer-specific assessment rates*. The United States has taken no action to implement the DSB's recommendations and rulings with respect to these rates.

108. The United States does not dispute that it has taken no action to revise the importer-specific assessment rates established in the five original periodic reviews. However, it objects that revision of these importer-specific assessment rates would involve retrospective relief, and explains that, in its view, a prospective remedy is one that applies solely to *new entries that occur on or after the end of the RPT*.[117] Thus, it believes that action is *never*

[111] United States' First Written Submission, para. 52.
[112] United States' First Written Submission, para. V.A.1, preceding para. 52.
[113] *See*, for example, United States' First Written Submission, paras. 65-67.
[114] United States' First Written Submission, para. 67.
[115] United States' First Written Submission, paras. 30-49.
[116] United States' First Written Submission, para. 66.
[117] United States' First Written Submission, paras. 53 and 54.

required to bring importer-specific assessment rates into conformity with WTO obligations because these rates always apply to entries that occurred before the end of the RPT.

109. In making this argument, the United States also does not dispute that the importer-specific assessment rates at issue provide the legal basis for the United States to collect definitive anti-dumping duties *after the end of the RPT*. It, therefore, believes that an implementing Member can continue to collect definitive duties, after the end of the RPT, on the basis of WTO-inconsistent importer-specific assessment rates that are subject to DSB recommendations and rulings. In other words, with respect to the importer-specific assessment rates, it treats the DSB's recommendations and rulings as purely "declaratory"[118] and, ultimately, legally irrelevant, solely because they concern entries that pre-date the end of the RPT.

110. In the next five sub-sections, Japan outlines its detailed objections to the United States' arguments:

- *First*, relying on the date of entry as the decisive moment for determining the temporal scope of a Member's implementation obligations regarding Article 9.3 produces absurd consequences that nullify rights and obligations in the *Anti-Dumping Agreement* and the DSU.
- *Second*, the legal provisions in the GATT 1994 and the *Anti-Dumping Agreement* on which the United States relies do not support its position.
- *Third*, the DSB's recommendations and rulings provide prospective relief when they govern future conduct pursuant to a measure that continues to operate after the end of the RPT – which is the case here.
- *Fourth*, the International Law Commission's ("ILC") *Articles on Responsibility of States for Internationally Wrongful Acts* ("*ILC Articles*") confirm Japan's position.
- *Fifth*, Japan's arguments are premised on the equality of retrospective and prospective duty collection systems.

111. Japan addresses these issues in turn.

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

(a) *Relying on the Date of Entry as the Decisive Moment for Determining the Temporal Scope of a Member's Implementation Obligations under Article 9.3 Produces Absurd Consequences*

112. The United States' argument that its implementation obligations apply solely to *new entries that occur on or after the end of the RPT* produces absurd consequences that nullify the disciplines in Article 9.3 of the *Anti-Dumping Agreement*, and severely compromise the effectiveness of the DSU.

113. By definition, a periodic review determines an importer-specific assessment rate for *past entries* which all occurred before initiation of the review, before initiation of dispute settlement proceedings, before adoption of the DSB's recommendations and rulings, and, therefore, *long before the RPT ended*. As a result, new entries occurring on or after the end of the RPT are *never* covered by an importer-specific assessment rate found to be WTO-inconsistent in the original proceedings.

114. Consequently, the United States' argument that implementation applies only to post-RPT entries means that a WTO-inconsistent importer-specific assessment rate need *never* be brought into conformity with Article 9.3 because it always relates to pre-RPT entries.

115. The post-RPT entries would be subject to a *second* periodic review initiated long after the end of the RPT. However, that second review would have to be challenged in a *new* WTO dispute. Yet, if that second review were also WTO-inconsistent – even for the same reasons as the first review – the United States' interpretation of the remedies available under the DSU means that there would never be any need to revise the second importer-specific assessment rate because, by definition, that rate covers solely entries that occurred *before* the end of the *second* RPT.

116. In short, the United States' interpretation creates a "Catch-22" that wholly deprives exporting Members of the benefits intended to accrue under Article 9.3: viewed from the perspective of the end of the RPT, a WTO-inconsistent importer-specific assessment rate *always relates to pre-RPT entries*, whereas implementation of the DSB's recommendations and rulings would *only apply to post-RPT entries*.

117. The consequence is that an importer-specific assessment rate is *totally immune* from the disciplines in Article 9.3. A Member could ignore the requirements of that provision with

impunity, and it could *always* determine a WTO-inconsistent "margin of dumping" as the inflated ceiling for the maximum amount of the duties under Article 9.3. There would never be any requirement to bring an inflated margin/rate into conformity with Article 9.3 because, *by definition*, the WTO-inconsistent margin/rate relates to entries that occurred long before the end of the RPT. The United States' circular argument, therefore, eviscerates Article 9.3, rendering it entirely hortatory. The United States' position is, thus, at odds with the principle of effective treaty interpretation because it deprives Article 9.3 of its substance.

118. The United States' position also runs counter to the basic objectives of dispute settlement set forth in the DSU:

- According to Article 3.2 of the DSU, dispute settlement serves to "preserve" Member's rights and obligations, which cannot be "diminished". Yet, this view of the relief available in dispute settlement reduces the protection in Article 9.3 to a dead letter.

- Instead of securing "prompt" settlement of disputes regarding Article 9.3, as required by Articles 3.3 and 21.1 of the DSU, the United States' interpretation means that the DSB's recommendations and rulings *never* settle disputes regarding importer-specific assessment rates.

- Postponing settlement of the dispute forever, and rendering Article 9.3 hortatory, is inconsistent with the requirement in Article 3.4 of the DSU that the DSB's recommendations and rulings aim at a "satisfactory solution" to the dispute.

- This outcome is also contrary to Article 3.5 of the DSU, which requires that "all solutions to matters … be *consistent* with" the covered agreements, and *not "nullify or impair benefits"*. A solution that allows a Member to continue applying a WTO-inconsistent assessment rate after the end of the RPT is *inconsistent* with Article 9.3, and causes *new or continued nullification or impairment* of benefits due to the over-collection of duties after the RPT.

119. Thus, in the words of the Appellate Body in *U.S. – Upland Cotton (21.5)*, the United States' interpretation of the DSU "compromise[s] the effectiveness" of the disciplines in Article 9.3 of the *Anti-Dumping Agreement*, and is, to say the least, "difficult to reconcile with objectives of the DSU".[119] Just as the United States failed to do in *U.S. – Upland Cotton (21.5)*, it has not demonstrated how the text of the DSU or, in this case, the *Anti-Dumping Agreement* requires the extreme interpretation that it proposes.

[119] Appellate Body Report, *U.S. – Upland Cotton (21.5)*, para. 246, *citing* to Articles 3.3 and 21.1 of the DSU.

(b) *The Provisions Relied on by the United States Do Not Support the View that the "Legal Regime" Governing the Amount of Anti-Dumping Duties Is Fixed at the Time of Importation*

120. The United States argues that "the text of the GATT 1994 and the AD Agreement confirms that it is *the legal regime in existence at the time that an import enters* the Member's territory that determines whether the import is liable for the payment of anti-dumping duties."[120] Specifically, the United States relies on Articles VI:2 and VI:6(a) of the GATT 1994, the Interpretive Note to paragraphs 2 and 3 of Article VI, and Articles 8.6, 10.1, and 10.6 of the *Anti-Dumping Agreement*.[121] The United States' reliance on these provisions, however, is misplaced, and certainly does not justify reducing Article 9.3, and dispute settlement generally, to a nullity.[122]

(b)(i) The fact that potential liability for duties arises on importation does not mean that an importing Member is free to disregard Article 9.3 of the *Anti-Dumping Agreement*

121. The provisions of Article VI:2 and VI:6(a), and the Interpretive Note, cited by the United States, establish that the importation of goods is an event that triggers *potential liability* to pay anti-dumping duties. As discussed further below, the United States itself recognizes this point, noting that the imposition of cash deposits on importation "serve[s] as a *placeholder* for the *liability* which is incurred at the time of entry".[123]

122. The United States' arguments regarding Article VI and the Interpretive Note ignore the significance of Article 9.3 of the *Anti-Dumping Agreement*, the very provision that the United States was found to have violated. Under that provision, a Member is required to take action, *long after importation*, to determine the *precise amount* of the definitive anti-dumping duties payable. The mere fact that Article VI provides that potential liability for the payment of duties is triggered by importation does not mean that a Member is liberated from its

[120] United States' First Written Submission, para. 59.
[121] United States' First Written Submission, paras. 59-62.
[122] The United States also argues that its interpretation of the relief available is supported by the practice of one Member of the WTO, the European Communities. That Member has, however, supports Japan's interpretation of the remedies available under the DSU. *See* European Communities' Third Party Submission, paras. 37-53. Furthermore, the United States has failed to demonstrate the relevance of the practice of that one Member under the rules of treaty interpretation in the *Vienna Convention on the Law of Treaties* ("*Vienna Convention*"). In *EC – Chicken Cuts*, the Appellate Body stated that the practice of *one* or *only a few* WTO Members was not sufficient to establish "subsequent practice" under Article 31(3)(b) of the *Vienna Convention*. Appellate Body Report, *EC – Chicken Cuts*, paras. 259, 262, 263 and 266.
[123] United States' First Written Submission, para. 61. *See also* para. 126 below.

obligations under Article 9.3 to ensure that the amount of duties definitively collected at a later date does not exceed the margin of dumping.

123. Indeed, it is absurd to suggest that an importing Member can – in total disregard of Article 9.3 – impose whatever amount of definitive duties it likes in a WTO-inconsistent periodic review, and refuse to revise that amount during an RPT, simply because the potential liability for duties was – as it always is – triggered on the date of importation pursuant to the provisions of Article VI and the Interpretive Note. Again, this interpretation serves only to reduce Article 9.3 to a nullity. In short, these provisions fall very far short of justifying an interpretation of the DSU that reduces Article 9.3 to a nullity, and that compromises the effectiveness of the DSU.

(b)(ii) The "legal regime" governing the amount of definitive duties did not exist at the time of importation

124. The existence of a review procedure in Article 9.3, which is always carried out long after importation, demonstrates a fallacy at the heart of the United States' argument. To recall, the United States argues that the domestic "legal regime" that applied at the time of importation determines "whether [an] import is liable" for anti-dumping duties, and a Member is not required to change that "legal regime" during implementation.[124] The premise of this argument is that altering the "legal regime" that applied at the time of importation would retrospectively "undo" a legal situation definitively fixed on importation.

125. The United States' argument is wrong. The domestic "legal regime" that applies at the time of importation is merely *provisional*, and notably *does not even include periodic reviews*, which are adopted *long after importation*. The United States itself recognizes that, at the time of importation, the importing Member establishes only that an import is *potentially* liable for duties. Indeed, it argues that, on importation into the United States, no anti-dumping duties are paid, and a cash deposit is collected as a form of security pending the collection of definitive duties *long after importation*.[125]

126. In this regard, Japan shares the view expressed in the following statement of the United States' argument in *U.S. – Customs Bond Directive*:

[124] United States' First Written Submission, para. 59.
[125] United States' First Written Submission, para. 61.

> The United States argues that *in no case is assessment* – whether at the cash deposit rate or otherwise – *conducted at the time of entry*, and *in all cases the cash deposit collected at the time of entry is a baseline proxy of the amount that may ultimately be assessed, and is never itself the final liability*.[126]

In other words, the United States accepts – as it must – that, at the time of importation, solely a *potential* liability for duties arises, and this potential liability "is *never* itself the final liability".

127. The Appellate Body agreed with the United States that, at the time of importation, what the United States refers to as the "legal regime"[127] governing imports is inherently uncertain because "dumping" is merely suspected:

> Until an assessment review is conducted and the import entries are liquidated, there remains uncertainty regarding the *magnitude* of dumping, so that dumping remains in this respect, and until then, "suspected".[128]

128. Thus, the "legal regime" that applies to an entry at the time of importation is provisional and "uncertain" pending the determination in a periodic review, if requested, of the definitive amount of duties due.

129. The consequence of the *provisional* character of the "legal regime" in place at the time of importation is that, *at that time*, the importing Member does *not* definitively establish any right to collect a specific amount of anti-dumping duties. Instead, when a periodic review occurs, that right is established much later in the procedure under Article 9.3. Thus, a periodic review under Article 9.3 establishes a *new "legal regime"* that *replaces* the *provisional* regime that applied at the time of importation. While the United States' excuse for not correcting the WTO-inconsistent periodic reviews is that the *provisional* "legal regime" that applied on importation cannot be changed, that provisional "legal regime" *has already been changed by the periodic reviews at issue*, which establish the amount of anti-dumping duties definitively due.

130. Japan, therefore, sees no basis in law or in fact for the United States' argument that importer-specific assessment rates cannot be brought into conformity with WTO law because

[126] Panel Report, *U.S. – Customs Bond Directive*, para. 7.89 (emphasis added).
[127] United States' First Written Submission, para. 59.
[128] Appellate Body Report, *U.S. – Customs Bond Directive*, para. 226 (underlining added).

a *long-since-changed* provisional "legal regime" must be preserved. Indeed, the fact that the United States has already changed the provisional "legal regime" once – when it adopted the original periodic reviews – demonstrates that the alleged need to preserve the provisional "legal regime" is, in reality, no impediment to changing the "legal regime" again, by bringing the periodic reviews into conformity with WTO law.

131. Finally, Japan notes that the "legal regime" in existence at the time of importation is not without significance because it fixes the universe of imports that are potentially liable to anti-dumping duties. Bringing the importer-specific assessment rates into conformity with WTO law does not alter that universe. When the periodic reviews are brought into conformity with WTO law, the same entries that were potentially liable to duties at the time of importation continue to be potentially liable to duties. However, the amount of definitive duties collected on these entries, after the end of the RPT, cannot exceed a WTO-consistent margin of dumping, as required by Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.

(b)(iii) The date on which importers are obliged to pay anti-dumping duties is not relevant in determining the date on which Members are obliged to respect Article 9.3 of the *Anti-Dumping Agreement*

132. The United States argues that Articles 8.6, 10.1, and 10.6 of the *Anti-Dumping Agreement* demonstrate that "determining whether relief is 'prospective' or 'retroactive' can only be determined by reference to date of entry."[129] Japan disagrees.

133. Articles 8.6, 10.1, and 10.6 set forth rules governing the earliest date of an importer's obligation to pay anti-dumping duties. In general, under Article 10.1, provisional measures and anti-dumping duties cannot be imposed on entries that occurred before the date of imposition of the measures. In certain circumstances, Articles 8.6 and 10.6 permit the application of duties to entries that occurred up to 90 days prior to the date of provisional measures.

134. Japan fails to see how these provisions mean that the United States need not revise the importer-specific assessment rates in this dispute. The United States is not exonerated from its duty to bring the periodic reviews into conformity with Article 9.3 simply because, at the

[129] United States' First Written Submission, para. 62.

time of importation, it respected Articles 8.6, 10.1, and 10.6. Indeed, Article 9.3 imposes separate obligations that do not even apply at the time of importation.

135. Moreover, the mere fact that an *importer's* obligation to pay *anti-dumping duties* is determined under Articles 8.6, 10.1, and 10.6 by reference to the date of importation does not dictate, as the United States argues, that an importing *Member's* obligation to observe *Article 9.3 of the Anti-Dumping Agreement* is determined by reference to exactly the same date. Different considerations apply to the effective date of application of these different obligations.

136. The United States has not explained how the text supports the view that the date of application of anti-dumping duties to importers governs the date of application of Article 9.3 to Members. Such an explanation is particularly important given that the United States' arguments under Articles 8.6, 10.1 and 10.6 nullify Article 9.3, and render the DSB's recommendations and rulings purely declaratory in nature.

137. In fact, separate provisions of the *Anti-Dumping Agreement* regulate the date of application of an importer's obligation to pay anti-dumping duties, on the one hand, and the date of application of a Member's obligation to observe the *Anti-Dumping Agreement*, on the other. Whereas Article 8.6, 10.1 and 10.6, among others, regulate the situation of importers, Article 18.3 regulates the situation of Members.

138. Article 18.3 provides that the *Anti-Dumping 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. Thus, the applicability of Article 9.3 turns on the date that an application for the initiation of a proceeding was made.

139. Although the United States argues that the date on which an import enters the United States is decisive,[130] that date is not pertinent under Article 18.3. Under that provision, if an application for a periodic review had been made on 2 January 1995 in connection with entries that occurred in 1993 and 1994, the Member conducting the review would have been subject to the obligations in Article 9.3, even though the relevant entries occurred before the *Anti-Dumping Agreement* entered into force. The terms of Article 18.3, therefore, defeat the

[130] United States' First Written Submission, paras. 59-62.

United States' assertion that the "legal regime" prevailing at the time of importation is decisive.

140. All of the periodic reviews at issue in these proceedings 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 the obligations in Article 9.3.

141. Therefore, by requiring the United States to bring the importer-specific assessment rates into conformity with Article 9.3 by the end of the RPT, the DSB did not retrospectively impose obligations on the United States. Instead, the DSB merely required the United States to revise the importer-specific assessment rates so that, by the end of the RPT, it would adhere to the WTO obligations that it was required to respect when it originally performed the reviews.[131] In other words, having initially failed to respect Article 9.3 when the reviews at issue were first performed, the United States was given a second chance to do so in the RPT.

142. The mere fact that, under Articles 8.6, 10.1 and 10.6, importers are not obliged to pay duties on entries that occur before a certain date is no reason to excuse Members from their obligations under Article 9.3 of the *Anti-Dumping Agreement*, whether at the time a periodic review is initially performed or during an RPT. The United States' argument regarding these three provisions is, therefore, irrelevant.

143. The United States' argument that the date of entry is decisive is also contradicted by United States domestic law, which treats the *date of liquidation* as the determining factor in deciding whether a *new methodology* can be applied to *past entries*.[132] In other words, in United States law, the "legal regime" in force at the date of entry, including the calculation methodology, can be changed subsequent to entry, and the assessment rate determined according to new calculation rules, provided that the new rules are put in place before the date of liquidation. For purposes of WTO law, the Appellate Body also confirmed in *U.S. – Customs Bond Directive* that, "[u]ntil an assessment review is conducted *and the import*

[131] *See* European Communities' Third Party Submission, para. 50.
[132] *See Parkdale International v. United States*, 475 F.3d 1375 (Fed. Cir. 2007) (Exhibit JPN-64).

entries are liquidated", the amount of dumping associated with an entry remains "uncertain[]".[133]

(c) *The DSB's Recommendations and Rulings Provide Prospective Relief When They Govern Future Conduct under a Measure*

144. In Japan's view, the decisive issue in determining whether the United States must modify a WTO-inconsistent periodic review is *whether the review continues to produce legal effects after the end of the RPT*. If an implementing Member continues to take action pursuant to a review after that date, the rates established in the review must be modified to ensure that future applications of the rates, after the RPT, are WTO-consistent.[134]

145. Japan's First Written Submission explains how the importer-specific assessment rate in a periodic review continues to be legally operational until definitive duties are collected, at the time when entries are liquidated on the basis of that rate.[135] Thus, where the United States collects definitive duties on entries covered by a contested periodic review *after the end of the RPT*, it does so by applying the importer-specific assessment rate determined in the review.[136] In essence, the importer-specific assessment rate applies until liquidation of all the entries it covers.

146. Accordingly, with respect to the five original periodic reviews for which there are unliquidated entries at the end of the RPT, the United States must bring the measure into conformity by modifying the importer-specific assessment rates to ensure that they are applied in a WTO-consistent fashion after the RPT expires. In short, after the end of the RPT, the United States' subsequent actions taken pursuant to the contested periodic reviews must be WTO-consistent. The United States should, therefore, have re-calculated the importer-specific assessment rates in the five original periodic reviews to ensure that they were applied in WTO-consistent fashion with effect from the end of the RPT.

147. Japan also emphasizes that, by correcting the importer-specific assessment rate, the United States would not retrospectively "undo" a legal situation definitively fixed at an earlier time. Its claims focus on situations where liquidation had not occurred by the end of

[133] Appellate Body Report, *U.S. – Customs Bond Directive*, para. 226 (underlining added). *See also* para. 127 above.
[134] *See also* European Communities' Third Party Submission, para. 46 and Hong Kong, China, Third Party Submission, para. 7.
[135] Japan's First Written Submission, paras. 40-47.
[136] Japan's First Written Submission, paras. 132-134.

the RPT. Prior to liquidation, the United States has *not* collected any definitive anti-dumping duties. Thus, there is *no* question of *repaying* duties that have already been definitively collected on an entry. Instead, the implementation action ensures the WTO-consistency of the United States' *future actions* in collecting definitive duties *for the first time* after the end of the RPT. In paragraph 131, Japan also noted that the universe of entries potentially liable for the payment of these duties is unchanged when the importer-specific assessment is revised during the RPT.

(d) *The ILC Articles on State Responsibility Confirm Japan's Position*

148. The *ILC Articles* are helpful in confirming that the United States must bring the five original periodic reviews into conformity with its WTO obligation to ensure that its actions pursuant to these reviews, after the end of the RPT, do not violate WTO law.[137]

(d)(i) Overview of the ILC Articles on when an internationally wrongful act occurs

149. The *ILC Articles* have been frequently relied on by the Appellate Body, panels, and also arbitrators acting under Article 22.6 of the DSU in interpreting WTO law.[138] In these compliance proceedings, Japan relies on the *ILC Articles* to show that it pursues prospective relief against future applications of the importer-specific assessment rates at issue; Japan's arguments are without prejudice to its position on the *ILC Articles* in other situations.

150. Article 13 of the *ILC Articles* states:

> An act of State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the breach occurs.

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[137] The *ILC Articles* were adopted by the ILC at its 2683rd meeting held on 31 May 2001, and at its 2701st meeting held on 3 August 2001, and by the General Assembly at its 85th plenary meeting on 12 December 2001. Available at: http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf (Exhibit JPN-65).
The official *Commentaries on Articles on Responsibility of States for Internationally Wrongful Acts* were adopted by the ILC at its 2702nd to 2709th meetings, held from 6 to 9 August 2001. Available at: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (Exhibit JPN-66).

[138] Appellate Body Report, *U.S. – CVDs on DRAMS*, footnotes 179 and 188; Appellate Body Report, *U.S. – Line Pipe*, para. 259; Appellate Body Report, *U.S. – Cotton Yarn*, para. 120; Panel Report, *U.S. – Gambling*, para. 6.128; Panel Report, *EC – Commercial Vessels*, footnote 395; Panel Report, *Turkey – Textiles*, paras. 9.42-9.43; Panel Report, *Korea – Procurement*, footnote 683; Panel Report, *EC – Bananas III (Ecuador)*, footnote 361; Panel Report, *Canada – Dairy*, footnote 427; Panel Report, *Australia – Salmon (Article 21.5)*, footnote 146; Panel Report, *U.S. – Wheat Gluten*, footnote 142; Decision by the Arbitrator, *U.S. – FSC (22.6 – U.S.)*, paras. 5.58-5.60 and footnotes 52 and 68; Decision by the Arbitrator, *Brazil – Aircraft (22.6 – Brazil)*, para. 3.44; and Decision by the Arbitrator, *EC – Bananas III (U.S.) (22.6 – EC)*, footnote 52.

151. Article 14 of the *ILC Articles* provides that:

> 1. The breach of an international obligation by an *act of a State not having a continuing character occurs at the moment when the act is performed*, even if its effects continue.
>
> 2. The breach of an international obligation by an *act of a State having a continuing character extends over the entire period during which the act continues* and remains not in conformity with the international obligation.

152. Article 15 of the *ILC Articles* sets forth:

> 1. The breach of an international obligation by a State through a *series of actions or omissions* defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.
>
> 2. In such a case, *the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation*.

153. Pursuant to these provisions, a breach of international law results from an act of a State, which may or may not be continuing in nature, or from a series of actions. The breach of international law occurs *when the wrongful act takes place*; in the event that the wrongful act continues or the breach arises from a series of actions, *the breach persists throughout the continuing act or series of actions*. For an act to be wrongful, the State must be subject to the obligation breached when the breach occurs or during the time that the breach is occurring, as set forth in Article 13 of the *ILC Articles*.

154. The *ILC Articles* are useful in showing that the United States is subject to a "prospective" remedy if it is required to revise the importer-specific assessment rates in the original reviews to ensure that any definitive anti-dumping duties collected, *after the end of the RPT*, on the basis of those rates do not exceed the properly determined margin of dumping.

155. Because the United States has been bound by the *Anti-Dumping Agreement* and the GATT 1994 since 1995, the periodic reviews at issue involved wrongful acts when they were

adopted. Although the United States' measures violated WTO law at the time of their adoption, the DSU granted the United States a reasonable period of time to end the violation. The end of the RPT marks the moment in time when the United States was required to comply fully with the DSB's recommendations and rulings by bringing the periodic reviews at issue into conformity with its obligations under Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.

156. With that in mind, Japan analyses the United States' conduct, after the end of the RPT, pursuant to the five original periodic reviews from the perspective of the *ILC Articles*. This analysis focuses on two acts of the United States, *both of which are taken on the basis of the contested periodic reviews*: (1) the issuance by USDOC of instructions to United States Customs and Border Protection ("USCBP") to collect duties on the basis of the WTO-inconsistent importer-specific assessment rate in question; and, (2) the issuance by USCBP to importers of payment notices on the basis of those instructions, resulting in the collection of definitive duties and liquidation of entries. For purposes of this analysis, Japan focuses solely on situations in which one (or both) of the two acts take place after the end of the RPT, pursuant to a contested periodic review.

157. In the next section, Japan analyzes these two acts from the perspective of Articles 14(1), 14(2), and 15(1) of the *ILC Articles*. Japan shows that, *whether the United States' two acts are characterized as completed or continuous, or whether they constitute a series of actions under the ILC Articles*, the United States' failure to bring the contested periodic reviews into conformity with its WTO obligations results in the commission or continuation of *future wrongful acts*, after the end of the RPT, on the basis of those reviews.

158. Bringing a measure into conformity with WTO law requires a Member to revise (or withdraw) a measure so that the Member ceases to engage in any post-RPT actions pursuant to the measure that would either involve *new* WTO-inconsistencies or *continue* old WTO-inconsistencies. This relief is prospective because it provides a remedy against future actions by the Member that occur after the end of the RPT and that would violate its WTO obligations. This form of relief is not retrospective because it does not require the implementing Member to "undo" legal situations that are already completed by the end of the RPT.

(d)(ii) Argument assuming that the USDOC's and USCBP's actions are completed acts under Article 14(1) of the ILC Articles

159. The USDOC's liquidation instructions and USCBP's payment notices might be considered as "act[s] … *not* having a *continuing character*" in terms of Article 14(1) of the *ILC Articles*. Assuming for these purposes that these instructions and notices are themselves "completed" acts under Article 14(1), they give rise to a new breach of WTO law when they occur. In particular, the collection of excessive anti-dumping duties on the basis of these measures, after the end of the RPT, violates Article 9.3 of the *Anti-Dumping Agreement* and Article II:1(a) of the GATT 1994.

160. Thus, contrary to the United States' argument that it was entitled to take no action in connection with the five original periodic reviews, the DSB's recommendations and rulings triggered a duty for it to bring the periodic reviews into conformity with its "pre-existing" WTO obligations, *with prospective effect*, to prevent further acts, on the basis of those reviews, that involve new WTO inconsistencies after the end of the RPT.[139]

(d)(iii) Argument assuming that the USDOC's and USCBP's actions are part of a continuing act under Article 14(2) of the ILC Articles

161. The two acts by the USDOC and USCBP might also be regarded as part of a continuing act under Article 14(2) of the *ILC Articles*. The continuing act would be the process by which the United States imposes and collects definitive anti-dumping duties. The earliest moment this continuing act could begin would be the date of entry, when the liability for the duties arises, and a cash deposit is collected. On this view, the act would continue during the completion of the periodic review and culminate in the issuance of liquidation instructions by USDOC, payment notices by USCBP, and finally the collection of anti-dumping duties in excess of the proper margin of dumping.

162. If a WTO-inconsistent periodic review is part of a continuing act for purposes of Article 14(2) of the *ILC Articles*, the wrongful character of this act extends until the collection of excessive anti-dumping duties on the basis of the review (*i.e.*, issuance of USCBP's payment notices and definitive collection of duties after the end of the RPT).

[139] Japan notes that the implementing Member is precluded from adopting WTO-inconsistent "measures taken to comply".

163. By failing to bring the periodic review into conformity with WTO law by the end of the RPT, the United States failed to terminate its continuing WTO-inconsistent act, as it was required to do by the DSB's recommendations and rulings to *bring the measures into conformity* with its obligations. Instead, the United States continues the inconsistent act after the end of the RPT. As noted, through the USDOC's and USCBP two post-RPT acts, the United States collects an amount of anti-dumping duties in excess of the proper margin of dumping under Article 9.3 of the *Anti-Dumping Agreement* and in excess of bound tariff rates under Article II:1(a) of the GATT 1994.

164. Thus, contrary to the United States' arguments that inaction was permitted, the DSB's recommendations and rulings triggered a duty for it to take action to bring the periodic reviews into conformity with its "pre-existing" WTO treaty obligations, *with prospective effect*, to terminate a WTO-inconsistency that would otherwise continue after the end of the RPT.

(d)(iv) Argument assuming that the USDOC's and USCBP's actions are part of a series of composite actions under Article 15(1) of the ILC Articles

165. Finally, the United States might be regarded as undertaking a "series" of inter-related, composite actions to collect definitive anti-dumping duties, the wrongfulness of which would be assessed in the "aggregate" for purposes of Article 15(1) of the *ILC Articles*. Again, the first action in the series could occur no earlier than the date when a cash deposit is collected; the adoption of a periodic review would be a further action in the series, and the series would end with the collection of definitive anti-dumping duties through USCBP's payment notices.

166. Assuming Article 15(1) of the *ILC Articles* is the relevant provision, the United States' series of actions became wrongful when a WTO-inconsistent periodic review was adopted, and that wrongfulness "lasts for as long as these actions or omissions are *repeated and remain not in conformity* with the international obligation". Thus, the series of actions ends when the United States collects an amount of anti-dumping duties, on the basis of the periodic review, in excess of the proper margin of dumping under Article 9.3 of the *Anti-Dumping Agreement* and in excess of bound tariff rates under Article II:1(a) of the GATT 1994.

167. Again, by failing to bring the periodic review into conformity with WTO law by the end of the RPT, the United States failed to terminate its continuing WTO-inconsistent act, as it was required it to do. Instead, for purposes of Article 15(1), the United States pursued a series of actions, through two post-RPT acts by the USDOC and USCBP, that remained "not in conformity" with its "pre-existing" WTO obligations after the end of the RPT, despite the DSB's recommendations and rulings.

168. Thus, action pursuant to the DSB's recommendations and rulings was essential to bring the periodic reviews into conformity with its "pre-existing" WTO obligations, *with prospective effect*, and, thereby, to terminate a WTO-inconsistency that would otherwise continue beyond the end of the RPT.

(d)(v) Conclusion on the ILC Articles

169. In sum, therefore, whether the USDOC's instructions and the USCBP notices issued after the end of the RPT are viewed (1) as completed acts when they occur, (2) as part of a continuing act, or (3) as part of a series of composite actions, they involve new or continued wrongful acts committed by the United States, *after the end of the RPT*, on the basis of periodic reviews that, *by that time*, should have been brought into conformity with WTO law. The DSB's recommendations and rulings preclude the commission of new acts after the end of the RPT on the basis of the original measures that would involve either *new WTO-inconsistencies or a continuation of the same WTO-inconsistencies*.

170. This interpretation is fully consistent with the view that the DSB's recommendations and rulings have solely prospective effects, because the obligation to bring the original periodic reviews into conformity with WTO law affects solely the United States' future actions after the end of the RPT. Once again, the DSB's recommendations and rulings require nothing more from the United States than that it modify its periodic reviews so that it respects the WTO obligations that applied to the reviews at the time they were initiated and conducted.

(e) *Japan's Arguments Are Premised on the Equality of Retrospective and Prospective Duty Collection Systems*

171. Japan strongly disagrees that its interpretation "creates inequality" in the implementation obligations that apply to retrospective and prospective duty collection

systems.[140] The United States contends that, in a prospective system, the importing Member collects the amount of anti-dumping duties "at the time of importation", and that there is no distinction between "potential and final liability in such systems".[141] It adds that, "[i]f an antidumping measure in a prospective system is found to be inconsistent with the AD Agreement, the Member's obligation is merely to modify the measure as it applies to imports occurring on or after the date of importation." The United States does not explain the basis for this interpretation; it does not even specify whether the "antidumping measure" it mentions is an original investigation or review measure.

172. In any event, the United States appears to believe that the definitive amount of anti-dumping duties due in a prospective system is fixed with certainty at the time of importation. This view is incorrect because it overlooks that, in a prospective system, the definitive amount of duties due may be revised *after* importation in a periodic review under Article 9.3.2. In such a review, as with the retrospective system, the authorities must examine whether the duties paid on importation exceed the margin of dumping determined for the product as a whole, for all entries covered by the review.[142] Following an Article 9.3.2 review, a refund of some or all of the duties initially paid may be made. Thus, in a prospective system, the definitive amount of duties due is determined in a periodic review, if requested, and not on importation.

173. In other words, the same interpretive principles apply to both retrospective and prospective systems. A periodic review may occur under either system, and that review determines the definitive amount of duties due. If that periodic review is found to be WTO-inconsistent, it must be brought into conformity with WTO law to the extent that the review remains legally operational after the end of the RPT. In both systems, a periodic review could continue to produce legal effects well after the end of the RPT because, for example, a Member's actions pursuant to that review are delayed by domestic litigation regarding the review. Indeed, such a delay is expressly foreseen in footnote 20 of the *Anti-Dumping Agreement*.

[140] United States' First Written Submission, heading V.A.2 (preceding para. 68), and paras. 68 and 69.
[141] United States' First Written Submission, para. 68.
[142] Appellate Body Report, *U.S. – Zeroing (Japan)*, para. 160; Appellate Body Report, *U.S. – Stainless Steel (Mexico)*, para. 121.

174. Japan notes that its interpretation is shared by the European Communities, which also operates a prospective system. It observes that, "if … the result of a refund investigation … is still pending" at the end of the RPT, it must be brought into conformity with WTO law.[143]

175. The fact that the mechanisms and labels used in domestic law might differ from one country to another is irrelevant to the interpretation of WTO law. For example, a country might not issue "assessment" or "liquidation" "instructions" following a periodic review. Instead, it might issue a different form of notice communicating the definitive amount of the duties due. However, irrespective of the mechanisms and labels used in domestic law, WTO law requires that – in both retrospective and prospective systems – periodic reviews be brought into conformity with Article 9.3 of the *Anti-Dumping Agreement* if the review will continue to operate after the end of the RPT and the results of the review are still pending at that time. Thus, in a prospective system, a refund of duties paid on pre-RPT entries may need to be made after the end of the RPT, pursuant to a revised dumping margin determination.

176. The Panel should, therefore, reject the United States' argument that Japan's interpretation "creates inequality" in the implementation obligations that apply to retrospective and prospective duty collection systems.[144]

177. In fact, it is the *United States' interpretation* that creates such inequality. In a prospective system, the margin determined in an investigation serves prospectively as the ceiling on the maximum amount of duties for the five year life of the anti-dumping order. If this margin were found to be inflated in dispute settlement, the United States' arguments mean that the margin would have to be revised downwards on implementation for entries occurring after the end of the RPT.

178. In contrast, the United States' arguments mean that the ceiling on the maximum amount of duties in the United States system – the importer-specific assessment rate – need *never* be changed, no matter how impermissibly inflated it is. Even cash deposit rates need never be brought into conformity, because each individual cash deposit rate is withdrawn and replaced long before the end of the RPT and, on the United States' view, the subsequent cash deposit rates can only be challenged in fresh proceedings, by which time the rate would have been replaced yet again.

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[143] European Communities' Third Party Submission, para. 51.
[144] United States' First Written Submission, heading V.A.2 (preceding para. 68), and paras. 68 and 69.

179. Thus, the United States offers an interpretation that means that the level of protection afforded by anti-dumping duties in its retrospective system is *always* immune from the impact of WTO dispute settlement, whereas the level of protection afforded by duties in a prospective system is not always immune. There is no basis for imposing these differing implementation obligations on the two systems. Japan's interpretation avoids this imbalance by requiring that the results of a periodic review under either Article 9.3.1 or 9.3.2 be revised if the review will continue to be legally operational after the end of the RPT.

(f) *Conclusion on the Prospective Character of the DSB's Recommendations and Rulings*

180. The United States' view that the temporal character of the DSB's recommendations and rulings must be determined in light of the date of entry of an import is contradicted by the WTO treaty text and United States domestic law itself. This conclusion is also supported by the principles of State responsibility set forth in the *ILC Articles*. Moreover, the United States' proposed interpretation is contrary to the principles of effective treaty interpretation because it would reduce Article 9.3 of the *Anti-Dumping Agreement* to a nullity, and would severely compromise the effectiveness of the DSU.

181. Instead, the temporal character of the DSB's recommendations and rulings should be determined in light of whether a measure found to be WTO-inconsistent continues to be legally operational after the end of the RPT. Here, the periodic reviews do continue to be operational because the importer-specific assessment rates will be applied to determine the duties definitively due on entries that were unliquidated at the end of the RPT. The United States' liquidation actions, on the basis of these importer-specific assessment rates, will give rise to new violations, or continue existing violations, of the covered agreements through the collection of excessive duties after the end of the RPT.

(ii) <u>The United States' Failure to Revise the Importer-Specific Assessment Rates in the Five Original Periodic Reviews 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 Is in Continued Violation of Articles 2.4 and 9.3 of the *Anti-Dumping Agreement*</u>

182. By omitting to bring the five periodic reviews found to be WTO-inconsistent into conformity with WTO law, the United States acts inconsistently with Articles 17.14, 21.1 and 21.3 of the DSU in the sense that these provisions aim at achieving a satisfactory and prompt

settlement of the matter, and is in continued violation of Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.

183. With respect to Article 17.14, it is hard to accept that the United States has unconditionally accepted the Appellate Body's Report given that it has not taken appropriate action to implement the Appellate Body's findings of inconsistency, which form the basis for the DSB's recommendations and rulings.[145] The European Communities also supported this argument in its Third Party Submission.[146] The United States asserts that "Japan has not identified . . . a measure that would show conditional acceptance by the United States".[147] As noted in paragraph 104 above, however, Japan has indeed identified such a measure – the *omission* to take compliance measures to bring the importer-specific assessment rates, determined in the original reviews, which had continuing legal effect at the end of the RPT, into conformity with WTO obligations assumed by the United States.

184. Japan also disagrees with the United States that Articles 21.1 and 21.3 of the DSU impose no substantive obligations on implementing Members in any way.[148] In *Australia – Salmon (21.5)*, the compliance panel described "prompt compliance" in Article 21.1 as a "*fundamental requirement*" of the DSU.[149] Other panels have also described Article 21.1 in similar language.[150] Additionally, although Article 21.3 confers a right on implementing Members to a reasonable period for compliance where immediate compliance is not practicable, that provision should be interpreted to require these Members to complete implementation within the RPT. The view that "prompt" compliance is not required within the reasonable period is yet another example of the United States seeking to undermine the effectiveness of the DSU.

185. The United States also continues to violate Articles 2.4 and 9.3 of the *Anti-Dumping Agreement*, and Article VI:2 of the GATT 1994, because of its failure to revise the importer-specific assessment rates in the five original periodic reviews.

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[145] *See further* United States' First Written Submission, para. 71.
[146] *See* European Communities' Third Party Submission, para. 35 (". . . [T]he United States has also breached Article 17.14 of the DSU since, by failing to comply with the adopted DSB reports, the United States has not accepted the Appellate Body report unconditionally.").
[147] United States' First Written Submission, para. 71.
[148] *See further* United States' First Written Submission, para. 72.
[149] Panel Report, *Australia – Salmon (21.5)*, para. 7.10 (sub-para. 9) (emphasis added).
[150] *See* Panel Report, *U.S. – Gambling (21.5)*, para. 6.53 (Article 21.1 "*requires* prompt compliance"); and Panel Report, *U.S. – FSC (21.5 – II)*, para. 7.26 ("the *requirement* of 'prompt compliance").

186. Finally, with respect to Article II:1(a) of the GATT 1994, the United States argues that "there is no basis for Japan to claim that the United States, after the RPT, *collected* duties in excess of the bound rates, and in a manner inconsistent with Article VI of the AD Agreement."[151] In fact, in its First Written Submission, Japan has provided the Panel with evidence in Exhibit JPN-40.A demonstrating that, after the end of the RPT, the United States adopted new measures – liquidation instructions and notices – that effect the collection of duties that exceed bound tariffs and that, therefore, give rise to new violations of Article II:1(a). This post-RPT action does not involve the permissible collection of anti-dumping duties within the meaning of Article II:2(b), because the periodic reviews on which the amount of the duties is based are inconsistent with the *Anti-Dumping Agreement*.

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

187. In Section II.A above, Japan has explained that the Panel has jurisdiction to examine Japan's claims regarding the three subsequent periodic reviews, which the United States expressly declares are "measures taken to comply". For the reasons set forth in paragraphs 149 to 154 of Japan's First Written Submission, these three reviews are inconsistent with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement*, and Article VI:2 of the GATT 1994, due to the application of the zeroing procedures.

D. *The United States Has Failed to Comply with the DSB's Recommendations and Rulings Regarding One Sunset Review*

188. Japan claims that the United States has failed to implement the DSB's recommendations and rulings regarding the sunset review of 4 November 1999 concerning *Anti-Friction Bearings* ("*AFB*").[152]

189. In reply, the United States admits that it has done nothing to implement the DSB's recommendations and rulings, but argues that "it was unnecessary to modify the final results of the challenged sunset review."[153] The basis for this startling position is an allegation that "an independent *WTO-consistent* basis for the likelihood of continuance of dumping determination exists".[154] The United States contends that the "majority" of the margins relied on by the USDOC in the 1999 *AFB* sunset review are not inconsistent with the *Anti-Dumping*

[151] United States' First Written Submission, footnote 116.
[152] *See* Japan's First Written Submission, paras. 155 to 158.
[153] United States' First Written Submission, para. 75.
[154] United States' First Written Submission, para. 75.

Agreement because they either pre-date the *Anti-Dumping Agreement* or they did not involve zeroing. Thus, it suggests that there is "no basis" to consider that the sunset review "continues to be in violation of Article 11.3 of the AD Agreement".[155]

190. This argument is groundless and, once more, seeks to undermine the effectiveness of dispute settlement. The Appellate Body found that the 1999 *AFB* sunset review is inconsistent with Article 11.3 of the *Anti-Dumping Agreement*,[156] and the DSB's recommendations and rulings required the United States to bring this WTO-inconsistent measure into conformity with its WTO obligations.

191. Following the adoption of the DSB's recommendations and rulings, the sunset review has not been changed in any way, and there have been no changes in the facts underlying the measure. The United States' argument relating to an alleged "majority" of the margins does not refer to new margins that were not considered in the original sunset determination. Instead, the United States now makes *new arguments* to this Panel based on *old facts* with a view to demonstrating that the unchanged sunset review is not, in fact, inconsistent with Article 11.3.

192. If the United States considered that its measure was consistent with Article 11.3, despite the reliance upon WTO-inconsistent margins calculated using zeroing, it should have presented arguments to that effect in the original proceedings. It did not do so.

193. These arguments cannot now be considered in compliance proceedings because this Panel – and the United States – must accept the original findings that the measure is WTO-inconsistent. The findings of inconsistency "must be treated by the parties to [the] particular dispute as *a final resolution to that dispute*."[157] Thus, as the panel in *U.S. – Gambling (21.5)* held, Article 21.5 proceedings do not provide respondents with an opportunity to re-litigate the WTO-consistency of measures found to be inconsistent in the original proceedings:

> Article 21.1 requires prompt compliance with those recommendations or rulings. A reassessment in a compliance proceeding of an issue that had already been ruled upon in an original proceeding in an adopted report, even with better arguments by the respondent but without a

[155] United States' First Written Submission, para. 73.
[156] Appellate Body Report, *U.S. – Zeroing (Japan)*, paras. 186 and 190(f).
[157] Appellate Body Report, *U.S. – Shrimp (21.5)*, para. 97. *See also* Panel Report, *U.S. – Gambling (21.5)*, para. 6.56.

> change relevant to the underlying facts in the intervening period, would run counter to the prompt settlement of disputes.[158]

194. In these proceedings, Japan is doubtful whether the United States' arguments are, in any event, "better" than those it made previously. For instance, the United States incorrectly suggests that, in a sunset review, an authority may rely on margins determined, using zeroing, before the *Anti-Dumping Agreement* entered into force. That argument is misguided.

195. At the time an authority makes a determination of a likelihood of continuation or recurrence of dumping under Article 11.3, it must have reliable evidence relating to the likelihood of "*dumping*" as that term is understood in the *Anti-Dumping Agreement*. Evidence drawn from a determination based on a different understanding of "dumping" is not pertinent because it does not give any indication of "dumping" according to the standard that applies under Article 11.3.

196. In any event, these arguments are irrelevant because the Panel cannot reverse the Appellate Body's conclusion that the 1999 *AFB* sunset review is inconsistent with Article 11.3, absent a change in the facts warranting a different conclusion. No such changes have occurred, and the United States simply seeks a different outcome in these proceedings based on new arguments regarding the same facts, and the same sunset determination already found to be WTO-inconsistent.

IV. CONCLUSION

197. For the reasons set forth in this submission, and in Japan's First Written Submission, Japan respectfully requests that the compliance Panel make the findings set forth in paragraph 159 of its First Written Submission. Japan also requests that the Panel reject the United States' requests for a preliminary ruling.

[158] Panel Report, *U.S. – Gambling (21.5)*, para. 6.53.