

BEFORE THE WORLD TRADE ORGANIZATION

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

Recourse by Japan to Article 21.5 of the DSU

WT/DS322/RW

**OPENING STATEMENT
AT THE MEETING WITH THE PANEL**

JAPAN

4 NOVEMBER 2008

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I. INTRODUCTION

1. Mr. Chairman and members of the Panel, Japan would like to thank you and the Secretariat for your efforts in these proceedings. This morning, we will not repeat our written arguments, but will respond to certain rebuttal arguments made by the United States. We note, though, that we are not in a position to respond to the U.S. rebuttal to our supplemental submission, because we received it just last night. With your permission, Mr. Chairman, we would like to do so tomorrow.

2. Our remarks this morning will address, *first*, this Panel’s jurisdiction to examine four subsequent periodic reviews as “measure taken to comply” and, *second*, Japan’s claims that the United States has failed to implement the DSB’s recommendations and rulings regarding: (i) the zeroing procedures; (ii) five original and four subsequent periodic reviews; and (iii) one original sunset review.

3. Before entering the substance of our remarks, we would like to note that we are providing a number of exhibits to accompany our opening statement. These exhibits are numbered JPN-69 to JPN-90. Fourteen of these, namely, Exhibits JPN -77 to JPN-90, contain proprietary business confidential information (“BCI”). Consistent with Article 18.2 of the DSU and paragraph 3 of the Working Procedures for the Panel, we have designated such information as BCI by enclosing it in double square brackets and marking it with the notation “Contains Business Confidential Information” at the top of each page containing the information. We would like to request that all those involved in these proceedings respect the confidentiality of the BCI contained in these exhibits, and ensure that it is not publicly disclosed. With this, let us turn to the Panel’s jurisdiction.

II. THE PANEL HAS JURISDICTION OVER THE FOUR SUBSEQUENT PERIODIC REVIEWS CHALLENGED IN THESE PROCEEDINGS

4. In its written submissions, Japan has demonstrated that four subsequent periodic reviews – reviews 4, 5, 6 and 9¹ – constitute “measures taken to comply”, under Article 21.5 of the DSU. The Panel, therefore, enjoys jurisdiction to assess the “consistency” of these four subsequent reviews with the *Anti-Dumping Agreement* and the GATT 1994. The United States, however, asks the Panel to rule that the four subsequent periodic reviews are not

¹ These reviews are the 03/04, 04/05, 05/06 and 06/07 periodic reviews for ball bearings. Japan relies on the numbering of the periodic reviews in Japan’s First Written Submission, para. 53. Review 9 is the 06/07 review for ball bearings.

subject to its jurisdiction, as they are not “measures taken to comply” with the recommendations and rulings of the DSB.

A. The Four Subsequent Periodic Reviews Are Declared Measures Taken to Comply

5. To deny the United States’ request, the Panel need look no further than the United States’ own submissions, which contain repeated declarations that the subsequent periodic reviews are “measures taken to comply”. The United States argues that the periodic reviews at issue in the original proceedings were “withdrawn”,² “superceded”,³ “eliminated”,⁴ “replaced”⁵ and “removed”⁶ by the subsequent periodic reviews challenged by Japan in these compliance proceedings. Significantly, the United States asserts that, with the adoption of the subsequent reviews, it “has *taken measures to comply with [the DSB’s] recommendations and rulings*”.⁷ It adds that, with the subsequent reviews, “compliance was accomplished”.⁸ Remarkably, the United States even holds out the subsequent periodic reviews as evidence that “*measures taken to comply*” *do indeed exist*:

As to the *existence of measures taken to comply*, the United States has shown that the United States removed the WTO-inconsistent cash deposit rate for entries of merchandise occurring on or after the date of implementation. This compliance was accomplished as an incidental consequence of the U.S. antidumping duty system, where the cash deposit rate from one review is replaced by that from a subsequent review.⁹

6. The United States is, of course, entitled to rely on the subsequent periodic reviews as evidence for its assertion that the original reviews have been “withdrawn” “within the meaning of DSU Article 3.7”.¹⁰ It is, moreover, entitled to argue that, with the subsequent reviews, “compliance was accomplished”. Finally, it is entitled to use the subsequent reviews to respond to Japan’s claim that no “measures taken to comply” exist. Indeed, as Japan has explained, this entitlement flows from a harmonious interpretation of Articles 3.7, 19.1 and

² United States’ Second Written Submission, para. 28; United States’ First Written Submission, paras. 39, 52, 54, 58, 65, 66, 67.

³ United States’ First Written Submission, paras. 3, 44.

⁴ United States’ Second Written Submission, para. 8; United States’ First Written Submission, paras. 44, 54.

⁵ United States’ Second Written Submission, para. 18; United States’ First Written Submission, para. 44.

⁶ United States’ Second Written Submission, paras. 18, 26.

⁷ United States’ First Written Submission, para. 51.

⁸ United States’ Second Written Submission, para. 18; United States’ First Written Submission, paras. 52, 67.

⁹ United States’ Second Written Submission, para. 18 (underlining added).

¹⁰ United States’ First Written Submission, para. 52.

21.5 of the DSU, whereby an implementing Member must be able to rely on measures that “withdraw” the original measures to demonstrate that “measures taken to comply” exist.¹¹

7. However, where an implementing Member relies on a measure to meet a claim that no “measures taken to comply” exist, the same harmonious interpretation of these provisions requires a panel, upon request, to examine the WTO “*consistency*” of that measure. Thus, from the perspective of Article 21.5, where subsequent periodic reviews are offered to rebut arguments “as to the *existence of measures taken to comply*”,¹² these measures cannot be anything *but* “measures taken to comply”, which Article 21.5 directs the Panel to review for their *consistency* with the covered agreements.

8. In short, the DSU allows the United States to assert the subsequent periodic reviews as vehicles for, and evidence of, its implementation of the DSB’s recommendations and rulings. But the DSU also requires this Panel to verify the U.S. assertions, by assessing whether those same reviews actually accomplish compliance in a WTO-consistent fashion.

9. The United States agrees that “the critical issue in an Article 21.5 proceeding is whether the implementing Member has complied with the recommendations and rulings of the DSB”.¹³ Where subsequent periodic reviews are held out as accomplishing compliance, a compliance panel must have jurisdiction to examine those measures to address “the critical issue” – whether compliance is indeed accomplished.

10. The United States also agrees that such an assessment includes determining whether, in securing withdrawal, the subsequent measures “could circumvent alleged compliance”.¹⁴ As we have demonstrated, the subsequent periodic reviews, in which the zeroing procedures were again applied, do indeed *circumvent* compliance, by incorporating and perpetuating the WTO violation found in the original proceedings.¹⁵ For this reason, the subsequent reviews *undermine* the very compliance that the United States asserts “was accomplished” by those same reviews.¹⁶

¹¹ Japan’s Second Written Submission, paras. 24-25.

¹² United States’ Second Written Submission, para. 18 (emphasis in original).

¹³ United States’ Second Written Submission, para. 25.

¹⁴ United States’ Second Written Submission, para. 25, citing *Australia – Automotive Leather (21.5)* and *Australia – Salmon (21.5)*.

¹⁵ Japan’s Supplemental Submission, paras. 30-31, 33-34 (review 9); Japan’s First Written Submission, paras. 149-154 (reviews 4, 5 and 6).

¹⁶ United States’ Second Written Submission, para. 18.

11. In that regard, failure to review these annually-recurring replacement measures – which are identical to those at issue in the original proceedings – would, in the Appellate Body’s words, “compromise the effectiveness” of the covered agreements, and make the DSB’s recommendations and rulings “essentially declaratory in nature”.¹⁷

B. The United States’ Intent to Comply Is Not Decisive under Article 21.5 of the DSU

1. Subsequent periodic reviews pre-dating adoption of the DSB’s recommendations and rulings can be measures “taken to comply”

12. As we have already noted, the United States declares that the four subsequent periodic reviews are “measures taken to comply”. Specifically, it asserts that the subsequent reviews secure withdrawal of the original, WTO-inconsistent reviews, accomplish compliance with the DSB’s recommendations and rulings, and offer evidence to meet Japan’s assertion that no “measures taken to comply” exist.

13. Nonetheless, the United States argues that since the subsequent periodic reviews only accomplished compliance *accidentally*, rather than *purposefully*, they cannot be considered “measures taken to comply”. In other words, the United States asserts that because it did not *intend* for the subsequent reviews to be measures taken to comply, they cannot be measures taken to comply. The United States’ reasoning is evident in two elements of its submissions.

14. *First*, it argues that the compliance accomplished by the subsequent periodic reviews is only an “*incidental* consequence of the U.S. antidumping duty system”.¹⁸ The United States distinguishes this category of “*incidental*” measure from “*voluntary*”¹⁹ measures that a Member “*chose*”²⁰ to take.²¹

15. The United States asserts that it “has not asked this Panel to focus on the subjective intent of the United States”²² and “does not make arguments focused on its intent to comply with the DSB’s recommendations and rulings”.²³ However, the formulation of its arguments

¹⁷ See Appellate Body Report, *U.S. – Upland Cotton (21.5)*, paras. 245-246. See also Japan’s First Written Submission, paras. 99-104.

¹⁸ United States’ Second Written Submission, paras. 8 (emphasis in original). See also *Id.*, para. 18. See also United States’ First Written Submission, para. 44.

¹⁹ United States’ First Written Submission, para. 43.

²⁰ United States’ First Written Submission, para. 41 (emphasis in original).

²¹ United States’ First Written Submission, para. 43.

²² United States’ Second Written Submission, para. 9.

²³ United States’ Second Written Submission, heading preceding para. 9.

believes this assertion – in particular, its statements that the measures must be “voluntary” and “chosen” to be considered as “taken to comply”. On the U.S. view, measures that “*incidentally*” achieve compliance cannot be measures taken to comply. The United States asserts that the subsequent periodic reviews fall in the latter category of accidental compliance measures.

16. *Second*, with respect to reviews 4 and 5, the United States asserts that measures taken prior to adoption of the DSB’s recommendations and rulings “typically are not taken *for the purpose of* achieving compliance with recommendations and rulings and would not be within the scope of an Article 21.5 proceeding”.²⁴ Since such measures are not taken “*in view of*”,²⁵ and have not “*taken into consideration*”²⁶ the recommendations and rulings of the DSB, the United States considers that they generally will not be “measures taken to comply”.

17. Although the United States argues that the *timing* of a measure constitutes an “objective” factor under Article 21.5, the words it uses show that timing is relied on to demonstrate an absence of “intent” to comply, which then excludes the measures from review by this Panel.²⁷ Specifically, the timing of reviews 4 and 5 is deemed to be critical, because it demonstrates that those reviews were neither taken “*for the purpose of*” achieving compliance, nor “*in view*” or “*consideration*” of the DSB’s recommendations and rulings. All of these formulations are redolent of intent.

18. The date on which the recommendations and rulings were adopted may be an “objective” marker. However, the United States offers that marker to argue that compliance could not have been the *intended objective* of measures taken before that date. Instead, on the U.S. view, compliance is merely a convenient accident for the implementing Member: the measure provides a defense to “non-existence” claims under Article 21.5, but its WTO-“consistency” escapes scrutiny under the same provision.

19. The distinction drawn by the United States between incidental and purposeful compliance is without foundation in the DSU. The Appellate Body and compliance panels have insisted that, for a measure to be “taken to comply”, it need not be taken for the *purpose* or *objective* of complying with the DSB’s recommendations and rulings.

²⁴ United States’ Second Written Submission, para. 10 (emphasis added). *See also Id.*, para. 16. *See also* United States’ First Written Submission, para. 33.

²⁵ United States’ Second Written Submission, para. 15.

²⁶ United States’ First Written Submission, para. 39.

²⁷ United States’ Second Written Submission, para. 9.

20. *First*, the Appellate Body has stated that a measure need not “move in the direction of . . . compliance” to be considered a measure “taken to comply”.²⁸ A measure that moves away from compliance, or that reinforces non-compliance, can also fall within the scope of Article 21.5 review.

21. *Second*, the Appellate Body has stated that compliance panels are not limited to reviewing measures that “*have the objective of achieving*[] compliance”.²⁹ Nor are compliance panels limited to review of measures that were “initiated *in order to* comply with the recommendations and rulings of the DSB”.³⁰ Echoing this view, the compliance panel in *U.S. – Gambling (21.5)* emphasized that it did not “exclude any potential ‘measures taken to comply’ due to the *purpose* for which they may have been taken”.³¹

22. Accordingly, a measure that complies by accident – that is, a measure taken neither “for the purpose of” achieving compliance,³² nor “in view”³³ or “consideration”³⁴ of the DSB’s recommendations and rulings – can fall within the scope of Article 21.5. Equally, because intent is not decisive, the fact that the measure was taken before the DSB’s recommendations and rulings is also not decisive. An implementing Member may seek to rely on a pre-adoption measure in reply to a “non-existence” claim – even though compliance was achieved by accident and prior to the DSB’s recommendations and rulings. In that case, the complainant may also request a review of the “consistency” of such a measure.

23. This view is reinforced by the Appellate Body’s emphasis of the need for “an examination of the *effects* of a measure” alleged to be “taken to comply”.³⁵ This focus on the *effects* of a measure, as distinct from the implementing Member’s *intent*, is confirmed by the text of Articles 3.7 and 19.1 of the DSU.

24. Article 3.7 addresses compliance in the form of “*secur[ing] withdrawal* of the measures concerned”. Article 19.1 speaks of recommendations to “*bring the measure into conformity*” with a Member’s obligations. Each provision focuses on the effect – or end

²⁸ Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, para. 67.

²⁹ Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, para. 67.

³⁰ Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, para. 88 (emphasis added).

³¹ Panel Report, *U.S. – Gambling (21.5)*, para. 6.24.

³² United States’ Second Written Submission, para. 10 (emphasis added). *See also Id.*, para. 16. *See also* United States’ First Written Submission, para. 33.

³³ United States’ Second Written Submission, para. 15.

³⁴ United States’ First Written Submission, para. 39.

³⁵ Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, para. 67 (emphasis added).

result – of a measure. Each provision asks what a measure *achieves*, and not the purpose for which it may have been adopted. Whether a measure *achieves* withdrawal or conformity is not dependent on the *purpose* of the measure. It is entirely possible to achieve withdrawal or conformity by accident, through a measure taken without regard to, and in advance of, the DSB’s recommendations and rulings.

25. In fact, that is precisely what the United States argues it has done in these proceedings. It argues that with the subsequent periodic reviews – including those taken before adoption of the DSB’s recommendations and rulings – it has secured “withdrawal” of WTO-inconsistent measures,³⁶ and brought those measures into conformity,³⁷ such that “compliance was accomplished”.³⁸

26. Significantly, the United States itself acknowledges that measures taken *before* adoption of the DSB’s recommendations and rulings *may* fall within a compliance panel’s jurisdiction under Article 21.5. The United States recognizes that the timing of a measure is only one “element” in determining whether it is “taken to comply”.³⁹ Indeed, the United States holds out the Zeroing Notice,⁴⁰ which withdraws the zeroing procedures in W-to-W comparisons in investigations, is a “measure taken to comply”, *even though it was taken before adoption of the DSB’s recommendations and rulings*.

27. The United States also repeatedly prefaces its timing arguments by noting that pre-adoption measures are “*typically*” not considered measures “taken to comply”.⁴¹ The United States’ comments beg the question of what circumstances give rise to the *atypical* case in which a pre-adoption measure *is* “taken to comply”. In Japan’s view, these proceedings involve precisely such circumstances. The United States has asserted to the DSB,⁴² and this Panel, that the subsequent periodic reviews – both those taken before and after adoption of the DSB’s recommendations and rulings – secure “withdrawal” of the original WTO-inconsistent reviews.⁴³ It also contends that the subsequent reviews “bring” the original

³⁶ See footnote 2 above.

³⁷ United States’ First Written Submission, para. 54 (footnote 101).

³⁸ United States’ Second Written Submission, para. 18; United States’ First Written Submission, paras. 52, 67.

³⁹ United States’ Second Written Submission, para. 14.

⁴⁰ Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 Fed. Reg. 77722, 77723 (Dep’t of Comm., 27 December 2006) (emphasis added) (Exhibit JPN-35).

⁴¹ United States’ Second Written Submission, paras. 10, 16; United States’ First Written Submission, para. 33.

⁴² Japan’s First Written Submission, para. 96. See also WT/DS322/22/Add.2 (emphasis added).

⁴³ See footnote 2, above.

WTO-inconsistent reviews “into conformity” with U.S. obligations.⁴⁴ Finally, it argues that, through both pre- and post-adoption subsequent reviews, “compliance was accomplished”.⁴⁵

28. The United States cannot, at once, seek credit under Articles 3.7, 19.1 and 21.5 of the DSU for measures it argues accomplish compliance, *regardless of when those measures were taken*, and at the same time, prevent the Panel from examining the WTO “consistency” of those measures, *because of when they were taken*.

29. In conclusion, the United States’ characterizations of the subsequent periodic reviews in relation to Articles 3.7, 19.1 and 21.5 present, at the very least, the type of atypical circumstances in which measures taken before adoption of the DSB’s recommendations and rulings should be considered “taken to comply”.

2. Subsequent periodic reviews post-dating adoption of the DSB’s recommendations and rulings are measures “taken to comply” even if not proximate to the date of declared measures taken to comply or the date of DSB adoption

30. The United States’ principal arguments concerning timing apply only to reviews 4 and 5, since reviews 6 and 9 were taken *after* adoption of the DSB’s recommendations and rulings. Nonetheless, the United States also argues that timing disqualifies reviews 6 and 9 from consideration as “measures taken to comply”, because they “did not occur around the same time as U.S. withdrawal of” the original reviews, and “did not closely correspond to the expiration of the RPT”.⁴⁶

31. On the first of these arguments, nothing in Article 21.5 requires that, to be considered as “taken to comply”, a measure must “occur around the same time as withdrawal” of an original measure. This consideration is simply not relevant.

32. On the second argument, nothing in Article 21.5 requires that, to be considered as “taken to comply”, a measure must “closely correspond to the expiration of the RPT”. It is noteworthy that the United States has itself successfully argued, in recent compliance proceedings in *EC – Bananas III*, that measures adopted nearly *seven years* after the end of

⁴⁴ United States’ First Written Submission, para. 54 (footnote 101).

⁴⁵ United States’ Second Written Submission, para. 18; United States’ First Written Submission, paras. 52, 67.

⁴⁶ United States’ Second Written Submission, para. 23; United States’ First Written Submission, para. 39.

the RPT are “measures taken to comply”.⁴⁷ The legal standard offered by the United States has *no* currency in the DSU. In any event, review 6 was adopted on 12 October 2007,⁴⁸ just two-and-a-half months before the end of the RPT on 24 December 2007. The determination date for review 6, therefore, did “closely correspond to” the end of the RPT.

C. The Four Subsequent Periodic Reviews Enjoy Close Substantive Connections to the Recommendations and Rulings of the DSB

33. Even if the Panel finds that the four subsequent periodic reviews are not effectively *declared* measures taken to comply, Japan has demonstrated that they are measures taken to comply by virtue of the *close substantive connections* they share with the DSB’s recommendations and rulings.⁴⁹

34. Specifically, Japan has noted that the subsequent reviews resulted from the *same type of USDOC anti-dumping proceedings* that were at issue in the original proceedings. Moreover, like several of the original reviews, they were conducted pursuant to the *same anti-dumping order* concerning ball bearings. As such, they all concern the *same subject product*, the *same exporting country* and, additionally, concern determinations made with respect to exports by the *same companies*.⁵⁰

35. Moreover, as we have already noted, the United States characterizes the subsequent periodic reviews as measures that “withdraw”, “supercede”, “eliminate”, “replace” and “remove” previous ball bearings reviews, in two senses.⁵¹ Each subsequent review establishes a cash deposit rate that replaces the cash deposit rate from the previous review; and each subsequent review determines the importer-specific assessment rate for entries initially subjected to the cash deposit rate from previous reviews.⁵²

36. The subsequent periodic reviews are, therefore, part of a chain of closely-connected measures that succeed each other year after year. Each successive measure in the chain both

⁴⁷ See WT/DS27/15 (RPT ended on 1 January 1999); Panel Report, *EC – Bananas III (Article 21.5 – US)*, para. 8.4 (Measure considered by the panel to be a measure “taken to comply” was adopted on 29 November 2005). See also Panel Report, *U.S. – FSC (21.5 II)*, paras. 1.1, 7.50 (Implementation period ended on 1 November 2000, while the Jobs Act, considered by the panel and the Appellate Body to be a measure “taken to comply”, was adopted nearly four years later, on 22 October 2004).

⁴⁸ Exhibit JPN-44.

⁴⁹ Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, para. 77 (emphasis added) (following discussion, at paras. 73-76, of the approach taken by the panels in *Australia – Salmon (21.5)* and *Australia – Leather (21.5)*). See Japan’s First Written Submission, paras. 66-76.

⁵⁰ Japan’s First Written Submission, paras. 90-93.

⁵¹ See footnotes 2-6, above.

⁵² Japan’s First Written Submission, para. 91.

impacts the U.S. implementation of the DSB’s recommendations and rulings, and *circumvents* implementation of those recommendations and rulings. Examining a similar chain of successive periodic reviews, the panel in *U.S. – Zeroing II (EC)* agreed that periodic reviews in such a chain were part of “the same subject matter” and “the same dispute”.⁵³ If the subsequent periodic reviews in these proceedings are not *declared* measures taken to comply, the Panel should make a similar finding.

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

37. Japan turns now to the United States’ actions with respect to the zeroing procedures. The Appellate Body concluded “that the ‘zeroing procedures’ under different comparison methodologies, and in different stages of anti-dumping proceedings, do not correspond to separate rules or norms, but simply reflect different manifestations of a single rule or norm”.⁵⁴ The zeroing procedures embody a rule or norm with a precise and unvarying substantive content – namely, the disregard of negative intermediate comparison results in the aggregation of an overall weighted average dumping margin.⁵⁵

38. The Appellate Body emphasized that this single rule did not become multiple rules simply because it applied “under different comparison methodologies, and in different stages of anti-dumping proceedings”.⁵⁶ To capture the WTO-inconsistency of this “single rule or norm” in its various “manifestations”, the DSB made four separate rulings regarding the zeroing procedures, addressing the application of those procedures in four different settings.⁵⁷

39. The United States has taken very limited action to implement these four rulings. Specifically, it narrowed the scope of application of the zeroing procedures to exclude weighted average-to-weighted average (“W-to-W”) comparisons in original investigations. The United States maintains the zeroing procedures in the three other “manifestations” or situations in which those procedures were found to be inconsistent with the United States’

⁵³ Panel Report, *U.S. – Zeroing II (EC)*, para. 7.28.

⁵⁴ Appellate Body Report, *U.S. – Zeroing (Japan)*, para. 88.

⁵⁵ See Panel Report, *U.S. – Zeroing (Japan)*, para. 7.53 (footnote 688).

⁵⁶ Appellate Body Report, *U.S. – Zeroing (Japan)*, para. 88.

⁵⁷ Japan’s Second Written Submission, para. 66.

WTO obligations. The precise substantive content of the zeroing procedures remains unchanged in these three situations.

40. Puzzlingly, the United States asserts that Japan has “de-constructed” the zeroing procedures so that they “consist of at least four different *measures*”.⁵⁸ This is fiction. Japan has consistently emphasized that the zeroing procedures were, and continue to be, a “single rule or norm” with precise and unvarying content. It is the United States that confounds the singularity of the zeroing rule with its *scope of application*. The scope of application – or what the Appellate Body termed the “manifestations” of the zeroing procedures – has changed from the original proceedings. However, the same singular measure, with the same, unvarying precise content, remains unchanged in *all* procedural settings in which it continues to be applied.

41. Lest there be any doubt that zeroing procedures with the same precise content still exist, Japan has provided considerable evidence demonstrating as much. That evidence shows that the United States expressly decided to discontinue the application of the zeroing procedures solely in W-to-W comparisons in original investigations, and expressly decided to maintain the zeroing procedures in all other settings.⁵⁹ U.S. courts have agreed.⁶⁰ The evidence also establishes that the United States has consistently applied the zeroing procedures in all other situations since the end of the RPT.⁶¹

42. Inexplicably, the United States does not address this evidence in any of its submissions. The United States has not offered one example of a determination in any of the three remaining situations subject to the DSB’s recommendations and rulings in which it has not applied the zeroing procedures.

43. In assessing the evidence, Japan recalls the Appellate Body’s admonition that “Article 21.5 proceedings do not occur in isolation from the original proceedings, but that both proceedings form part of a continuum of events.”⁶² In light of this “continuum of events”, the Appellate Body observed that “doubts could arise about the objective nature of an Article

⁵⁸ United States’ Second Written Submission, para. 87 and footnote 110 (emphasis added).

⁵⁹ See Japan’s Second Written Submission, paras. 82-93.

⁶⁰ See Japan’s Second Written Submission, paras. 94-96.

⁶¹ See Japan’s Supplemental Submission, para. 32; Japan’s Second Written Submission, paras. 98-102.

⁶² Appellate Body Report, *Chile – Price Band system (21.5)*, para. 136, citing Appellate body Report, *Mexico Corn Syrup (21.5)*, para. 121.

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.”⁶³

44. There is no relevant change to the underlying evidence to justify a conclusion that the United States has eliminated the zeroing procedures in the three remaining “manifestations” subject to the DSB’s recommendations and rulings. The unchallenged evidence demonstrates that the United States has maintained the zeroing procedures in those three remaining manifestations with the same, unvarying precise content found in the original proceedings. The United States has done nothing more than eliminate one manifestation of a single rule or norm, the singularity of which does not, as unambiguously emphasized by the Appellate Body, depend on its scope of application.⁶⁴

45. Finally, even if the Panel were to conclude that the original zeroing procedures have been withdrawn through a narrowing of their scope of application, the evidence shows that they were simultaneously replaced by new zeroing procedures, with exactly the same precise content, applying in all situations addressed by the DSB’s recommendations and rulings, except W-to-W comparisons in original investigations.

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

1. The United States Must “Bring” the Importer-Specific Assessment Rates “Into Conformity” with its WTO Obligations

46. With respect to the five original periodic reviews, the disagreement between the Parties concerns the U.S. failure to bring the importer-specific assessment rates into conformity with its WTO obligations. The United States argues that it need not bring these rates into conformity, because such action would impose a “retrospective” remedy given that the rates were established in the past, and relate to past entries.⁶⁵ Japan, in contrast, contends that modifying the rates involves “prospective” implementation, because it affects future U.S. actions taken pursuant to the original reviews.

47. In Japan’s view, the words “retrospective” and “prospective” do not assist the Panel in resolving the interpretive question before it. Neither the DSU nor the *Anti-Dumping*

⁶³ Appellate Body Report, *U.S. – Softwood Lumber VI (21.5)*, para. 103.

⁶⁴ Appellate Body Report, *U.S. – Zeroing (Japan)*, para. 88 (“[T]he ‘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”).

⁶⁵ See, e.g., United States’ First Written Submission, paras. 53 and 58.

Agreement uses these words to describe a Member’s implementation requirements. Instead, they are merely labels, used informally to describe the effect of relief available in WTO law. The Panel is not, therefore, called upon to interpret either of these labels under the *Vienna Convention*, much less apply them to the facts. The ordinary meaning of the word “retrospective” is, therefore, no more relevant than the ordinary meaning of the word “prospective”. Equally, non-existent treaty words do not have context, or object and purpose.

48. Instead, the Panel must interpret and apply the treaty words to which the Members agreed. Consistent with Articles 19.1, 22.1, 22.2 and 22.8 of the DSU, the DSB recommended that the United States “bring [the five periodic reviews] *into conformity*” with its WTO obligations. The DSB’s recommendations and rulings apply to the importer-specific assessment rates because the Appellate Body expressly found that these rates were WTO-inconsistent.⁶⁶ The importer-specific assessment rates must, therefore, be “br[ought] into conformity” with WTO law.

49. The ordinary meaning of the verb “bring” is “to cause to come *from, into, out of, to,* etc. a certain state or condition” and “to cause to become”.⁶⁷ This verb, therefore, connotes *transformative action* by the implementing Member that changes the “state” of a measure. The immediate context of the verb in the DSU shows that the action must transform the measure into a state of “conformity” with WTO law. This meaning is confirmed by the Appellate Body’s statement that an implementing Member must take transformative action “by modifying or replacing [the WTO-inconsistent measure] with a revised measure”.⁶⁸

50. The context also supports this meaning. Article 3.7 of the DSU states that, absent a mutually agreed solution, the first objective of dispute settlement is “withdrawal” of the WTO-inconsistent measure. Although Japan does not insist on “withdrawal”, this language shows that dispute settlement aims at the termination of the WTO inconsistency. Also, Article 22.2 envisages retaliation by the complainant *solely* in the event that a measure is *not* brought into conformity, demonstrating again that the first aim of implementation is to transform the measure at issue into a state of WTO-consistency by the end of the RPT.

⁶⁶ Appellate Body Report, *U.S. – Zeroing (Japan)*, para. 175.

⁶⁷ Definition of “to bring”, *The Oxford English Dictionary*, J.A. Simpson and E.S.C. Weiner (eds.) (Clarendon Press, 1989, 2nd ed.), Volume II, page 555 (1st column, numbered 8) (original italics). Exhibit JPN-69.

⁶⁸ Appellate Body Report, *U.S. – OCTG from Argentina (21.5)*, para. 173 (footnote 367) (emphasis added).

51. This interpretation promotes the object and purpose of the covered agreements. According to Article 3.2 of the DSU, dispute settlement is a “central” feature of the multilateral trading system, serving to “preserve the rights and obligations of Members” through the rule of law. It does so by providing a forum for Members, through the DSB, to rule that a Member’s measures are WTO-inconsistent, and to recommend action by that Member to revise its inconsistent measures. Implementation action terminates the WTO-inconsistency and the resulting nullification or impairment, thereby maintaining the “balance” of the Members’ rights and obligations, as required by Article 3.3.

52. If a Member is allowed to continue enforcing a WTO-inconsistent measure after the end of the implementation period, the goal of dispute settlement is eviscerated. The DSB’s recommendations and rulings are rendered “essentially declaratory in nature”;⁶⁹ one Member is permitted to continue violating its obligations *in the knowledge of that violation*; and another Member continues to suffer nullification or impairment as a result. Japan urges the Panel to reject this absurd interpretation of the term “bring into conformity”.

53. Timing is, of course, relevant to implementation. Pursuant to Article 21.3 of the DSU, where it is “impracticable to comply immediately”, an implementing Member is given a reasonable period of time. However, by the end of that period, a measure must be WTO-consistent, so that it applies in a WTO-consistent fashion, and does not nullify or impair benefits.

2. The United States’ Arguments that Implementation Would Be Retrospective Are Misplaced

54. The dangers of relying on non-treaty labels, such as the words “retrospective” and “prospective”, are evident in the U.S. arguments. The United States rejects Japan’s view that implementation is “prospective” on the grounds that Japan’s argument would require Commerce to “recalculate the final liability” in the five original reviews.⁷⁰ The United States attaches great significance to Japan’s use of the prefix “re” in the word “recalculate”.⁷¹ In essence, the United States argues that revising a WTO-inconsistent measure involves retrospective implementation because a Member’s determinations in adopting the original measure must be “re-calculated”.

⁶⁹ Appellate Body Report, *U.S. – Upland Cotton (21.5)*, paras. 245-246.

⁷⁰ United States’ Second Written Submission, para. 47.

⁷¹ United States’ Second Written Submission, para. 47.

55. If accepted, this argument would routinely excuse WTO Members from the duty to implement, because bringing a measure into conformity inevitably involves a *re*-vision of the original measure, for example, through a *re*-calculation or *re*-determination by an executive agency, or a *re*-enactment by parliament. Indeed, this process of “*re*”-vising a measure, by the end of the RPT at the latest, is the very essence of *prospective* implementation which, as the Appellate Body observed, results in “a *revised* measure”.⁷²

56. The United States’ objections to the “*re*”-vision of WTO-inconsistent measures would, again, eviscerate WTO dispute settlement. Simply by tagging the “*re*”-vision of a measure as “retrospective” implementation, Members could: maintain and enforce WTO-inconsistent measures after the end of the RPT; continue to nullify and impair benefits; and perpetuate an imbalance in the Members’ rights and obligations. This untenable interpretation should be dismissed.

3. Implementation Action Is Required When Measures Continue to Produce Legal Effects

57. In a very small minority of disputes, panels and the Appellate Body have condoned inaction by the respondent through a decision *not* to recommend that a measure be brought into conformity. In short, no recommendation is made if the measure at issue has already been withdrawn, and the measure does not produce continuing legal effects that nullify or impair benefits.⁷³ However, in cases where the WTO-inconsistent measure continues to produce WTO-inconsistent legal effects, panels require that the measure be brought into conformity.

58. Japan has already referred to *EC – Commercial Vessels*, in which the panel insisted that the EC was obliged to take action to implement the DSB’s recommendations and rulings with respect to WTO-inconsistent measures “to the extent that [they] *continue to be operational*”.⁷⁴

59. A similar conclusion was reached in *India – Autos*. In that dispute, India subjected the importation of automotive products to the fulfillment of certain WTO-inconsistent conditions. Among others, importation was conditioned on an agreement by importers to

⁷² Appellate Body Report, *U.S. – OCTG from Argentina (21.5)*, para. 173 (footnote 367) (emphasis added).

⁷³ See, for example, Appellate Body Report, *U.S. – Certain EC Products*, para. 81; Panel Report, *Dominican Republic – Cigarettes*, para. 419.

⁷⁴ Panel Report, *EC – Commercial Vessels*, para. 8.4 (emphasis added).

export a minimum amount of production. India withdrew the original measures such that *new* imports were no longer subject to the WTO-inconsistent restrictions. India argued that there was, therefore, no duty to implement, because the measures had been withdrawn, and *new* entries were not subject to restrictions.⁷⁵

60. Focusing on the *continuing legal effects* of the original measures, the panel rejected this view. Although the original measures no longer applied to new entries, India continued to “execute” certain past measures, namely individual “as applied” agreements with importers or MOUs.⁷⁶ Under these measures, because a right to import had accrued, importers had undertaken WTO-inconsistent export conditions.⁷⁷ India indicated that it would continue to enforce these past “as applied” measures.⁷⁸

61. The panel indicated that the duty to bring a WTO-inconsistent measures into conformity does *not* arise if past measures “have *ceased to have an effect*”.⁷⁹ It noted, though, that the past “as applied” measures at issue “remain[ed] binding and enforceable”,⁸⁰ and concluded:

The essential issue here is that the [restrictive condition] foreseen in [the past measures], which was found to be inconsistent, continues to be binding and to produce effects This issue does not relate to whether any *past execution of* [the past measures] might be required to be “undone” or otherwise called into question, but merely to establishing whether the measure previously found to be in violation of two of the GATT provisions continues to have an existence today, so that the Panel would be justified in making a recommendation that this measure be brought into conformity with the relevant agreement as of today.⁸¹

62. There are very close parallels between the five periodic reviews at issue in these proceedings and the measures in *India – Autos*. In both cases, the respondent argued that no implementation was required because the WTO-inconsistent measures had been withdrawn with respect to *new* entries. As the United States puts it in these proceedings, its duty to implement should similarly concern solely *new* entries.

⁷⁵ Panel Report, *India – Autos*, paras. 8.4 and 8.5.

⁷⁶ See Panel Report, *India – Autos*, para. 3.2 for the U.S. explanation of the measures, and paras. 7.251-7.253 for the Panel’s finding that the individual “as applied” agreements are “measures”.

⁷⁷ Panel Report, *India – Autos*, paras. 7.24 and 8.55.

⁷⁸ Panel Report, *India – Autos*, paras. 7.24 and 8.55.

⁷⁹ Panel Report, *India – Autos*, para. 8.26.

⁸⁰ Panel Report, *India – Autos*, para. 7.235.

⁸¹ Panel Report, *India – Autos*, para. 8.58 (underlining added).

63. However, in language strongly echoing Japan’s arguments, the panel disagreed, upholding the arguments of the United States (and the European Communities), as complainant. In particular, the panel held that the duty to implement turns on whether past “as applied” measures continue to be “binding”, “enforceable” and “to produce effects”. If so, implementation action is required.

64. In *India – Autos*, the continuing legal effects consisted in the future “execution” or enforcement of WTO-inconsistent “as applied” measures, and not “past execution”. In these proceedings, the continuing legal effects of the five periodic reviews consists in the future “execution” or enforcement of WTO-inconsistent importer-specific assessment rates, also in “as applied” measures, and not the “past execution” of those rates in connection with entries for which duties have already been collected.

65. In both disputes, the legal conclusion is the same. In *India – Autos*, India had to bring the “as applied” measures into conformity with its WTO obligations to ensure that the future enforcement of the measures was WTO-consistent. In these proceedings, because the WTO-inconsistent importer-specific assessment rates continue to be binding, enforceable and produce legal effects, the respondent must bring them into conformity, thereby terminating the WTO violation and the resulting nullification or impairment.

66. *India – Autos* involved claims under Articles III and XI of the GATT 1994; however, nothing in the *Anti-Dumping Agreement* or the DSU warrants a different outcome. In particular, there are no “special or additional rules and procedures” in the *Anti-Dumping Agreement* that justify excusing the United States from the requirement to bring measures that continue to produce legal effects into conformity with WTO law.

4. The United States Continues to Nullify or Impair Benefits Through the Collection of Excessive Anti-Dumping Duties After the End of the RPT

67. In these proceedings, the five original periodic reviews were found to be inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994. The obligations in these provisions relate to the amount of anti-dumping duties that may be collected by an importing Member.

68. As the Appellate Body put it, these provisions “ensure that the total amount of anti-dumping duties collected on the entries of a product from a given exporter” does not exceed

the exporter's margin of dumping.⁸² It also said that this margin of dumping “operates as a *ceiling* for the total amount of anti-dumping duties that can be *levied* on the entries of the subject product”.⁸³ The Appellate Body's interpretation is confirmed by the title of Article 9, which states that the provision deals with the “*Imposition and Collection of Anti-Dumping Duties*”.

69. The United States expressly states that it agrees with this interpretation:

The United States does not dispute that Article 9.3 of the AD Agreement obliges Members to ensure that *the amount of antidumping duty collected not exceed the margin of dumping* established under Article 2 of the AD Agreement.⁸⁴

70. Pursuant to this interpretation, irrespective of the date a periodic review is completed, Article 9.3 and Article VI:2 discipline a Member's actions in *collecting* duties. Moreover, the benefits that accrue to Japan under this provision concern the amount of the anti-dumping duties actually collected.

71. In these proceedings, the importer-specific assessment rates continue to be binding and enforceable, and continue to produce legal effects, after the end of the RPT. After that date, the United States will take enforcement actions to collect anti-dumping duties in excess of the margin of dumping. By collecting excessive duties, the United States violates Article 9.3 and Article VI:2, and nullifies or impairs benefits accruing to Japan under those provisions.

72. Furthermore, as we will discuss a little later, the U.S. enforcement actions are distinct measures that also nullify or impair benefits under Article II of the GATT because, through these measures, the United States imposes duties at rates in excess of its tariff bindings.

⁸² Appellate Body Report, *U.S. – Zeroing (EC)*, para. 130, and Appellate Body Report, *U.S. – Zeroing (Japan)*, para. 155.

⁸³ Appellate Body Report, *U.S. – Zeroing (EC)*, para. 130, and Appellate Body Report, *U.S. – Zeroing (Japan)*, para. 155 (underlining added).

⁸⁴ United States' Second Written Submission, para. 64.

5. Actions by U.S. Courts Do Not Excuse the United States From the Requirement to Bring the Five Original Periodic Reviews into Conformity

73. The United States argues that the importer-specific assessment rates in the five original periodic reviews need not be “brought into conformity”, even though they continue to produce legal effects, because enforcement was delayed until after the end of the RPT due to injunctions issued in domestic litigation.⁸⁵ Specifically, because duties collected *after* the end of the RPT would have been collected *before* that date but for the injunctions, the United States argues that it is absolved of its obligation to bring the original periodic reviews into conformity.

74. On the U.S. view, bringing the original periodic reviews into conformity with U.S. obligations in these circumstances would amount to using “U.S. litigation to *alter*” rights and obligations under the covered agreements.⁸⁶ To support this argument, the United States argues that, although judicial review of periodic reviews is offered in U.S. law, it is “not provided for by the terms of” the *Anti-Dumping Agreement*.⁸⁷

75. Japan disagrees. In fact, all Members must provide judicial review of anti-dumping determinations under Article 13 of the *Anti-Dumping Agreement*. Moreover, the *Agreement* specifically envisions the possibility that judicial proceedings required by Article 13 may delay enforcement of a periodic review.⁸⁸ There is no justification for absolving the United States of the requirement to bring WTO-inconsistent periodic reviews into conformity because judicial review required by the *Anti-Dumping Agreement* leads to delays specifically envisioned by the *Agreement*.

76. Further, the United States is asking the Panel to disregard the court injunctions in deciding whether the original reviews continue to produce legal effects after the end of the RPT. In essence, because the continuing legal effects stem from court injunctions, the United States invites the Panel to pretend that liquidation had occurred before the end of the RPT, and that the reviews have no post-RPT legal effects.

⁸⁵ United States’ Second Written Submission, paras. 51-56.

⁸⁶ United States’ Second Written Submission, para. 51.

⁸⁷ United States’ Second Written Submission, para. 56.

⁸⁸ See *Anti-Dumping Agreement*, footnote 20, which refers to the possibility of delays, as a result of domestic judicial proceedings, with respect to all the deadlines in Article 9.3.

77. However, the status of a measure under domestic law – including the “existence of domestic litigation” affecting that measure – is a fact.⁸⁹ In making an objective assessment of the matter, panels must rule upon measures as they stand, without distorting any facts – such as court injunctions – that do not suit one party.

78. *Brazil – Tyres* provides an illustration. In that dispute, the enforcement of the measure at issue was partially suspended pursuant to court injunctions obtained by private parties in domestic courts. Contrary to the approach advocated by the United States, both the panel and the Appellate Body assessed the measure in light of this fact. The panel and the Appellate Body held that Brazil’s measure could not benefit from an exception under Article XX of the GATT 1994 *because of the court injunctions*.⁹⁰ According to the panel, the fact that Brazil’s partial suspension of the measure “arise[s] from court rulings does not exonerate Brazil from its obligation to comply with the requirements of Article XX”.⁹¹ Neither the panel nor the Appellate Body considered that Brazil’s rights under Article XX had thereby been impermissibly “alter[ed]”⁹² due to domestic litigation commenced by private parties, as the United States suggests here. Ruling upon the facts as they stand neither adds to nor diminishes a Member’s rights and obligations.

79. The United States insinuates that it cannot be held responsible for actions by “private enterprises”.⁹³ However, the court injunctions do not involve acts by private enterprises. Instead, they are acts of the United States’ own courts, attributable to the United States under WTO law. As noted by the Appellate Body in *U.S. – Shrimp*, the United States “bears responsibility for acts of all its departments of government, *including its judiciary*”.⁹⁴ In other words, any delay in the collection of duties under the original periodic reviews is attributable to the United States, and the United States bears any consequences of its decisions to delay duty collection.

80. Japan also notes that a decision by a U.S. court to issue an injunction is not taken frivolously, but only after determining “that there is a likelihood of success on the merits”.⁹⁵

⁸⁹ United States’ Second Written Submission, para. 51.

⁹⁰ Appellate Body Report, *Brazil – Tyres*, para. 252.

⁹¹ Panel Report, *Brazil – Tyres*, para. 7.305.

⁹² United States’ Second Written Submission, para. 51.

⁹³ United States’ Second Written Submission, para. 56.

⁹⁴ Appellate Body Report, *U.S. – Shrimp*, para. 173 (emphasis added). *See also* Panel Report, *Brazil – Tyres*, para. 7.305, *citing* Article 4(1) of the *ILC Articles* (Exhibit JPN-65).

⁹⁵ U.S. Court of Appeals for the Federal Circuit, *Zenith Radio Corp. v. United States*, 710 F.2d 806 (Fed. Cir. 1983), at 809 (Exhibit JPN-70). *See also* Nies J., concurring, at 812.

The United States surely does not suggest that it is frivolous for private parties to seek to enjoin enforcement of – let us recall – *WTO-inconsistent* periodic reviews.

81. There is nothing frivolous about such litigation, nor about delaying the collection of duties pending the outcome of that litigation. Interested parties incurred considerable expense in pursuing these judicial proceedings, which included challenges to the use of zeroing.⁹⁶ In some instances, parties have pursued their argument that the United States must implement its zeroing-related WTO obligations in domestic law all the way to the U.S. Supreme Court.⁹⁷

82. In sum, it is a fact that the United States' own courts have decided to suspend enforcement of the original periodic reviews. The Panel must assess the reviews in light of that fact. The United States is not “exonerate[d]”⁹⁸ from the requirement to bring the WTO-inconsistent reviews into compliance with its obligations where its own actions lead to the collection of duties after the end of the RPT.

6. The ILC Articles on State Responsibility Confirm Japan's Position

83. We turn now to the *ILC Articles on State Responsibility*. The United States considers that “it is not at all clear what provisions of the DSU or the other covered agreements Japan is seeking to clarify by reference to the ILC Articles”.⁹⁹ If there was any doubt, Japan is happy to clarify that it uses the *ILC Articles* to inform its interpretation of Article 19.1 of the DSU, which requires the United States to “bring the measure[s] into conformity” with its WTO obligations by the end of the RPT.¹⁰⁰

⁹⁶ Raised by _____ in Review (1), 341 F. Supp. 2d 1334 (CIT 2004), 210 Fed. Appx. 992 (Fed. Cir. 2006) and _____'s brief before the Court of Appeals for the Federal Circuit (June 27, 2005), 128 S. Ct. 486 (U.S. 2007) and _____'s petition for certiorari before the Supreme Court (June 6, 2007), joined by _____ (Exhibits JPN-71.A, JPN-71.B, JPN-71.C, JPN-71.D and JPN-71.E); raised by _____ in Review (2), 128 S. Ct. 1121 (U.S. 2008) and _____'s petition for certiorari before the Supreme Court (September 28, 2007) (Exhibits JPN-72.A and JPN-72.B); raised by _____, _____ and _____ in Review (3), 416 F. Supp. 2d 1334 (CIT 2006), and 510 F.3d 1375 (Fed. Cir. 2007) (Exhibits JPN-73.A and JPN-73.B); and raised by _____ in Review (7), 341 F. Supp. 2d 1334 (CIT 2004), 210 Fed. Appx. 992 (Fed. Cir. 2006) and _____'s brief before the Court of Appeals for the Federal Circuit (June 27, 2005), 128 S. Ct. 486 (U.S. 2007) and _____'s petition for certiorari before the Supreme Court (June 6, 2007), joined by _____ (Exhibits JPN-71.A, JPN-71.B, JPN-71.C, JPN-71.D and JPN-71.E).

⁹⁷ See _____'s and _____'s joint petition for certiorari before the Supreme Court in connection with Reviews (1) and (7) (Exhibit JPN-71.E); and _____'s petition for certiorari before the Supreme Court in connection with Review (2) (Exhibit JPN-72.B).

⁹⁸ See Panel Report, *Brazil – Tyres*, para. 7.305.

⁹⁹ United States' Second Written Submission, para. 67.

¹⁰⁰ Japan's Second Written Submission, paras. 148-170.

84. Specifically, Japan relies on Articles 13, 14 and 15 of the *ILC Articles*, which set forth rules on the *moment in time* when an act breaches an international obligation (e.g., whether a new breach occurs after the end of the RPT), and on the *extension in time* of that breach (e.g., whether a breach continues after the end of the RPT). These temporal rules show that U.S. duty collection actions, taken after the end of the RPT pursuant to the five original reviews, involve either the *commission of a new breach of WTO obligations*, or the *continuation of an existing breach of WTO obligations*, in both cases on the basis of the original reviews.

85. The *ILC Articles*, therefore, confirm that implementation action to “bring the measure[s] into conformity”, with *prospective effect* from the end of the RPT, was essential to prevent *post-RPT conduct*, under the original measures, from giving rise to WTO-inconsistencies that *occurred newly or continued after the end of the RPT*. As a result, the *Articles* confirm that, absent prospective implementation action, the original reviews have ongoing legal effects after the end of the RPT, resulting in violations of WTO law at that time, with continued nullification or impairment of benefits.

86. The United States raises two objections to Japan’s use of the *ILC Articles*. *First*, it argues that the *ILC Articles* are irrelevant because they are “trump[ed]” by “the specific WTO provisions” on dispute settlement.¹⁰¹ However, the United States fails to identify which “specific WTO provisions” “trump” Articles 13, 14 and 15 of the *ILC Articles*. In any event, Japan is unaware of any rules in the covered agreements that address the particular temporal issues covered by these provisions of the *ILC Articles*, far less conflict with them.¹⁰²

87. *Second*, the United States argues that the *ILC Articles* cannot be used to “support” the interpretation of the covered agreements.¹⁰³ This argument is belied by the fact that the Appellate Body, panels and arbitrators have frequently relied on the *ILC Articles* to support the interpretation of the covered agreements.¹⁰⁴ In these decisions, the *ILC Articles* have

¹⁰¹ United States’ Second Written Submission, para. 70.

¹⁰² Appellate Body Report, *Guatemala – Cement I*, paras. 65-66 (the Appellate Body held that a conflict between two provisions occurs only where the provisions are “mutually inconsistent”, in the sense that “adherence to the one provision will lead to a violation of the other provision”).

¹⁰³ United States’ Second Written Submission, para. 67.

¹⁰⁴ Appellate Body Report, *U.S. – Cotton Yarn*, para. 120; Appellate Body Report, *U.S. – CVDs on DRAMS*, para. 112, footnote 179, and para. 116, footnote 188; Appellate Body Report, *U.S. – Line Pipe*, para. 259; Panel Report, *Australia – Salmon (21.5)*, para. 7.12, footnote 146; Panel Report, *Brazil – Tyres*, para. 7.305, footnote 1480; Panel Report, *Canada – Dairy*, para. 7.77, footnote 427; Panel Reports, *EC – Bananas III (Ecuador)*, *EC – Bananas III (Guatemala and Honduras)*, *EC – Bananas III (Mexico)* and *EC – Bananas III (US)*, para. 7.50, footnote 361; Panel Report, *Korea – Procurement*, para. 6.5, footnote 683; Panel Report, *Mexico – Soft Drinks*, para. 8.180; Panel Report, *Turkey – Textiles*, paras. 9.42-9.43; Panel Report, *U.S. – Certain EC Products*, para.

been cited as “rules of general international law”,¹⁰⁵ and as reflective of “customary international law”.¹⁰⁶ The official *Commentary* to the *ILC Articles* states that the *Articles* codify the rules of international law concerning State responsibility.¹⁰⁷ Arbitrators have also described the ILC’s work on State responsibility as “based on relevant State practice as well as on judicial decisions and doctrinal writings, which constitute recognized sources of international law”.¹⁰⁸

88. Articles 13, 14 and 15 of the *ILC Articles* are, therefore, “rules of international law” under Article 31(3)(c) of the *Vienna Convention* that, as Japan has just outlined,¹⁰⁹ are “relevant” in interpreting Article 19.1 of the DSU. Articles 13, 14 and 15 of the *ILC Articles* could also be used to inform the “ordinary meaning” of Article 19.1 under Article 31(1) of the *Convention*, and may even be more pertinent than dictionaries.¹¹⁰

7. Japan’s Interpretation Places All Duty Collection Systems on an Equal Footing

89. The United States continues to argue that an obligation to revise an importer-specific assessment rate would “create[] inequalities between retrospective and prospective antidumping systems”.¹¹¹ Japan has already explained that, under its interpretation, the implementation of the DSB’s recommendations and rulings operates in exactly the same way in both systems.¹¹²

6.23, footnote 100; Panel Report, *U.S. – Gambling*, para. 6.128; Decision by the Arbitrator, *Brazil – Aircraft* (22.6), para. 3.44; Decision by the Arbitrator, *EC – Bananas III (U.S.)* (22.6), para. 6.16, footnote 67; Decision by the Arbitrator, *U.S. – FSC* (22.6), para. 5.26, footnote 52, paras. 5.58-5.60 and footnote 68.

¹⁰⁵ Appellate Body Report, *U.S. – Cotton Yarn*, para. 120, and Panel Report, *Australia – Salmon* (21.5), para. 7.12, footnote 146

¹⁰⁶ Appellate Body Report, *U.S. – Line Pipe*, para. 259 (“Although Article 51 is part of the International Law Commission’s Draft Articles, which do not constitute a binding legal instrument as such, this provision sets out a *recognized principle of customary international law*.”) (emphasis added); Panel Report, *U.S. – Gambling*, para. 6.128; and Panel Report, *Canada – Dairy*, para. 7.77, footnote 427. *See also* Panel Report, *Korea – Government Procurement*, para. 7.96. (“Customary international law applies generally to the economic relations between the WTO Members. Such international law applies to the extent that the WTO treaty agreements do not ‘contract out’ from it. To put it another way, to the extent there is no conflict or inconsistency, or an expression in a covered WTO agreement that implies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO.”)

¹⁰⁷ *Commentaries on Articles on Responsibility of States for internationally Wrongful Acts*, General Commentary, para. 1 (Exhibit JPN-66).

¹⁰⁸ Award of the Arbitrator, *U.S. – FSC* (22.6), para. 5.59, footnote 68; Award of the Arbitrator, *Brazil – Aircraft* (22.6), para. 3.44.

¹⁰⁹ *See* paras. 83 and 85 above.

¹¹⁰ *See* Appellate Body Report, *U.S. – Shrimp*, paras. 130-131, where international law norms were used in a general way to inform ordinary meaning, with reference to the *Vienna Convention*.

¹¹¹ United States’ Second Written Submission, heading III.A.1.

¹¹² Japan’s Second Written Submission, paras. 171-179.

90. Specifically, whenever a WTO-inconsistent measure continues to produce legal effects after the end of the RPT, it must be brought into conformity with WTO law. This same obligation applies to all Members, irrespective of the duty collection system they operate. Accordingly, although the domestic legal mechanisms for duty collection may differ from country to country, every Member must revise a periodic review found to be WTO-inconsistent, if it will enforce the results of the review after the end of an RPT accorded to bring the measure into conformity.

91. The United States argues that “Japan provides *no evidence*” to support its legal interpretation.¹¹³ Japan does not understand the relevance of this argument, because the burden of proof does not apply to questions of *legal interpretation*.¹¹⁴ The Panel does not decide such questions on the basis of the relative strength of the Parties’ evidence, but on the basis of the Panel’s knowledge of the law.

92. In any event, the only evidence cited by the United States comes from the practice of the European Communities.¹¹⁵ The United States has not suggested that this practice constitutes “subsequent practice” under the *Vienna Convention*. It is, therefore, not relevant to the Panel’s interpretation. Further, notwithstanding the U.S. arguments, the European Communities agrees with Japan.¹¹⁶

8. The United States’ Arguments Reduce Article 9.3 of the *Anti-Dumping Agreement* to Inutility

93. In closing this part of Japan’s statement, Japan would like to reiterate that the U.S. position reduces Article 9.3 of the *Anti-Dumping Agreement* to a nullity.¹¹⁷ In short, an importing Member can totally ignore the constraints in Article 9.3, safe in the knowledge that there is *never* an enforceable obligation to bring the measure into conformity with its obligations. Instead of imposing effective disciplines, Article 9.3 would be little more than a blank cheque for anti-dumping authorities to collect however much anti-dumping duties they wish.

¹¹³ United States’ Second Written Submission, para. 44.

¹¹⁴ Appellate Body Report, *EC – Tariff Preferences*, paragraph 105 (footnote 220); Panel Report, *EC – Export Subsidies on Sugar*, para. 7.121.

¹¹⁵ United States’ Second Written Submission, para. 44.

¹¹⁶ European Communities’ Third Party Submission, para. 46-50 (“In the EC’s view, *prospective implementation* of the DSB’s recommendations implies that, after the end of the reasonable period, a WTO Member is prevented from taking positive acts which are diametrically contrary to the adopted DSB report”)

¹¹⁷ See, e.g., Japan’s Second Written Submission, paras. 6, 55, 112-119, 136, and 180.

94. The United States’ response merely confirms that it nullifies Article 9.3. It contends that effective implementation under Article 9.3 is ensured because the *cash deposit rate* established in the original reviews has been withdrawn by the cash deposit rate established in subsequent periodic reviews.¹¹⁸ This argument is flawed for two reasons.

95. *First*, the subsequent reviews – by which the United States says “compliance was accomplished”¹¹⁹ – are WTO-inconsistent for exactly the same reasons as the original reviews. For example, the latest *cash deposit rate*, adopted in the 06/07 review, was calculated using zeroing – just like the original cash deposit rates. In other words, despite alleging that “compliance was accomplished”,¹²⁰ *nothing has changed*. New entries are subject to a cash deposit rate calculated with zeroing. (On the U.S. view, though, none of the subsequent reviews can be addressed in these proceedings, *even though they allegedly “accomplished”*¹²¹ *compliance*.)

96. *Second*, and much more importantly, the United States argues that the importer-specific assessment rates need *never* be revised because they do not apply to new entries. This is a crucial failing because, whereas the cash deposit merely reflects a *provisional liability* for duties, the importer-specific assessment rate determines how much money is finally *collected* by way of anti-dumping duties.¹²²

97. In that regard, Japan and the United States agree that “Article 9.3 of the AD Agreement obliges Members to ensure that *the amount of antidumping duty collected not exceed the margin of dumping*”.¹²³ In other words, the U.S. argument that implementation under Article 9.3 can be “accomplished” by withdrawing *cash deposit rates* ignores *the* key obligation in Article 9.3. Indeed, despite arguing that it can comply by withdrawing cash deposits, *the United States does not even believe that cash deposits are anti-dumping duties subject to Article 9.3*.¹²⁴

98. In any event, implementation action with respect to initial cash deposit rates can *never* secure compliance with the obligations in Article 9.3 regarding *the amount of duties finally*

¹¹⁸ See, e.g., United States’ Second Written Submission, paras. 45 and 63.

¹¹⁹ United States’ Second Written Submission, para. 18.

¹²⁰ United States’ Second Written Submission, para. 18.

¹²¹ United States’ Second Written Submission, para. 18.

¹²² See Japan’s Second Written Submission, para. 125 ff.

¹²³ United States’ Second Written Submission, para. 64. See para. 69 above.

¹²⁴ United States’ First Written Submission, para. 61. See also Appellate Body Report, *U.S. – Customs Bond Directive*, para. 239.

collected (unless no periodic review occurs). Even if a WTO-consistent cash deposit rate were to apply at the time of importation, much higher duties could be subsequently collected on the basis of a WTO-inconsistent importer-specific assessment rate.

99. In sum, although the United States acknowledges that Article 9.3 disciplines “the amount of antidumping duty collected”,¹²⁵ it seeks to reduce those disciplines to redundancy. On the U.S. view, a Member can continue to collect any amount of anti-dumping duties it wishes, without legal constraint in WTO law, even after the end of the RPT. The only constraint suggested by the United States applies to *cash deposit rates*, which has no bearing whatsoever on the amount of duties finally collected, and is not the focus of the obligations in Article 9.3.

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

100. In relation to the substance of Japan’s claims that four subsequent periodic reviews are inconsistent with the *Anti-Dumping Agreement* and the GATT 1994, we note only that the United States’ defense rests entirely on its jurisdictional arguments.¹²⁶ That is, the United States asserts that the Panel cannot examine these reviews. However, it does not argue that any of the reviews are consistent with its WTO-obligations; nor does it dispute that the USDOC used the zeroing procedures in any of these reviews.

101. In connection with reviews 4, 5, and 6, Japan takes this opportunity to submit the USDOC’s Issues and Decisions Memoranda as Exhibits JPN-74, JPN-75, and JPN-76. In these memoranda, the USDOC expressly confirms the use of zeroing, rejecting the respondents’ requests for it to abandon zeroing. Japan has already provided the Issues and Decisions Memorandum for the 06/07 review as Exhibit JPN-67.B, which confirms the use of zeroing in that review. Japan also hereby requests, pursuant to Article 13.1 of the DSU, that the Panel ask the United States to confirm whether it used zeroing in the these four subsequent periodic reviews.

¹²⁵ United States’ Second Written Submission, para. 64.

¹²⁶ United States’ Second Written Submission, para. 79.

D. Liquidation Notices and Instructions Are Inconsistent with Article II of the GATT 1994

102. Japan claims that United States' liquidation notices and instructions, issued pursuant to four original periodic reviews (numbers 1, 2, 7, and 8), are inconsistent with Article II:1(a) of the GATT 1994. The United States argues that these claims should not be addressed because Japan "failed to request findings" from the Panel under Article II, and because these claims are "entirely derivative".¹²⁷ These are yet more arguments trying to shield the United States' failure to implement the DSB's recommendations and rulings from scrutiny.

103. *First*, there is no requirement in the DSU for a Member to "request findings" in its submissions to the Panel. A complainant must identify the measures at issue and claims in its panel request, which Japan did; and it must make argument and provide evidence, which Japan has done and continues to do. In any event, if such a request is necessary, Japan hereby requests a finding under Article II of the GATT 1994.

104. *Second*, like "any act or omission" attributable to a Member,¹²⁸ the United States' liquidation instructions and notices are "measures". To accompany Exhibit JPN-40.A, Japan provides evidence of the liquidation measures taken since the end of the RPT in Exhibits JPN-77 to JPN-87.¹²⁹ Japan's Article II claims in connection with these measures are not "derivative", because they challenge separate measures with respect to a violation of separate WTO obligations.

105. Notably, whereas the four original periodic reviews were all adopted before the original panel proceedings began, the liquidation measures were all adopted after the end of the RPT. This shows that the measures involve separate acts of the United States. The content of the measures also differs, because the liquidation measures are the acts by which the United States collects or levies the excessive duties, whereas the periodic reviews established *rates* at which duties would be subsequently collected or levied.

¹²⁷ United States' Second Written Submission, para. 75.

¹²⁸ Appellate Body Report, *U.S. – Zeroing (EC)*, para. 188.

¹²⁹ In Exhibits JPN-77 to JPN-87, and JPN-40.A. Japan provides USDOC liquidation instructions to USCBP (Exhibits JPN-77 to JPN-80) and USCBP notices of liquidation (Exhibits JPN-81 to JPN-87) for anti-dumping duties collected by USCBP pursuant to reviews (1), (2), (7) and (8). In Exhibits JPN-88 and JPN-89, Japan also provides annotations explaining the terms contained in the liquidation instructions and notices. In Exhibit JPN-90, Japan provides an updated version of Exhibit JPN-45, showing which liquidation instructions and notices relate to which original periodic reviews, and showing that the amount of duties collected in connection with importation exceeds the bound rates.

106. Japan disagrees with the U.S. argument that the liquidation measures do not violate Article II because liability for the duties arose at the time of importation when a cash deposit was paid.¹³⁰ Even if *provisional liability* for duties arose at the time of importation, the cash deposit rates did not establish the “treatment”¹³¹ to which Japanese imports were ultimately subjected in connection with importation. Further, even if the periodic reviews establish the “treatment” to which imports are subsequently *liable*, the duties themselves are not *collected* or *levied* in the final results of a periodic review. Instead, the final “*treatment*” is made concrete only through the liquidation measures, which formally effect collection or levy of the import duties.

107. Japan is unaware of any provision in the covered agreements shielding measures that effect the collection or levy of import duties at WTO-inconsistent rates from scrutiny under Article II of the GATT 1994, even if a related periodic review is challenged under separate WTO provisions.

108. The liquidation measures at issue nullify and impair Japan’s benefits under Article II because they levy import duties that deprive Japanese imports of the market access treatment to which they are entitled under the U.S. Schedule of Concessions.

109. Specifically, on importation, the entries at issue were subject to ordinary customs duties, as shown in Exhibit JPN-45. In addition, subsequent to the end of the RPT, the United States collected additional import duties, on the same entries, through the liquidation measures. Exhibit JPN-45 identifies, by exporter, the additional duties collected through these measures. Exhibit JPN-45 also shows that the cumulative *ad valorem* duty rate applied to these imports exceeds the bound rate (*i.e.*, ordinary customs duties *plus* WTO-inconsistent anti-dumping duties).

110. Accordingly, by adopting the liquidation measures, the United States acted inconsistently with its obligations under Article II:1(a) of the GATT 1994. Japan asks the Panel to make findings in that regard, independently of any findings it makes under the *Anti-Dumping Agreement* regarding the periodic reviews.

¹³⁰ United States’ Second Written Submission, para. 76.

¹³¹ Article II:1(a) of the GATT 1994.

E. The United States Has Failed to Comply with the DSB’s Recommendations and Rulings Regarding One Sunset Review

1. The Panel cannot reconsider the Appellate body’s finding that the USDOC’s likelihood-of-dumping determination is WTO-inconsistent

111. Japan claims that the United States has failed to implement the DSB’s recommendations and rulings regarding the sunset review of 4 November 1999 concerning *Anti-Friction Bearings* (or “AFBs”).¹³² The United States persists in arguing that it need not take any implementation action because “an independent WTO-consistent basis for the likelihood of continuance of dumping determination exists”.¹³³

112. Although the United States accepts that findings of inconsistency “must be treated by the parties to [the] particular dispute as a final resolution to that dispute”,¹³⁴ it argues that there is no resolution on the issue it raises, namely “whether the *original likelihood of dumping determination can exist on alternative grounds*”.¹³⁵

113. Japan disagrees. The Appellate Body held that the *USDOC’s likelihood-of-dumping determination* is WTO-inconsistent:

As the likelihood-of-dumping determinations in the sunset reviews at issue in this appeal relied on margins of dumping calculated inconsistently with the *Anti-Dumping Agreement*, they are inconsistent with Article 11.3 of that Agreement.¹³⁶

114. The U.S. arguments expressly confirm that it seeks a reassessment of the Appellate Body’s conclusion regarding the WTO-consistency of the *USDOC’s likelihood-of-dumping determination*. For example, the United States contends that the issue is “whether the *original likelihood of dumping determination can exist on alternative grounds*”.¹³⁷ However, the Appellate Body’s conclusion that the USDOC’s likelihood-of-dumping is WTO-inconsistent represents a “final resolution” of the matter that is binding on the Parties, and that conclusion cannot be reassessed by this Panel.¹³⁸

¹³² See Japan’s First Written Submission, paras. 155 to 158.

¹³³ United States’ First Written Submission, para. 75.

¹³⁴ Appellate Body Report, *U.S. – Shrimp (21.5)*, para. 97. See also Panel Report, *U.S. – Gambling (21.5)*, para. 6.56.

¹³⁵ United States’ Second Written Submission, para. 84.

¹³⁶ Appellate Body Report, para. 185.

¹³⁷ United States’ Second Written Submission, para. 84. See also quote in para. 1 above.

¹³⁸ United States’ Second Written Submission, para. 84.

115. Japan notes that a similar finding was made in *U.S. – OCTG from Argentina (21.5)*:

The original panel concluded that “the USDOC’s likelihood determination in the instant sunset review was inconsistent with Article 11.3 of the Anti-Dumping Agreement.” It is evident from this language that the original panel’s finding of WTO-inconsistency is addressed to the USDOC’s likelihood-of-dumping determination. Therefore, to comply with the original panel’s finding, as adopted by the DSB, the United States had to bring its determination of likelihood of dumping into conformity with Article 11.3 of the *Anti-Dumping Agreement*.¹³⁹

2. The United States has not demonstrated a WTO-consistent basis for the USDOC’s likelihood-of-dumping determination

116. The Panel need go no further than to conclude that the United States has taken no implementation action to bring the 1999 *AFB* sunset review into conformity with Article 11.3 of the *Anti-Dumping Agreement*. Nonetheless, Japan wishes to comment on the U.S. assertions that the USDOC’s 1999 likelihood determination is WTO-consistent, despite the Appellate Body’s ruling to the contrary.

(a) The U.S. evidence does not substantiate the U.S. arguments

117. Based on the scant evidence provided by the United States, Japan sees no basis for the U.S. assertions. The United States contends that “the *majority* of the dumping margins relied on in that determination are not WTO-inconsistent”.¹⁴⁰ However, the supporting evidence it provides concerns just 10 of the 21 margins calculated in the 1996 periodic review, which is just one of nine periodic reviews covered by the 1999 sunset determination.¹⁴¹ This is very far from a “majority” of the margins relied on by the USDOC.

(b) The U.S. arguments are ex post rationalization that is not reflected in the USDOC’s determination

118. The United States’ assertion that the USDOC’s 1999 likelihood determination is justified by just 10 margins determined in the 1996 review using adverse facts, suffers from other serious flaws. According to the Appellate Body:

... a sunset review determination under Article 11.3 must be on the basis of a “rigorous examination” leading to

¹³⁹ Appellate Body Report, *U.S. – OCTG from Argentina (21.5)*, para. 143.

¹⁴⁰ United States’ First Written Submission, paras. 3 and 75.

¹⁴¹ United States’ Second Written Submission, para. 85.

“reasoned and adequate conclusions”, and be supported by
“positive evidence” and a “sufficient factual basis”.¹⁴²

119. The picture painted today by the United States does not conform to the terms of the 1999 likelihood determination.¹⁴³ In fact, Japan considers that the United States is engaging in the worst form of *ex post* rationalization in an attempt to justify its inaction. An anti-dumping determination must be defended on the basis of the authority’s own “reasoned and adequate conclusions”, and not *ex post* arguments generated by the Member in dispute settlement that bear no relation to the determination. The United States’ current explanation even seems to have evolved since earlier this year, when the United States failed to provide the DSB with any reasons for its failure to take implementation action regarding the 1999 sunset review – despite Japan’s formal request for an explanation.¹⁴⁴

120. Although the United States now presents the 10 adverse facts margins as the *centerpiece* of the USDOC’s 1999 likelihood determination, that determination curiously makes no reference whatsoever to these particular margins. The USDOC failed, therefore, to provide any explanation of how margins established entirely using adverse facts drawn from allegations made in a 1988 petition can provide “positive evidence” for an order-wide determination that “dumping” is likely to recur or continue after 1999. Thus, the USDOC’s determination does not contain “reasoned and adequate conclusions” that support the latest arguments by the United States.

(c) *The 10 adverse facts margins from 1996 do not constitute “positive evidence” or provide a “sufficient factual basis” for the USDOC’s likelihood-of-dumping determination*

121. Even if the USDOC had expressly addressed the 10 adverse facts margins in its 1999 likelihood determination, these margins would not provide “positive evidence” for a determination regarding the likelihood of a continuation or recurrence of dumping in 1999. The entire basis for the 10 margins is the petitioners’ 1988 allegations of dumping. However, even in an original investigation, an authority cannot simply rely on the allegations in a petition as “positive evidence” for a dumping determination. Instead, it must conduct a comprehensive investigation, gathering pertinent information to verify the accuracy of the petitioners’ allegations. In a sunset review conducted 11 years after the petition was filed, the

¹⁴² Original Appellate Body Report, para. 182.

¹⁴³ The 1999 sunset review is contained in Exhibit JPN-22, which was submitted in the original proceedings and a copy of which Japan provides today.

¹⁴⁴ See Japan’s First Written Submission, para. 29.

petitioners' allegations are even less "positive evidence", and a "rigorous examination" going beyond the terms of the petition is all the more important. Nothing in the USDOC's determination or the U.S. arguments suggests that such an inquiry has been conducted.

122. Further, an authority cannot cherry-pick the evidence on which it chooses to rely, for example, taking account of 10 adverse facts margins to the exclusion of all other relevant evidence. Instead, it must conduct a "rigorous examination" of all relevant evidence. The 1999 determination does not explain how the "less-than-positive" evidence drawn from the 10 adverse facts margins was weighed with "positive evidence" in reaching a conclusion supported by a "sufficient factual basis".

123. In fact, instead of explaining how the 10 margins were weighed with "positive evidence", the 1999 determination inaccurately depicts the facts, because the USDOC impermissibly relied on many margins calculated using zeroing.¹⁴⁵ Obviously, the USDOC's 1999 determination does not explain the consequences of excluding these margins from its analysis. Nor does it address the fact that, absent zeroing, many of the margins calculated in the nine years before 1999 might have been less than zero, indicating no dumping during the life of the order.

(d) *The 10 adverse facts margins are additionally not "positive evidence" because they were not determined in a WTO-consistent fashion*

124. The U.S. allegation that the USDOC relied upon the 10 adverse facts margins raises another important issue. Even if that allegation were an accurate description of the 1999 determination, these 10 margins do not provide a WTO-consistent basis for a likelihood determination, because they were not calculated in a WTO-consistent fashion.

125. If an investigating authority relies on margins calculated in earlier proceedings, those margins – whenever they were determined – must be consistent with the requirements of the *Anti-Dumping Agreement*.¹⁴⁶ Otherwise, they do not provide positive evidence of "dumping", as that term is understood in WTO law.

126. In this case, Japan questions whether the 10 margins mentioned were determined consistently with WTO requirements relating to the use of facts available. In selecting secondary information, Annex II(7) of the *Anti-Dumping Agreement* requires an authority to

¹⁴⁵ Original Panel Report, para. 7.256; Original Appellate Body Report, para. 184.

¹⁴⁶ Original Appellate Body Report, para. 183.

use “*special circumspection*”, choosing the “most appropriate” information available,¹⁴⁷ and verifying it against information from “independent sources”.

127. In the 1996 review, the USDOC relied on the *highest alleged* margin in the 1988 petition. By its own terms, the petition merely contains *allegations* of “*estimated* dumping margins”; moreover, the petitioners’ estimates ranged from a low of 5.80 percent to a high of 106.61 percent, with scores of estimated margins in between.¹⁴⁸ The reason that the USDOC chose the *highest alleged* margin was that, “in accordance with our practice we have used the *more adverse*” facts.¹⁴⁹

128. However, the choice of the *most unfavorable alleged margin* does not appear to meet the requirement to use “*special circumspection*”, given that there were many more “appropriate” sources of information that could have been used in place of the petitioners out-dated allegations. These alternative sources included, in particular, the USDOC’s own independent dumping calculations in the investigation into the petitioners’ allegations, and those made in the four previous periodic reviews prior to the 1996 review.

3. Conclusion on the 1999 likelihood-of-dumping determination

129. In conclusion, the Panel cannot re-open the conclusion that the USDOC’s 1999 likelihood-of-dumping determination is inconsistent with the *Anti-Dumping Agreement*. And, even if it could, the United States fails in its attempts to justify the 1999 determination because its *ex post* rationalization bears no relation to, and is not supported by, the terms of that determination. The U.S. *ex post* rationalization does not show that the 1999 determination was based on a “rigorous examination” leading to a “reasoned and adequate explanation” supported by sufficient “positive evidence”. The facts suggest that it would be impossible to make such a showing.

130. Finally, the arguments surrounding the U.S. *ex post* rationalization demonstrate that the DSB’s recommendations and rulings are too complex to be resolved by an *ex post* rationalization. Instead, the United States was required to revisit its 1999 determination in light of all pertinent evidence that was available at the time, but chose not to do so.

¹⁴⁷ Panel Report, *Mexico – Rice*, para. 7.166.

¹⁴⁸ Exhibit US-A26, page 32 and Table 1A.

¹⁴⁹ See *Anti-Friction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, Germany, Italy, Japan, Singapore, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews*, 61 Fed. Reg. 66,472, 66,479 (17 December 1996), cited in United States’ Second Written Submission, para. 85 (footnote 106).

131. Mr. Chairman, that completes Japan's opening statement. We look forward to answering your questions.