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)

SUPPLEMENTAL SUBMISSION OF JAPAN

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TABLE OF ABBREVIATIONS

Abbreviation	Description
Anti-Dumping Agreement	*Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*
DSU	*Understanding on Rules and Procedures Governing the Settlement of Disputes*
GATT 1994	*General Agreement on Tariffs and Trade 1994*
06/07 review	Periodic review for Ball Bearings and Parts Thereof from Japan (1 May 2006 through 30 April 2007) (JTEKT, Nippon Pillow Block, and NTN)
RPT	Reasonable period of time
USDOC	United States Department of Commerce

I. INTRODUCTION

1. Japan appreciates this opportunity to file a supplemental submission regarding the United States' periodic review for Ball Bearings and Parts Thereof from Japan (1 May 2006 through 30 April 2007) (, , and) ("06/07 review").[1] In this submission, Japan *first* responds to the United States' arguments that the Panel does not have jurisdiction over this periodic review. *Second*, Japan argues that the latest periodic review is inconsistent with Articles 2.4 and 9.3 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("*Anti-Dumping Agreement*"), and Article VI:2 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994").

II. THE PANEL HAS JURISDICTION OVER THE 06/07 REVIEW

2. As demonstrated below, the Panel has jurisdiction to assess the consistency with the *Anti-Dumping Agreement* and the GATT 1994 of the 06/07 review. Specifically, Japan's request for establishment of this Panel includes the 06/07 review, which constitutes a "measure taken to comply", within the meaning of Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").

3. In this submission, Japan explains that the 06/07 review is a "measure taken to comply" under Article 21.5 of the DSU due to its close connections with the other Ball Bearing reviews at issue, and with the DSB's recommendations and rulings. Thereafter, Japan responds to two arguments made by the United States that attempt to exclude this "measure taken to comply" from the scope of these proceedings. In particular, Japan shows that its panel request is sufficiently specific to identify the 06/07 review, and that measures adopted during panel proceedings may fall within a panel's terms of reference.

4. The Appellate Body has recognized that "Article 21.5 proceedings involve, in principle, not the original measure, but rather a *new and different measure which was not*

[1] Ball Bearings and Parts Thereof from Japan, Final Results for the Period 1 May 2006 – 30 April 2007 (USDOC Annual Review in Case Number A–588–804), 73 Fed. Reg. 52823, 11 September 2008. Exhibit JPN-67.A.

before the original panel."[2] Where such new measures have "a *particularly close relationship* to the declared 'measures taken to comply', and to the recommendations and rulings of the DSB", or where there are "*sufficiently close links*" among them, the Appellate Body has concluded that those new measures are subject to review by an Article 21.5 panel.[3]

5. The 06/07 review enjoys the *same close substantive relationship* to the reviews challenged in the original proceedings as do reviews 4, 5 and 6.[4] Specifically:

- the 06/07 review, like the original reviews and the reviews 4, 5 and 6, resulted from anti-dumping proceedings conducted by the United States Department of Commerce ("USDOC") and, in particular, the same type of proceeding, namely periodic reviews;
- the 06/07 review, like several of the original reviews and reviews 4, 5 and 6, was conducted pursuant to an anti-dumping order concerning "Ball Bearings and Parts Thereof From Japan", which is to say that it concerns the same subject product and the same exporting country as the original reviews and reviews 4, 5 and 6; and,
- the 06/07 review, like the original reviews and reviews 4, 5 and 6, concerns dumping determinations made with respect to exports from the same companies.[5]

6. Moreover, as with reviews 4, 5 and 6, the 06/07 review constitutes a replacement measure that "supersedes" the previous periodic review involving ball bearings (review 6). That is, the 06/07 review establishes a cash deposit rate that replaces the cash deposit rate from the previous review, and determines the importer-specific assessment rate for entries initially subjected to the cash deposit rate from previous reviews.[6]

7. Finally, Japan notes that, as with the original reviews and reviews 4, 5 and 6, Japan contests "a specific component" of the 06/07 review, namely, the use of the zeroing

[2] Appellate Body Report, *Canada – Aircraft (21.5)*, para. 41 (emphasis added). *See* Japan's First Written Submission, paras. 63-64.
[3] 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.
[4] Japan's First Written Submission, paras. 90-93.
[5] Japan's First Written Submission, para. 90.
[6] Japan's First Written Submission, para. 91.

procedures in making the dumping determinations.[7] Japan challenges this specific component of the 06/07 review – and not other aspects of that measure – in these proceedings.

8. Thus, the 06/07 review is part of a chain of measures with extremely close substantive connections that succeed each other year after year, with each successive measure in essence changing only the rates determined in the previous measure in the chain. In a report circulated on 1 October 2008, the panel in *United States – Continued Existence and Application of Zeroing Methodology* ("*U.S. – Zeroing II (EC)*") also examined a chain of successive periodic reviews, and reached a similar conclusion. It found that a series of periodic reviews identified in the European Communities' panel request were within its terms of reference, even if not identified in the consultations request, because they referred to "the same subject matter, the same dispute".[8]

9. The United States resists the inclusion of the 06/07 review as a "measure taken to comply", for two reasons. *First*, the 06/07 review is not properly within the Panel's terms of reference, because it was not identified in Japan's panel request with sufficient specificity, as required by Article 6.2 of the DSU; and, *second*, the 06/07 review cannot be part of these proceedings because it did not exist at the time of panel establishment.[9] For the reasons provided below, the United States is in error.

10. Japan disagrees that the 06/07 review was not identified in Japan's panel request.[10] Section III:B of Japan's panel request identifies the periodic reviews at issue, namely: (i) five reviews at issue in the original proceedings; (ii) three closely connected reviews that the United States argues have "superseded", and secured "withdrawal" of, certain measures at issue in the original proceedings; and, (iii) "any subsequent closely

[7] Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, para. 83. *See* Japan's First Written Submission, para. 92.
[8] Panel Report, *U.S. – Zeroing II (EC)*, para. 7.28.
[9] United States' Second Written Submission, para. 36. *See also* United States' Second Written Submission, paras. 29-34.
[10] United States' Second Written Submission, para. 36. *See also* United States' Second Written Submission, paras. 29-34.

connected measures".[11] The 06/07 review is such a "subsequent closely connected measure", and for that reason, is part of these proceedings.

11. Although the United States now contends that Japan's panel request is not sufficiently specific, in its First Written Submission, the United States quoted Japan's reference in the panel request to "any subsequent closely connected measures", and stated:

> … the United States is concerned that Japan is trying to include in the Panel's terms of reference any future administrative reviews related to the eight identified in its panel request … .[12]

12. The United States, therefore, understood that the words of Japan's request identified future periodic reviews related to the Ball Bearing reviews. This confirms that the terms of Japan's panel request are sufficiently specific to identify the 06/07 review.

13. With respect to the second objection raised – the timing of the 06/07 review – the United States argues that this review is not properly within the Panel's terms of reference, because it did not exist at the time of panel establishment.[13] Again, the United States is in error.

14. Before turning to the specific arguments on the timing of the 06/07 review, Japan notes that the timing of subsequent periodic reviews is a major feature of the U.S. attempts to force all disputes regarding such reviews into fresh WTO proceedings, thereby turning dispute settlement into a Ground Hog Day. In particular, Japan notes that the United States contends that the timing of four Ball Bearing reviews – 03/04 (review 4), 04/05 (review 5), 05/06 (review 6) and 06/07 reviews – excludes each from the scope of these proceedings. In short, the United States' view is that the reviews were adopted *too soon* to be part of these proceedings (reviews 4 and 5), *not close enough* to the end of the reasonable period of time ("RPT") for implementation (review 6), or *too late* (06/07

[11] WT/DS322/27, para. 12.
[12] United States' First Written Submission, para. 50.
[13] United States' Second Written Submission, para. 36. *See also* United States' Second Written Submission, paras. 29-34.

review). It seems there is never a moment when the timing of a subsequent review would allow it to be part of compliance proceedings.

15. With respect to the 06/07 review, the United States argues that future measures can never be part of a panel's terms of reference. This interpretation is contradicted by previous interpretations of Articles 6.2 and 21.5 of the DSU. In *U.S. – Zeroing II (EC)*, circulated just last week, the panel, building on several earlier decisions, expressly recognized that, in appropriate circumstances, future measures identified in a panel request can be included within a panel's terms of reference:

> There may be exceptional cases where panels may consider to make findings on measures not identified in the complaining party's panel request if circumstances justify it. For that to happen, however, the new measure or measures have to constitute "a measure" within the meaning of Article 6.2 of the DSU and have to come into existence during the panel proceedings.[14]

16. The panel concluded that, although the European Communities' panel request had identified a category of measure that might exist at some time in the future,[15] the European Communities had failed to demonstrate that any such measure existed at any time before or subsequent to panel establishment. The panel therefore declined to make findings with respect to those measures.[16]

17. In these proceedings, the 06/07 review satisfies the circumstances identified by the panel. In contrast to the alleged measures challenged by the European Communities in *U.S. – Zeroing II (EC)*, there is no dispute that the 06/07 review *exists* or that it came

[14] Panel Report, *U.S. – Zeroing II (EC)*, para. 7.59.
[15] Panel Report, *U.S. – Zeroing II (EC)*, para. 7.47 (quoting the European Communities' panel request with respect to a category of measure described as "[t]he continued application of" anti-dumping duties resulting from certain orders "at a level in excess of the anti-dumping margin which would result from the correct application of the Anti-Dumping Agreement").
[16] Panel Report, *U.S. – Zeroing II (EC)*, para. 7.61. *See also* Panel Report, *U.S. – Zeroing II (EC)*, paras. 7.40-7.60.

into existence during these panel proceedings.[17] Furthermore, as stated above, the measure was adequately identified in Japan's panel request.

18. The compliance panel in *Australia – Salmon (21.5)* also found that measures adopted during panel proceedings may fall within a panel's terms of reference, particularly in the context of compliance proceedings. In that dispute, the DSB's recommendations and rulings required Australia to bring a federal ban on salmon imports into conformity with its WTO obligations. Although Australia withdrew the federal ban, the state of Tasmania imposed a new import ban on salmon subsequent to establishment of the compliance panel.

19. The panel undertook a two-step analysis to determine whether the Tasmanian ban was properly subject to its review. In a first step, the panel assessed whether the Tasmanian ban was a "measure taken to comply" under Article 21.5 of the DSU, and concluded that it was.[18] Japan recalls that it has similarly established that the 06/07 review is a "measure taken to comply" on the basis of the close substantive relationship between the 06/07 review, the reviews subject to the original proceedings, and the DSB's recommendations and rulings regarding the original reviews.[19]

20. In a second step, the panel in *Australia – Salmon (21.5)* considered whether the Tasmanian ban was properly within its terms of reference under Article 6.2 of the DSU, even though the ban "was only introduced subsequent to this Panel's establishment and therefore not *expressis verbis* mentioned in Canada's Panel request."[20]

21. In finding that the ban was part of its terms of reference, the panel noted that Canada's panel request identified measures taken to comply that Australia "'has taken <u>or does take</u>'", which the panel found to be a reference to "future measures".[21] The panel also found that "[t]he ban falls within the *category of measures specified in the Panel*

[17] Ball Bearings and Parts Thereof from Japan, Final Results for the Period 1 May 2006 – 30 April 2007 (USDOC Annual Review in Case Number A–588–804), 73 Fed. Reg. 52823, 11 September 2008. Exhibit JPN-67.A.
[18] Panel Report, *Australia – Salmon (21.5)*, para. 7.10 (sub-paras. 21-23).
[19] *See* paras. 5 - 7 above.
[20] Panel Report, *Australia – Salmon (21.5)*, para. 7.10 (sub-para. 24).
[21] Panel Report, *Australia – Salmon (21.5)*, para. 7.10 (sub-para. 26).

request".[22] Australia was, therefore, on notice that future measures belonging to an identified category of measures were at issue.

22. The United States appears to believe that the Tasmanian ban was part of the panel's terms of reference in *Australia – Salmon (21.5)* because it "implemented" or was "similar" to a declared compliance measure, namely the removal of the federal ban.[23] Japan is unsure why the United States takes the view that introducing a regional ban "implements" or is "similar" to the elimination of a country-wide ban. The Tasmanian ban did not implement any aspect of the elimination of the federal ban; nor is a new ban similar to the elimination of an old ban.[24]

23. Instead, the crucial feature of *Australia – Salmon (21.5)* is that a subsequent "measure taken to comply" was part of the panel's terms of reference *because it belonged to a category of measures identified in the panel request*. Similar to *Australia – Salmon (21.5)*, the 06/07 review is a "measure taken to comply" that falls within a category of measures explicitly identified in the panel request, namely "any subsequent closely connected measures".

24. The panel in *Australia – Salmon (21.5)* also held that the *particular characteristics of compliance proceedings* compelled the inclusion of the Tasmanian ban within its terms of reference:

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[22] Panel Report, *Australia – Salmon (21.5)*, para. 7.10 (sub-para. 27).
[23] U.S. Second Written Submission, para. 32 ("The panel considered that Canada had identified in its panel request the Australian government's new salmon import policy, AQPM 1999/51 and more generally, any measures that Australia took, or would take, *to implement that policy*. The panel determined that the Tasmanian ban was *similar to an implementing measure* related to the policy adopted by Australia and identified in the panel request, and therefore found that the subsequent ban fell within the scope of the Article 21.5 proceeding" (emphasis added)). *See also* U.S. Second Written Submission, para. 33 (characterizing the withdrawal of the federal ban as "a regulatory standard that was adopted to comply").
[24] To the extent that the United States is repeating its argument that an undeclared compliance measure (e.g. the Tasmanian ban) can only be a "measure taken to comply" for purposes of Article 21.5 *based on its relationship to a declared compliance measure* (e.g. the elimination of the federal ban), Japan has already expressed its disagreement in earlier submissions. The key issue is not whether an undeclared measure undermines compliance achieved by a *declared compliance measure* (or is otherwise related to a declared compliance). Instead, the issue is whether an undeclared measure undermines or circumvents compliance with the *DSB's recommendations and rulings*. Accordingly, an undeclared measure with sufficiently close connections to the DSB's recommendations and rulings may be treated as "taken to comply", *whether or not there is a declared measure*. *See* Japan's First Written Submission, para. 65 ff, and Japan's Second Written Submission, paras. 47 to 49.

> What is referred to this Article 21.5 Panel is basically a disagreement as to implementation. One measure was explicitly identified [in Canada's panel request], with the knowledge, however, that further measures might be taken. To exclude such further measures from our mandate once we have found that they are "measures taken to comply", would go against the objective of "prompt compliance" set out in Articles 3.3 and 21.1 of the DSU. To rule that such measures fall within our mandate would not, in our view, deprive Australia of its right to adequate notice under Article 6.2. On the basis of the Panel request Australia should have reasonably expected that any further measures it would take to comply, could be scrutinized by the Panel. We are faced here not with an Australian measure that was unexpectedly included by Canada in its claims, but with a measure taken during our proceedings by Australia, . . . and as part of Australia's implementation process to which Canada subsequently referred. Arguably, the surprise or lack of notice may, indeed, be more real for Canada than for Australia.[25]

25. Thus, like Canada's panel request in *Australia – Salmon (21.5)*, Japan's panel request identified certain original and subsequent reviews "with the knowledge" of both Parties that future "closely connected",[26] and identified, subsequent reviews might be taken. Indeed, the United States was very much aware that the 06/07 review might be adopted during these proceedings given that it initiated the review on 29 June 2007, during the RPT.

26. As the panel *Australia – Salmon (21.5)* said,

> … compliance is often an ongoing or continuous process and once it has been identified as such in the panel request, as it was in this case, any "measures taken to comply" can be presumed to fall within the panel's mandate, unless a genuine lack of notice can be pointed to.[27]

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[25] Panel Report, *Australia – Salmon (21.5)*, para. 7.10 (sub-para. 27).
[26] WT/DS322/27, para. 12.
[27] Panel Report, *Australia – Salmon (21.5)*, para. 7.10 (sub-para. 28). *See also* Appellate Body Report, *Chile – Price Band System (21.5)*, para. 136, *citing* Appellate Body Report, *Mexico – Corn Syrup (21.5)*, para. 121 ("Article 21.5 proceedings do not occur in isolation from the original proceedings, but . . . both proceedings form part of a *continuum of events*") (emphasis added). In *EC – Bananas III (21.5 – U.S.)*, the panel found that a measure adopted many years after the end of the RPT could be a "measure taken to

27. In these proceedings – as with *Australia – Salmon (21.5)* – the respondent has received ample "notice". The terms of Japan's request were sufficiently specific to alert the United States that the panel request addressed, in the United States' own words, "any future administrative reviews related to the eight identified in its panel request … ".[28] There was, therefore, nothing whatsoever "unexpected[]"[29] in Japan's claims regarding the 06/07 review in these proceedings.

28. As the panel in *Australia – Salmon (21.5)* said, this interpretation of Article 6.2 promotes the prompt settlement of disputes under Articles 3.3 and 21.1 of the DSU. With successive periodic reviews withdrawing, replacing, and succeeding each other year after year,[30] compliance in these proceedings is an "ongoing or continuous" process, just as it was in *Australia – Salmon (21.5)*. The settlement of any disputes regarding this "ongoing" process must be addressed in Article 21.5 proceedings.

29. For all these reasons, the 06/07 review is a "measure taken to comply" that is properly within the Panel's terms of reference.

III. THE 06/07 REVIEW IS INCONSISTENT WITH THE *ANTI-DUMPING AGREEMENT* AND THE GATT 1994

30. In the 06/07 review, the USDOC calculated: (1) a margin of dumping for each examined exporter that became the cash deposit rate for all entries of the product, from that exporter, occurring after 11 September 2008; and (2) an importer-specific assessment rate based on the total amount of dumping attributable to each importer, which determined that importer's final liability for anti-dumping duties in connection with the entries that occurred during the review period.

31. In the review proceedings, several interested parties argued that the USDOC should not use the zeroing procedures to calculate either the cash deposit or importer-

comply", confirming the view that implementation is an "ongoing" process that can extend over many years (Panel Report, *EC – Bananas III (21.5 – U.S.)*, para. 7.493).
[28] United States' First Written Submission, para. 50.
[29] Panel Report, *Australia – Salmon (21.5)*, para. 7.10 (sub-para. 27).
[30] United States' First Written Submission, paras. 3, 39, 44, 52, 54, 58, 65, 66 and 67.

specific assessment rates, because these procedures are WTO-inconsistent.[31] However, rejecting these arguments, the USDOC decided to maintain its use of zeroing:

> While the Department has modified its calculation of weighted-average dumping margins when using average-to-average comparisons in antidumping investigations, the Department has not adopted any other modifications concerning any other methodology or type of proceedings, such as administrative reviews.[32]

In concluding, the USDOC stated that it "has continued to deny offsets to dumping based on export transactions that exceed normal value in these reviews".[33]

32. Japan notes that the 06/07 review constitutes yet another example of the United States' maintenance of the zeroing procedures, following the expiry of the RPT on 24 December 2007, in situations other than weighted average-to-weighted average comparisons in original investigations. In addition, the 06/07 review was completed with four other reviews issued under separate anti-dumping orders concerning the importation of ball bearings from France, Germany, Italy and the United Kingdom. The United States also used zeroing in these four other reviews.[34] To reflect these five additional examples of the use of zeroing following the end of the RPT, Japan submits Exhibit JPN-68, which is an updated version of Exhibit JPN-46 that includes these five reviews.

33. In addition to relying on the 06/07 review as evidence of the maintenance of the zeroing procedures, Japan also makes claims regarding that review. The sole element of the 06/07 review that Japan contests is the USDOC's use of the zeroing procedures. The Appellate Body has ruled in three separate disputes, including in the original proceedings in this dispute, that the United States acts inconsistently with the *Anti-Dumping*

[31] USDOC Issues and Decision Memorandum: Ball Bearings and Parts Thereof from Japan (undated), at Comment 1, p. 4 ff. Exhibit JPN-67.B.
[32] USDOC Issues and Decision Memorandum: Ball Bearings and Parts Thereof from Japan (undated), at Comment 1, p. 8. Exhibit JPN-67.B.
[33] USDOC Issues and Decision Memorandum: Ball Bearings and Parts Thereof from Japan (undated), at Comment 1, p. 10. Exhibit JPN-67.B.
[34] Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom, Final Results for the Period 1 May 2006 – 30 April 2007 (USDOC Annual Review in Cases Number A–427–801, A–428–801, A–475–801, A–588–804, A–412–801), 73 Fed. Reg. 52823, 11 September 2008; and USDOC Issues and Decision Memorandum: Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom (undated), at Comment 1. Exhibits JPN-67.A and JPN-67.B.

Agreement and the GATT 1994 by relying on zeroing to calculate margins of dumping in periodic reviews.[35] Equally, in a report circulated on 1 October 2008, the panel in *U.S. – Zeroing II (EC)* reached the same conclusion.[36]

34. For the reasons given in these rulings, Japan submits that the 06/07 periodic review is inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 due to the application of the zeroing procedures. Moreover, for the reasons given in the original proceedings in this dispute, the review is also inconsistent with the "fair comparison" obligation of Article 2.4.[37]

35. Finally, Japan recalls its claim that the United States has violated Article II of the GATT 1994 by issuing instructions and notices for the liquidation of entries at WTO-inconsistent importer-specific assessment rates determined in the periodic reviews numbered (1), (2), (7) and (8) in paragraph 53 of Japan's First Written Submission.[38] Japan wishes to clarify that it does not pursue claims under Article II of the GATT 1994 in relation to liquidations instructions and notices issued pursuant to the 06/07 review, because no such instructions have yet been issued.

IV. CONCLUSION

36. Japan respectfully requests that the compliance Panel find that, in adopting the 06/07 review, a measure taken to comply, the United States has acted inconsistently with its obligations under Articles 2.4 and 9.3 of the *Anti-Dumping Agreement*, and Article VI:2 of the GATT 1994.

[35] Appellate Body Report, *U.S. – Zeroing (EC)*, para. 263(a)(i) (Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994); Appellate Body Report, *U.S. – Zeroing (Japan)*, para. 190(c),(e) (Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994); Appellate Body Report, *U.S. – Stainless Steel (Mexico)*, para. 165(a)-(b) (Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994).
[36] Panel Report, *U.S. – Zeroing II (EC)*, para. 8.1(e).
[37] Appellate Body Report, *U.S. – Zeroing (Japan)*, para. 168.
[38] *See* Japan's First Written Submission, para. 139.