**BEFORE THE APPELLATE BODY OF 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)**

**(AB-2009-2)**

## APPELLEE'S SUBMISSION OF JAPAN

**15 JUNE 2009**

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## TABLE OF ABBREVIATIONS

| Abbreviation | Description |
|---|---|
| *Anti-Dumping Agreement or AD Agreement* | *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* |
| DSB | Dispute Settlement Body |
| DSU | *Understanding on Rules and Procedures Governing the Settlement of Disputes* |
| EC | European Communities |
| GATT 1994 | General Agreement on Tariffs and Trade 1994 |
| ILC | International Law Commission |
| ILC Articles | International Law Commission's *Articles on Responsibility of States for Internationally Wrongful Acts* |
| ILC Commentaries | Commentaries to the *ILC Articles* |
| MOU | Memorandum of Understanding |
| RPT | reasonable period of time |
| T-to-T comparisons | transaction-to-transaction comparisons |
| U.S.C. | United States Code |
| USCBP | United States Customs and Border Protection |
| USCIT | United States Court of International Trade |
| USDOC | United States Department of Commerce |
| USITC | United States International Trade Commission |
| *Vienna Convention* | *Vienna Convention on the Law of Treaties* |
| W-to-W comparisons | weighted average-to-weighted average comparisons |

## I. INTRODUCTION

1. This appeal raises three questions that go to the heart of the United States' requirement to comply with the Dispute Settlement Body's ("DSB") recommendations and rulings regarding periodic reviews.

2. The first question concerns the scope of the requirement to "bring the measure into conformity", as set forth in Article 19.1 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").

3. In the original proceedings, the United States was found to have acted inconsistently 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") by applying its zeroing procedures in a series of periodic reviews ("original reviews").[1] At the end of the reasonable period of time ("RPT"), the United States was still to take action to collect anti-dumping duties on entries of goods covered by certain of the original reviews.[2]

4. Before the Panel, and on appeal, the United States effectively argues that it is never required to take action to bring WTO-inconsistent periodic reviews into conformity with its WTO obligations, even where duties remain to be collected pursuant to those reviews after the end of the RPT. To the United States, the date of entry of goods covered by a periodic review determines its implementation obligations, or in other words, the requirement for it to comply with the recommendations and rulings of the DSB ("implementation obligation"). Since goods covered by periodic reviews found to be WTO-inconsistent will, by definition, always have entered *before* the end of the RPT, the United States considers that it has no obligation to comply with the DSB's recommendations and rulings concerning periodic reviews.

5. Moreover, even if the date of *collection* of anti-dumping duties, rather than the date of *entry* of goods covered by those reviews, determines its implementation obligations, the United States still considers that it should be excused from bringing the original reviews at issue into conformity with its WTO obligations. This is so, the United States explains, because "but for"

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

decisions of U.S. courts to enjoin duty collection, duties would have been collected *before* the end of the RPT.[3] The United States' rights and obligations under the DSU should not, in its view, be "alter[ed]"[4] in this way, even if by consequence of injunctive action taken by its own courts, under its own laws.

6. The United States seeks to be exonerated from the requirement to comply because of action, taken by U.S. courts, that are attributable to the United States. A Member cannot plead such issues of domestic law – which are facts that must be fully taken into account – as an excuse for not complying with its WTO obligations. Moreover, the consequence of the United States' approach is that there is never a point in time when the United States considers itself bound by its WTO obligations. The Panel correctly rejected the United States' approach, and found that by failing to take action to revise the importer-specific assessment rates determined in the original reviews by the end of the RPT, the United States had failed to comply with the Dispute Settlement Body's ("DSB") recommendations and rulings to bring the original reviews into conformity with the United States' WTO obligations.[5]

7. The second question concerns the scope of Article 21.5 of the DSU with respect to: (i) a series of periodic reviews, adopted after the original reviews under the same anti-dumping order, and in which the United States applied its zeroing procedures ("subsequent reviews"); and, (ii) a series of liquidation instructions and notices, adopted after the end of the RPT, in which the United States ordered collection of anti-dumping duties at the WTO-inconsistent importer-specific assessment rates calculated in the original reviews ("duty collection measures").

8. Taking account of the U.S. argument that, with the subsequent reviews, the United States had "taken measures to comply with [the DSB's] recommendations and rulings",[6] such that "compliance was accomplished",[7] and in light of the close connections between the subsequent reviews, the original reviews and the DSB's recommendations and rulings, the Panel found that the subsequent reviews are "measures taken to comply".[8] Noting that the

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[2] Panel Report, *U.S. – Zeroing (Japan) (21.5)*, para. 7.139 and footnote 149. Hereinafter, Japan refers to the compliance Panel's report by the short citation "Panel Report".
[3] United States' Appellant's Submission, paras. 4, 96, 100.
[4] United States' Second Written Submission, para. 51.
[5] Panel Report, paras 7.148, 7.154.
[6] United States' First Written Submission, para. 51.
[7] United States' Second Written Submission, para. 18; United States' First Written Submission, paras. 52, 67.
[8] Panel Report, paras. 7.82, 7.114.

"underlying basis" for the duty collection measures is the original reviews, and that the rates informing the duty collection measures are "based entirely" on the original reviews, the Panel similarly concluded that the duty collection measures are "measures taken to comply".[9]

9. Turning to the "consistency" with the covered agreements of these "measures taken to comply", under Article 21.5, the Panel found, based on evidence provided by Japan, that the United States had used the zeroing procedures to calculate inflated cash deposit rates and importer-specific assessment rates in the subsequent reviews, in violation of Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.[10] With respect to the duty collection measures, the Panel found that in failing to revise the WTO-inconsistent importer-specific assessment rates in the original reviews, and in proceeding to collect duties after the end of the RPT pursuant to those WTO-inconsistent rates, the United States collected or will collect duties "well in excess of the bound rates . . . set forth in the United States' Schedule of Concessions", contrary to Articles II:1(a) and (b) of the GATT 1994.[11]

10. The United States does not allege that in using the zeroing procedures in the subsequent reviews, it acted consistently with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994. Nor does the United States allege that, pursuant to the duty collection measures, collecting duties in excess of its bound rates after the end of the RPT is consistent with Articles II:1(a) and (b) of the GATT 1994.

11. Instead, the United States appeals the Panel's conclusion that the subsequent reviews and the duty collection measures can properly "serve as the *basis* for a finding of WTO-inconsistency in this dispute".[12] In Japan's view, in arguing that the subsequent reviews and the duty collection measures "cannot serve as the *basis* for a finding of WTO-inconsistency in this dispute",[13] the United States effectively appeals the Panel's finding that those measures are "measures taken to comply". The "basis" for a compliance panel to consider the consistency of a measure with the covered agreements is, after all, the measure's status as "taken to comply", within the meaning of Article 21.5. Thus, the United States' appeal addresses the scope of a compliance panel's review under Article 21.5.

[9] Panel Report, paras. 7.200, 7.207.
[10] Panel Report, para. 7.166.
[11] Panel Report, paras. 7.206, 7.207-7.208.
[12] United States' Appellant's Submission, para. 105 (emphasis added). *See also Id.*, paras. 21, 24, 86, 89, 108.
[13] United States' Appellant's Submission, para. 105 (emphasis added). *See also Id.*, paras. 21, 24, 86, 89, 108.

12. The third question concerns the inclusion, within a compliance panel's terms of reference, of a "measure taken to comply" that undermines the implementing Member's asserted compliance with the recommendations and rulings of the DSB and that is sufficiently identified in panel request, but that comes into existence after establishment, during the panel proceedings. Specifically, the United States appeals the Panel's finding that, in the circumstances of this dispute, Article 6.2 of the DSU permitted the inclusion in the Panel's terms of reference of a subsequent review that was adopted during the panel proceedings.[14]

13. In *Australia – Salmon (21.5)*, the implementing Member asserted that it had achieved compliance by removing a WTO-inconsistent federal ban, only to replace it, after establishment of the compliance panel, with an equally WTO-inconsistent state-level ban.[15] Similarly, in these proceedings, the United States asserted that the WTO-inconsistent original reviews had been "withdrawn",[16] only to be replaced, after establishment of the Panel, with (among others) the equally WTO-inconsistent subsequent review subject to its Article 6.2 claim. In these circumstances, where compliance is an ongoing and continuous process and where Japan's panel request sufficiently identified a category of measure in which the post-establishment subsequent review falls, the Panel properly found that inclusion of that review in the terms of reference is consistent with Article 6.2.

14. On each of these three questions, and for reasons provided in this Appellee's Submission, Japan requests that the Appellate Body deny the United States' appeal, and uphold the Panel's findings and conclusions.

## II. EXECUTIVE SUMMARY OF JAPAN'S ARGUMENTS

### A. Introduction

15. This appeal raises three questions at the heart of the requirement to comply with the recommendations and rulings of the DSB: the scope of the requirement, in Article 19.1 of the DSU, to "bring" measures "into conformity"; the scope of proceedings under Article 21.5 of the DSU; and, the inclusion, within a panel's terms of reference, of a measure adopted during the panel proceedings, pursuant to Article 6.2 of the DSU. Japan explains below that the Appellate Body should deny the U.S. appeal, and uphold the Panel's findings.

[14] Panel Report, paras. 7.107, 7.116.
[15] Panel Report, para. 7.116 (footnote 142).

## B. Overview of the Proceedings and Measures at Issue

16. On 23 January 2007, pursuant to the original proceedings, the DSB requested[17] the United States to bring certain measures (zeroing procedures, one investigation, eleven periodic reviews, and two sunset reviews) found to be inconsistent with the *Anti-Dumping Agreement* and the GATT 1994 into conformity with the United States' obligations under those agreements.[18] Japan and the United States agreed that the RPT would expire on 24 December 2007.[19]

17. At issue in this appeal is the United States' failure to comply, by the expiry of the RPT, with the DSB's recommendations and rulings with respect to five of the periodic reviews found to be WTO-inconsistent in the original proceedings (Reviews 1, 2, 3, 7 and 8 in the list below), as well as four subsequent periodic reviews (Reviews 4, 5, 6 and 9 in the list below) which, along with Reviews 1, 2 and 3, form a continuous chain of reviews under a single U.S. anti-dumping order, *Ball Bearings and Parts Thereof From Japan*. The periodic reviews at issue in this appeal are:

(1) Ball Bearings and Parts Thereof From Japan (1 May 1999 through 30 April 2000) (JTEKT and NTN);

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

(3) Ball Bearings and Parts Thereof From Japan (1 May 2002 through 30 April 2003) (JTEKT, NSK, and NTN);

(4) Ball Bearings and Parts Thereof From Japan (1 May 2003 through 30 April 2004) (JTEKT, NSK, NPB, and NTN);

(5) Ball Bearings and Parts Thereof From Japan (1 May 2004 through 30 April 2005) (JTEKT, NSK, NPB, and NTN);

(6) Ball Bearings and Parts Thereof From Japan (1 May 2005 through 30 April 2006) (Asahi Seiko, JTEKT, NSK, NPB, and NTN);

(7) Cylindrical Roller Bearings and Parts Thereof From Japan (1 May 1999 through 31 December 1999) (JTEKT and NTN);

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[16] United States' Second Written Submission, para. 28; United States' First Written Submission, paras. 39, 52, 54, 58, 65, 66, 67.
[17] WT/DSB/M/225, para. 96.
[18] *See* Appellate Body Report, *U.S. – Zeroing (Japan)*, para. 191.
[19] WT/DS322/20.

(8) Spherical Plain Bearings and Parts Thereof From Japan (1 May 1999 through 31 December 1999) (NTN); and,

(9) Ball Bearings and Parts Thereof From Japan (1 May 2006 through 30 April 2007) (JTEKT, NPB, and NTN).

Also at issue in this appeal are liquidation instructions and notices ("duty collection measures") adopted by the United States subsequent to the end of the RPT to collect definitive anti-dumping duties at WTO-inconsistent assessment rates established pursuant to original Reviews 1, 2, 7 and 8.

18. In this appeal, the United States has appealed the Panel's findings that:

- Review 9 was within the Panel's terms of reference;
- The United States failed to comply with the DSB's recommendations and rulings regarding the importer-specific assessment rates determined in Reviews 1, 2, 3, 7 and 8, which apply to entries not yet liquidated by the expiry of the RPT;
- The United States is in continued violation of its obligations under Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, also with regard to Reviews 1, 2, 3, 7 and 8;
- The United States acted inconsistently with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 by applying the zeroing procedures to calculate WTO-inconsistent cash deposit and importer-specific assessment rates in Reviews 4, 5, 6 and 9; and,
- The United States is in violation of Articles II:1(a) and (b) of the GATT 1994 with respect to duty collection measures adopted after the expiry of the RPT.[20]

19. The United States, however, has <u>not</u> appealed the Panel's findings that:

- The United States failed to implement the DSB's recommendation that it bring the zeroing procedures "as such", in the context of T-to-T comparisons in original investigations and under any comparison methodology in periodic and new shipper reviews, into conformity with its WTO obligations;[21] and,
- The United States failed to implement the DSB's recommendation that it bring the 1999 sunset review into conformity with its WTO obligations.[22]

20. The United States presents its appeal with respect to Reviews 1 through 9 in a single consolidated section of its Appellant's Submission.[23] However, this presentation is confused,

[20] United States' Appellant's Submission, Section VI.
[21] Panel Report, para. 8.1(c).

because Reviews 1, 2, 3, 7 and 8 are *original measures* found to be WTO-inconsistent in the original proceedings (at issue is compliance with the DSB's recommendations and rulings), while Reviews 4, 5, 6 and 9 are "measures taken to comply" (at issue is "consistency" with the covered agreements). Given these differences, the Panel correctly examined these measures separately, and Japan does so as well in this Appellee's Submission.

## C. The Panel Properly Found the United States Failed to Comply with the DSB's Recommendations and Rulings With Regard to Reviews 1, 2, 3, 7 and 8, and Is in Continued Violation of Its Obligations Under Articles 2.4 and 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994

21. In this Section, Japan demonstrates that the Panel properly found that the United States had failed to comply with the DSB's recommendations and rulings regarding the importer-specific assessment rates determined in Reviews 1, 2, 3, 7 and 8, which cover entries that were, or will be, liquidated after the expiry of the RPT.[24] Accordingly, the Panel properly found that the United States is in continued violation of its obligations under Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.[25]

22. Japan first reviews the textual basis for the United States' implementation obligations. Second, Japan explains that the United States' two over-arching arguments as to why it should be excused from its implementation obligations lack merit. Specifically, Japan demonstrates that: (1) dates of entry are not the decisive dates for determining a Member's implementation obligations;[26] and, (2) delays due to U.S. judicial proceedings do not relieve the United States of its implementation obligations.[27]

### 1. The Panel's Findings

23. With respect to Reviews 1, 2, 3, 7 and 8, the sole issue before the Panel was whether the United States had complied with the DSB's recommendations and rulings as to importer-specific assessment rates determined in those Reviews that applied to entries that had been, or would be, liquidated after the end of the RPT.[28] The Panel determined that the United States

[22] Panel Report, para. 8.1(e).
[23] United States' Appellant's Submission, Section IV.
[24] Panel Report, para. 8.1(a).
[25] Panel Report, para. 8.1(a)(i).
[26] United States' Appellant's Submission, para. 60.
[27] United States' Appellant's Submission, para. 62.
[28] Panel Report, para. 7.139. *See also Id.*, para. 7.155 ("The basic issue before us is whether or not the United States has complied with the recommendations and rulings of the DSB regarding the relevant importer-specific assessment rates").

had failed to comply with the recommendations and rulings because it had not taken action to revise the assessment rates to exclude zeroing.[29] Specifically, the United States had "done '*nothing*'"[30] by *the expiry of the RPT*, which was the relevant date for a WTO Member to implement the DSB's recommendations and rulings.[31] The United States, therefore, remained in violation of Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.[32]

24. In reaching its conclusion, the Panel rejected several arguments raised by the United States because they had no basis in the DSU, the *Anti-Dumping Agreement* or the GATT 1994. These are the very same arguments that the United States raises in this appeal. Specifically, the Panel rejected the United States' arguments that:

- Japan was seeking a "retrospective", as opposed to "prospective", remedy;[33]
- several provisions of the *Anti-Dumping Agreement* and the GATT 1994 suggest that the "legal regime in existence at the time of entry" determines the scope of implementation obligations;[34]
- a finding in favor of Japan would result in inequality between retrospective and prospective anti-dumping systems;[35] and,
- delays resulting from domestic litigation should not be used to "*alter*" the United States' rights and obligations under the covered agreements.[36]

### 2. The United States Must "Bring" the Importer-Specific Assessment Rates in Reviews 1, 2, 3, 7 and 8 "Into Conformity" with its WTO Obligations

25. As the Panel properly found, a WTO Member's implementation obligations should be determined with regard to the provisions of the covered agreements that explicitly address them.[37] In the present case, this means that, pursuant to the text of the DSU, the United States was required to "bring" the importer-specific assessment rates in Reviews 1, 2, 3, 7 and 8 "into conformity" with its WTO obligations by the end of the RPT.

[29] Panel Report, para. 7.154.
[30] Panel Report, para. 7.146 (emphasis added).
[31] Panel Report, paras. 7.144, 7.148.
[32] Panel Report, para. 7.154.
[33] Panel Report, para. 7.140.
[34] Panel Report, para. 7.147.
[35] Panel Report, paras. 7.150-7.152.
[36] Panel Report, para. 7.153.
[37] Panel Report, para. 7.140. *See also* Appellate Body Report, *U.S. – Zeroing (EC) (21.5)*, para. 297.

### (a) *The DSU Specifies What Implementation Action Must Be Taken (Bring into Conformity) and with Respect to Which Measures (Original Measures Found to Be WTO-Inconsistent)*

26. When a panel or the Appellate Body finds that a measure is inconsistent with the covered agreements, the implementing Member is required to take action to remedy the inconsistency. Specifically, Article 19.1 of the DSU, as well as Articles 22.1, 22.2 and 22.8, describe implementation in terms of "bring[ing] a measure into conformity with the covered agreements"; Article 22.8 also speaks of the "remov[al]" of "the measure found to be inconsistent". Pursuant to Articles 3.7 and 19.1, the "measure" that must be brought into conformity is the "specific measure at issue", identified in the original panel request, which the panel and/or Appellate Body found to be WTO-inconsistent in the original proceedings.

27. The verb "bring" expresses the action that an implementing Member must take. This verb means "to cause to come *from, into, out of, to,* etc. a certain state or condition" and "to cause to become".[38] Thus, this verb connotes *transformative action* by the implementing Member to transform the measure into a state of "conformity" with WTO law.[39]

28. 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, and Article 22.2 envisages retaliation by the complainant *solely* in the event that a measure is *not* brought into conformity. These provisions demonstrate 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.

29. This interpretation promotes the object and purpose of the covered agreements, particularly the aim of Article 3.2 of the DSU to "preserve the rights and obligations of Members" through dispute settlement. Implementation action terminates any WTO-inconsistencies that give rise to nullification or impairment, thereby restoring the "balance" of the Members' rights and obligations, as required by Article 3.3. If a Member is allowed to continue enforcing a WTO-inconsistent measure after the end of the RPT, the goal of dispute

[38] 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) (emphasis in original) (Exhibit JPN-69).
[39] *See* Appellate Body Report, *U.S. – OCTG Sunset Reviews (21.5)*, para. 173 (footnote 367) (stating that an implementing Member must take transformative action "by modifying or replacing [the WTO-inconsistent measure] with a revised measure"); Appellate Body Report, *EC – Selected Customs Matters*, para. 134 ("Through the recommendation under Article 19.1, the Member found to have violated a provision of a covered agreement is required to take *corrective action to remove* the violation") (emphasis added).

settlement is eviscerated, and the DSB's recommendations and rulings are rendered "essentially declaratory in nature".[40]

30. The Appellate Body should therefore reject the United States' absurd interpretation of the term "bring into conformity", as the Panel rightly did.

### (b) *Implementation Must Be Achieved by the End of the RPT*

31. 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 to bring its WTO-inconsistent measures into conformity. By the end of the RPT, an original WTO-inconsistent measure must be revised so that it applies henceforth (prospectively) in a WTO-consistent fashion, and does not nullify or impair benefits.[41] That is, the implementing Member's *future actions*, with effect from the end of the RPT, must be WTO-consistent, but not its past actions.

32. In the present case, the United States need not repay inflated duties collected through actions taken *before* the end of the RPT pursuant to Reviews 1, 2, 3, 7 and 8. However, if the United States had not yet taken action to collect duties by the end of the RPT, the United States must revise the original measures to bring them, and the United States' post-RPT actions pursuant to those measures, into conformity with WTO law. As the Appellate Body has held, implementation "extend[s] to the actual collection and liquidation of duties … when these actions result from administrative review determinations made before the end of the reasonable period of time".[42] This is a *prospective*, not retrospective, remedy.

### (c) *Implementation Action Is Required When Measures Continue to Produce Legal Effects*

33. Where the original WTO-inconsistent measure continues to produce WTO-inconsistent legal effects, the original measure must be brought into conformity.[43] The panel in *India – Autos* – a case with very close parallels to the present case – found that the duty to bring a WTO-inconsistent measure into conformity depends on whether the measure

[40] Appellate Body Report, *U.S. – Upland Cotton (21.5)*, paras. 245-246.
[41] Panel Report, para. 7.148; Appellate Body Report, *U.S. – Zeroing (EC) (21.5)*, para. 299.
[42] Appellate Body Report, *U.S. – Zeroing (EC) (21.5)*, para. 311.
[43] *See* Panel Report, *EC – Commercial Vessels*, para. 8.4.

continues to be "*binding*" and "*enforceable*", and "to *produce effects*", in domestic law.[44] Such a duty does *not* arise if the original measures "have *ceased to have an effect*".[45]

34. In the present case, the continuing legal effects of Reviews 1, 2, 3, 7 and 8 consist in the *"execution"*[46] *or enforcement* of WTO-inconsistent assessment rates, after the end of the RPT, in collecting excessive duties. The Panel agreed.[47] Implementation would not require the United States to "undo" the "past execution"[48] of assessment rates through the repayment of duties that had been collected before the end of the RPT.

### (d) *The Terms "Retrospective" and "Prospective" Are Not Treaty Terms, and Do Not Guide a Panel's Analysis*

35. The United States has argued that requiring it to bring the importer-specific assessment rates in Reviews 1, 2, 3, 7 and 8 into conformity would impose a "retrospective", rather than "prospective", remedy.[49] However, the terms "retrospective" and "prospective" do not assist a panel in determining the scope of a WTO Member's implementation obligations, because they are not treaty terms. Neither the DSU nor the *Anti-Dumping Agreement* uses these words to describe a Member's implementation obligations.[50] An important way in which the treaty interpreter interprets a treaty word with many shades of meaning is through the contextual relationship of that word to other words and phrases in the treaty. When a word is not part of the treaty, like the words "retrospective" and "prospective", it is simply impossible to engage in this important exercise and, therefore, impossible to arrive at a meaning that "fits comfortably in the treaty as a whole".[51]

36. In any event, as already discussed, the requirement for the United States to take transformative action to bring the importer-specific assessment rates in Reviews 1, 2, 3, 7 and

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[44] Panel Report, *India – Autos*, paras. 7.235, 8.58 (emphases added).
[45] Panel Report, *India – Autos*, para. 8.26 (emphasis added).
[46] Panel Report, *India – Autos*, para. 8.56 (emphasis added).
[47] Panel Report, para. 7.149 ("*importer-specific assessment rates [established in Reviews 1, 2, 3, 7 and 8] continued to have legal effect after the end of the RPT*, in the sense that they *continued to provide the authority for the collection of anti-dumping duties* in respect of the relevant (unliquidated) import entries") (emphases added).
[48] Panel Report, *India – Autos*, para. 8.58 (emphasis added).
[49] *See, e.g.,* United States' Appellant's Submission, paras. 60-61, 63-66.
[50] Panel Report, para. 7.140.
[51] Appellate Body Report, *U.S. – Continued Zeroing*, para. 268.

8 into conformity with its WTO obligations is entirely *prospective* in nature.[52] Yet, the United States failed to take any such action.[53]

### 3. The United States Is Not Excused from Its Implementation Obligations in the Present Case

#### (a) *The Date of Entry Is Not the Decisive Moment for Determining the Temporal Scope of a Member's Implementation Obligations*

##### (i) *The Legal Provisions in the GATT 1994 and the Anti-Dumping Agreement on which the United States Relies Do Not Support Its Position*

37. The United States relies on Articles VI:2 and VI:6(a) of the GATT 1994, the Interpretive Note to paragraphs 2 and 3 of Article VI, and Articles 8.6, 10.1, 10.6 and 10.8 of the *Anti-Dumping Agreement* to argue that "the legal regime in existence at the time that an import enters" determines liability for anti-dumping duties, and therefore the date of entry is decisive for assessing implementation obligations.[54] The Panel in this dispute, and both the panel and the Appellate Body in *U.S. – Zeroing (EC) (21.5)*, dismissed this argument.[55]

38. The provisions cited from the *Anti-Dumping Agreement* and the GATT 1994 address the date on which an anti-dumping order can be applied to an entry and, in that regard, they set forth limits on the retroactive application of an anti-dumping order. However, as the Panel found, "not a single word of those provisions addresses the issue of how a Member should implement the recommendations and rulings of the DSB",[56] or the "applicable date for implementation action".[57] They are therefore irrelevant to the issue before the Appellate Body.

##### (ii) *Relying on the Date of Entry as Decisive Nullifies Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994, and Is Contrary to the Object and Purpose of Dispute Settlement*

39. The United States' argument that its implementation obligations apply solely to *new entries that occur on or after the end of the RPT* nullifies the disciplines in Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994. These provisions require that

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[52] *See* Appellate Body Report, *U.S. – Zeroing (EC) (21.5)*, para. 309.
[53] Panel Report, para. 7.149.
[54] United States' Appellant's Submission, paras. 67-72.
[55] Panel Report, para. 7.147; Appellate Body Report, *U.S. – Zeroing (EC) (21.5)*, paras. 308-309.
[56] Panel Report, para. 7.147.

the amount of duties "*collected*", *long after importation*, not exceed the exporter's margin of dumping.[58] Yet, the U.S. argument allows an importing Member to *always* collect inflated anti-dumping duties under an original periodic review, making importer-specific assessment rates *immune* from the disciplines of Article 9.3.

40. The U.S. approach is also contrary to the object and purpose of the dispute settlement system, and undermines the implementation obligations in Articles 3.7, 19.1, 21.1 and 21.3 of the DSU,[59] which aim to end any nullification and impairment resulting from WTO-inconsistent measures by the end of the RPT. The United States has failed to demonstrate how the text of the DSU or the *Anti-Dumping Agreement* require its extreme interpretation.

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

41. Japan disagrees with the United States' argument that the Panel's interpretation, which is in concert with the Appellate Body's interpretation in *U.S. – Zeroing (EC) (21.5)*, treats retrospective and prospective duty collection systems unequally, and "[u]nfairly disadvantages" Members with retrospective systems.[60] Under both retrospective *and* prospective systems, the amount of duties collected at the time of importation is *subject to review* under Article 9.3 so as to ensure that they do not exceed the margin of dumping as established under Article 2 of the *Anti-Dumping Agreement*.[61] In either case, an importing Member may be required to "refund" some or all of the duties "paid" on importation. Thus, under either system, a review could continue to produce legal effects well after the end of the RPT, and such a WTO-inconsistent review must be brought into conformity with WTO law.

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

42. Articles 13, 14 and 15 of the *ILC Articles* are helpful in confirming that Articles 3.7, 19.1, 21.1 and 21.3 of the DSU require the United States to bring Reviews 1, 2, 3, 7 and 8

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[57] Panel Report, para. 7.147.
[58] Appellate Body Report, *U.S. – Zeroing (EC)*, para. 130; Appellate Body Report, *U.S. – Zeroing (Japan)*, para. 155 (emphasis added).
[59] Appellate Body Report, *U.S. – Upland Cotton (21.5)*, para. 246, *citing* to Articles 3.3 and 21.1 of the DSU.
[60] United States' Appellant's Submission, Heading IV.B.2, paras. 77-83.
[61] Appellate Body Report, *U.S. – Zeroing (Japan)*, para. 160. *See also* Appellate Body Report, *U.S. – Continued Zeroing*, para. 294; Appellate Body Report, *U.S. – Stainless Steel (Mexico)*, para. 121.

into conformity with its WTO obligations when they continue to produce legal effects after the end of the RPT, regardless of the dates of entry.[62]

43. Articles 13, 14 and 15 of the *ILC Articles* set forth rules on the *moment in time* when an act breaches an international obligation (*e.g.*, whether an act breaches WTO law after the end of the RPT), and on the *extension in time* of that breach (*e.g.*, whether an act continues to breach WTO law after the end of the RPT). These rules show that U.S. duty collection measures, taken after the end of the RPT pursuant to Reviews 1, 2, 3, 7 and 8, involve either the *commission of a new breach of WTO obligations at that time* (under Article II:1 of the GATT 1994) or the *continuation of an existing breach of WTO obligations* (under Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994), in each case on the basis of the original Reviews that, *by that time*, should have been brought into conformity with WTO law.

44. The *ILC Articles*, therefore, confirm that implementation action to "bring the measure[s] into conformity", with *prospective effect* from the end of the RPT, is essential to prevent *post-RPT conduct*, under the original measures, from giving rise to WTO-inconsistencies that *occur newly or continue after the end of the RPT*.

### (b) *Actions by U.S. Courts Do Not Excuse the United States from the Requirement to Bring Reviews 1, 2, 3, 7 and 8 into Conformity with Its WTO Obligations*

#### (i) *Court Injunctions Issued by a Member's Own Courts Do Not Exonerate the Member from Complying with Its WTO Obligations*

45. The United States argues that "but for" actions by U.S. courts enjoining liquidation of entries covered by Reviews 1, 2, 3, 7 and 8, duty collection would have been completed before the end of the RPT.[63] The United States seeks to be exonerated from implementation obligations that would otherwise apply because of this type of "delay that is a consequence of judicial review",[64] asking the Appellate Body to pretend that U.S. courts did not issue

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[62] The *ILC Articles* were adopted by the International Law Commission on 9 August 2001, and by Resolution 56/83 of 12 December 2001, the General Assembly took note of the Articles and recommended them to the attention of Governments; these are available at: http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf (Exhibit JPN-65).
[63] United States' Appellant's Submission, paras. 4, 96, 100.
[64] United States' Appellant's Submission, para. 95.

injunctions, and treat the United States as if liquidation had occurred before the end of the RPT.

46. However, the status of a measure under domestic law – including the existence of domestic litigation affecting that measure – is a fact.[65] In making an objective assessment of the matter, panels must rule upon measures as they stand, without distorting or disregarding any facts – such as court injunctions – that do not suit one party.[66] The United States "bears responsibility for acts of all its departments of government, *including its judiciary*".[67] The injunctions at issue were issued by U.S. courts, under standards set out in U.S. law.[68] The United States is therefore not "exonerate[d]"[69] from the requirement to bring the WTO-inconsistent reviews into compliance with its obligations where its own actions, under its own laws, lead to the collection of duties after the end of the RPT.

### (ii) *Footnote 20 of the Anti-Dumping Agreement Does Not Excuse a Member from Complying with the DSB's Recommendations and Rulings*

47. The United States cites to footnote 20 of the *Anti-Dumping Agreement* as textual support for its argument that the United States need not bring Reviews 1, 2, 7 and 8 into conformity with its WTO obligations by the end of the RPT due to judicial delay.[70] There are at least two problems with this argument. *First*, although footnote 20 authorizes non-compliance with the deadlines in Article 9.3 of the *Anti-Dumping Agreement*, it does not provide any exception to the obligations in the DSU to bring WTO-inconsistent periodic reviews into conformity with WTO law. *Second*, although footnote 20 excuses a departure from the *deadlines* in Article 9.3 where judicial review causes delay, it does not excuse a Member from meeting the *substantive obligation* to refund excessive anti-dumping duties,

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[65] *See* Appellate Body Report, *Dominican Republic – Cigarettes*, para. 46; Appellate Body Report, *India – Patents (U.S.)*, paras. 65-71, *citing Certain German Interests in Polish Upper Silesia*, [1926], PCIJ Rep., Series A, No. 7, p. 19; Appellate Body Report, *U.S. – OCTG Sunset Reviews*, para. 26.
[66] Panel Report, *Brazil – Retreaded Tyres*, para. 7.305; Appellate Body Report, *Brazil – Retreaded Tyres*, para. 252.
[67] Appellate Body Report, *U.S. – Shrimp*, para. 173 (emphasis added), *citing* Appellate Body Report, *U.S. – Gasoline*, p. 28; Jennings and Watts (eds.), *Oppenheim's International Law*, 9th ed., Vol. I (Longman's 1992), p. 545; and I. Brownlie, *Principles of Public International Law*, 4th ed. (Clarendon Press, 1990), p. 450. *See also* Panel Report, *Brazil – Retreaded Tyres*, para. 7.305, *citing* Article 4(1) of the *ILC Articles* (Exhibit JPN-65).
[68] A decision by a U.S. court to issue an injunction is not granted automatically, but only after the court has determined "that there is a likelihood of success on the merits". *See, e.g.*, U.S. Court of Appeals for the Federal Circuit, *Zenith Radio Corp. v. United States*, 710 F.2d 806 (Fed. Cir. 1983), at 809, and Nies J., concurring, at 812. (Exhibit JPN-70).
[69] *See* Panel Report, *Brazil – Retreaded Tyres*, para. 7.305.
[70] United States' Appellant's Submission, paras. 95-96.

once the delay has passed. In short, the United States has no textual support for its view that different – *diminished* – implementation obligations apply due to actions by a Member's own courts.

#### (iii) *USCBP Duty Collection Measures Derive Mechanically from the USDOC's Assessment Rates Whether or Not Litigation Occurs*

48. The United States contends that "judicial review severs any so-called 'mechanical' link between the assessment of liability in the original review determination and the liquidation instructions".[71] However, with or without litigation, the mechanism for duty collection takes exactly the *same* ordinary course: USDOC determines the assessment rates; USDOC communicates its assessment rates to USCBP through liquidation instructions; and, USCBP computes the amount of duties by multiplying the USDOC's assessment rates by the entered values of the goods. Amended rates pursuant to judicial review may be relevant in Article 21.5 proceedings, but only because they may bring the original reviews into conformity with WTO law, which did not occur in this case.[72]

## D. The Panel Properly Found that the United States Has Acted Inconsistently with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 by Applying Zeroing in Reviews 4, 5, 6 and 9

49. In this Section, Japan demonstrates that:

- *First*, the Panel correctly found Reviews 4, 5, 6 and 9 to be "measures taken to comply", within the meaning of Article 21.5. Japan begins with this issue because the United States' appeal against the Panel's "basis"[73] for finding these Reviews to be WTO-inconsistent is essentially a challenge to the Panel's finding that these Reviews are "measures taken to comply".
- *Second*, the Panel correctly found that Review 9 was within its terms of reference, under Article 6.2 of the DSU.
- *Third*, the Panel properly concluded that the United States has acted inconsistently with its WTO obligations by applying zeroing in Reviews 4, 5, 6 and 9.

[71] United States' Appellant's Submission, para. 97.
[72] Panel Report, paras. 7.139 (footnote 148), 7.154.
[73] United States' Appellant's Submission, para. 105. *See also Id.*, paras. 21, 24, 86 and 89.

### 1. The Panel Properly Found Reviews 4, 5, 6 and 9 to Be Measures Taken to Comply

#### (a) *Scope of Article 21.5 Proceedings*

50. Proceedings under Article 21.5 concern a disagreement about either the "existence", or the "consistency with a covered agreement", of "measures taken to comply" with the recommendations and rulings of the DSB. "Measures taken to comply" include both: (i) measures declared by an implementing Member as taken "in the direction of", or "for the purpose of achieving", compliance with the DSB's recommendations and rulings; and, (ii) measures that move away from compliance, or are not taken with the objective, purpose or intent to comply with the DSB's recommendations and rulings.[74]

51. The Appellate Body and several panels have elaborated and refined a standard to determine when measures not declared to be "taken to comply" are, nonetheless, subject to a compliance panel's mandate.[75] This standard requires examination of the factual and legal background, nature, effects, and timing of the measures at issue to ascertain whether they bear a "particularly close relationship" with the DSB's recommendations and rulings, and the original measures subject to those recommendations and rulings.[76]

#### (b) *Reviews 4, 5, 6 and 9 Are "Declared" Measures "Taken to Comply"*

52. The United States repeatedly declared that Reviews 4, 5, 6 and 9 were taken "to comply" with the DSB's recommendations and rulings. In a status report to the DSB on its implementation efforts and in submissions to the Panel, the United States argued that the periodic reviews at issue in the original proceedings were "withdrawn",[77] "superceded",[78] "eliminated",[79] "replaced",[80] and "removed"[81] by the subsequent periodic reviews challenged

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[74] Appellate Body Report, *U.S. – Zeroing (EC) (21.5)*, para. 202.
[75] *See, e.g.*, Appellate Body Report, *U.S. – Zeroing (EC) (21.5)*, paras. 198-207; Appellate Body Report, *EC – Bananas III (21.5)*, para. 245; Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, para. 77; Panel Report, *Australia – Salmon (21.5)*, para. 7.10 (sub-para. 22); Panel Report, *Australia – Automotive Leather II (21.5)*, para. 6.5. The Panel assessed this case-law at paragraphs 7.51-7.62 of its Report.
[76] Panel Report, para. 7.59, *quoting* Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, para. 77; Appellate Body Report, *U.S. – Zeroing (EC) (21.5)*, paras. 201, 207, 229, *citing* Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, para. 77.
[77] United States' Second Written Submission, para. 28; United States' First Written Submission, paras. 39, 52, 54, 58, 65, 66, 67.
[78] WT/DS322/22/Add.2; United States' First Written Submission, paras. 3, 44.
[79] United States' Second Written Submission, para. 8; United States' First Written Submission, paras. 44, 54.
[80] United States' Second Written Submission, para. 18; United States' First Written Submission, para. 44.
[81] United States' Second Written Submission, paras. 18, 26.

by Japan in these compliance proceedings – *i.e.*, Reviews 4, 5, 6 and 9 – and the United States had therefore "*taken measures to comply*".[82]

53. The Panel rejected the U.S. argument that Reviews 4, 5, 6 and 9 were somehow separate from the measures effecting removal of the WTO-inconsistent cash deposit rates in the original periodic reviews,[83] effectively finding Reviews 4, 5, 6 and 9 to be the United States' declared measures to comply. The Appellate Body should confirm this finding and, accordingly, be satisfied of its jurisdiction to examine and uphold the Panel's finding that Reviews 4, 5, 6 and 9 are inconsistent with the covered agreements.

### (c) *Reviews 4, 5, 6 and 9 Are Closely Connected to the DSB's Recommendations and Rulings and the Periodic Reviews Subject to Those Recommendations and Rulings*

54. Should the Appellate Body consider that Reviews 4, 5, 6 and 9 are not "declared" measures "taken to comply", they are nonetheless "measures taken to comply" within the meaning of Article 21.5, because they bear a "particularly close relationship"[84] to the DSB's recommendations and rulings, and the original measures subject to those recommendations and rulings.

55. In terms of the *factual and legal background*, each of Reviews 4, 5, 6 and 9 was conducted pursuant to the same 1989 Anti-Dumping Order on "*Ball Bearings and Parts Thereof From Japan*" as original Reviews 1, 2 and 3; and, Reviews 4, 5, 6 and 9 followed consecutively from Review 3, the latest of the original periodic reviews.[85] In short, as the Panel correctly found, these reviews form part of a "continuum" of consecutive periodic reviews, with each later review "supersed[ing]" the prior review.[86] Specifically, exporter-specific cash deposit rates determined in one review replace those rates determined in the prior review, and importer-specific assessment rates determined in one review are applied to entries that were subject to the exporter-specific cash deposit rates from the prior review.

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[82] United States' First Written Submission, para. 51.
[83] Panel Report, paras. 7.69-7.73.
[84] Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, para. 77.
[85] The review for 2001-2002, which comes between Reviews 2 and 3, was at issue in the original dispute, but not challenged in these proceedings because the United States had already collected definitive duties on all entries covered by this review by the end of the RPT. *See* Panel Report, para. 7.66 (footnote 92).
[86] Panel Report, paras. 7.65 and footnote 90, 7.75, 7.114,

56. The *nature* of Reviews 4, 5, 6 and 9 is identical to that of Reviews 1, 2 and 3, as the Panel correctly concluded.[87] All these measures result from the same type of proceeding (periodic reviews) pursuant to the same 1989 Anti-Dumping Order (*Ball Bearings*), concern the same product, and relate to exports from the same companies. Moreover, as in *U.S. – Zeroing (EC) (21.5)*,[88] the use of zeroing links Reviews 1, 2 and 3 and Reviews 4, 5, 6 and 9, and the use of zeroing is the only aspect of Reviews 4, 5, 6 and 9 challenged by Japan.

57. Reviews 4, 5, 6 and 9 also have identical *effects* to Reviews 1, 2 and 3, as the Panel also correctly concluded.[89] That is, Reviews 4, 5, 6 and 9 perpetuate the use of the WTO-inconsistent zeroing procedure in periodic reviews, and have "the effect of undermining compliance" and of "circumvent[ing]" the DSB's recommendations and rulings.[90] As in *U.S. – Zeroing (EC) (21.5)*, the effects of assessment rates and cash deposit rates that continue to reflect the zeroing methodology provide a "sufficient link" to the original reviews and the DSB's recommendations and rulings as to the original reviews.[91]

58. The *timing* of Reviews 4 and 5 (which pre-dated adoption of the DSB's recommendations and rulings) and 6 and 9 (which post-dated adoption) does not bar them from being "measures taken to comply". The Appellate Body has made clear that the timing of a measure, although a relevant factor in the analysis, is not determinative of whether a measure is "taken to comply".[92] The Panel concurred,[93] and concluded that the timing of these measures is not sufficient to break the strong substantive links that otherwise exist to the DSB's recommendations and rulings, and the original measures.[94]

59. The United States' alleged *lack of intent* to use, in particular, Reviews 4 and 5 (the pre-adoption subsequent periodic reviews), to comply with the DSB's recommendations and

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[87] Panel Report, para. 7.65 (with respect to Reviews 4, 5 and 6) and para. 7.114 (with respect to Review 9).
[88] Appellate Body Report, *U.S. – Zeroing (EC) (21.5)*, para. 230.
[89] Panel Report, para. 7.65 (with respect to Reviews 4, 5 and 6) and para. 7.114 (with respect to Review 9).
[90] Appellate Body Report, *U.S. – Upland Cotton (21.5)*, para. 205. *See also* Appellate Body Report, *U.S. – Zeroing (EC) (21.5)*, para. 252 ("In our view, the use of zeroing to calculate assessment rates in administrative reviews issued after the end of the reasonable period of time is an indication that these reviews could undermine the compliance allegedly achieved by the United States"), para. 256 ("In our view, the United States misinterprets the findings of the Appellate Body in *U.S. – Softwood Lumber IV (Article 21.5 – Canada)* as requiring that the 'closely connected' measures actually undermine the compliance otherwise achieved by the implementing Member").
[91] Appellate Body Report, *U.S. – Zeroing (EC) (21.5)*, para. 231.
[92] Appellate Body Report, *U.S. – Zeroing (EC) (21.5)*, para. 224.
[93] Panel Report, para. 7.78.
[94] Panel Report, para. 7.79. Concerning Review 9, *see Id.*, para. 7.114 (Review 9 "is therefore the latest link in the chain of assessment …").

rulings, also does not disqualify these measures from being "taken to comply".[95] The Panel correctly found that a Member's intent is not determinative of whether a measure is "taken to comply".[96] The Appellate Body concurred in *U.S. – Zeroing (EC) (21.5)*.[97]

60. Thus, the Panel properly found that Reviews 4, 5, 6 and 9 are "measures taken to comply" because they bear a "particularly close relationship" to Reviews 1, 2 and 3, and the DSB's recommendations and rulings relating to those Reviews. The Appellate Body should confirm this finding and, accordingly, be satisfied of its jurisdiction to examine and uphold the Panel's finding that Reviews 4, 5, 6 and 9 are inconsistent with the covered agreements.

### 2. **The Panel Properly Found Review 9 to Be within Its Terms of Reference**

61. The United States appeals the Panel's decision to include Review 9 (adopted by the USDOC during the panel proceedings) in its terms of reference,[98] asserting that its inclusion is inconsistent with Article 6.2 of the DSU.[99] Japan demonstrates in this Section that the Panel's inclusion of Review 9 was consistent with Article 6.2.

#### (a) ***The Panel's Findings***

62. The Panel recalled that Article 6.2 requires a panel request to "identify the specific measures at issue",[100] with two objectives in mind: (i) "due process"; and (ii) defining the scope of the panel's jurisdiction.[101] Each case requires "a close examination of the relevant facts".[102] In this case, in light of the objectives of Article 6.2 and the relevant facts at hand, the Panel found Review 9 to be within its terms of reference, for three reasons.

63. *First*, the category of "subsequent closely connected measures" identified in Japan's panel request satisfied the Article 6.2 requirement, and was broad enough to include Review 9.[103] The Panel based this conclusion on the terms used in the panel request, the predictability of the U.S. retrospective system, and the circumstances of Review 9 – namely,

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[95] Panel Report, paras. 7.80-7.81, *quoting* United States' First Written Submission, paras. 33, 43. Concerning Review 9, *see* United States' Supplemental Submission, para. 3.
[96] Panel Report, para. 7.80, *citing* Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, para. 67, and Panel Report, *U.S. – Gambling (21.5)*, para. 6.24.
[97] Appellate Body Report, *U.S. – Zeroing (EC) (21.5)*, para. 226.
[98] Panel Report, paras. 7.100-7.116.
[99] United States' Appellant's Submission, paras. 43-58.
[100] Panel Report, paras. 7.101, 7.104.
[101] Panel Report, para. 7.104.
[102] Panel Report, para. 7.101.
[103] Panel Report, paras. 7.101-7.107, 7.110-7.111.

that Review 9 had been initiated at the time of panel establishment, and stemmed from the same 1989 Anti-Dumping Order on *Ball Bearings* as the original reviews at issue. The Panel also found that the United States had expressly indicated its awareness that subsequent periodic reviews such as Review 9 were covered by the terms of reference.[104]

64. *Second*, the Panel considered it important that Review 9 was the "latest link" in an ongoing chain of "measures taken to comply" that, like Reviews 4, 5 and 6 before it, undermined the DSB's recommendations and rulings as to use of the zeroing procedures.[105]

65. *Third*, although Review 9 came into existence during the panel proceedings and was at the time of establishment a "future measure", the Panel found its existence to be "entirely predictable, rather than 'entirely speculative'", especially given that it had already been initiated at the time of Japan's panel request.[106] The Panel recalled that the Appellate Body had "not ruled out the inclusion of future measures",[107] noting "future measures" may be included in "limited circumstances", such as the *Australia – Salmon (21.5)* panel's inclusion of an import ban that *did not exist* at the time of that panel's establishment.[108]

### (b) *Article 6.2 of the DSU Permits the Inclusion in a Panel's Terms of Reference of Measures Adopted During Panel Proceedings*

66. The text of Article 6.2 requires a panel request to "identify the specific measures at issue", in order to define the scope of the dispute and serve the due process objective of giving notice.[109] The Appellate Body has identified a "general rule" that a measure must exist at the time of panel establishment to be included in a panel's terms of reference, but has also said that exceptions can be made in "limited circumstances", while still retaining consistency with Article 6.2.[110]

67. In Japan's view, Article 21.5 compliance proceedings offer circumstances where an exception from the "general rule" is warranted. The compliance panel in *Australia – Salmon*

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[104] Panel Report, para. 7.105.
[105] Panel Report, para. 7.114. *See also Id.*, paras. 7.112-7.113.
[106] Panel Report, paras. 7.115-7.116.
[107] Panel Report, para. 7.116 (footnote 142).
[108] Panel Report, para. 7.116 (footnote 142), *citing* Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, para. 74.
[109] Appellate Body Report, *EC – Chicken Cuts*, para. 155. *See also* Appellate Body Report, *Brazil – Desiccated Coconut*, pg. 22.
[110] Appellate Body Report, *EC – Chicken Cuts*, para. 156.

*(21.5)* agreed.[111] In that dispute, which involved circumstances closely resembling Review 9, the panel found, in the context of Article 21.5 proceedings, that a measure that comes into existence during panel proceedings can be included within a compliance panel's terms of reference – a decision the Appellate Body has approved and the Panel in this case has recalled.[112]

### (c) *Japan's Panel Request Identifies a Category of Measure that Is Sufficiently Specific to Satisfy the Requirement of Article 6.2 of the DSU, and Broad Enough to Include Review 9*

68. The reference in Japan's panel request to "any subsequent closely connected measures" is sufficiently specific to satisfy Article 6.2.[113] Panels and the Appellate Body have previously found a *category* of measure to be sufficiently specific to satisfy Article 6.2.[114] Japan's panel request specifies that the periodic reviews at issue relate to one of three antidumping orders, namely "Ball Bearings", "Cylindrical Roller Bearings", and "Spherical Plain Bearings".[115] The request identifies the periodic reviews as: (i) five periodic reviews at issue in the original proceedings; (ii) "three *closely connected* periodic reviews that the United States argues 'superseded' the original reviews"; and, (iii) "any subsequent *closely connected* measures".[116] Any "subsequent closely connected" periodic reviews under the third category could relate solely to the *Ball Bearings* order, because the United States revoked the other two orders, effective 1 January 2000.[117]

69. The category of "subsequent closely connected measures" is also broad enough to cover Review 9, unlike other disputes with narrowly drafted panel requests.[118] Thus, as Review 9, issued under the *Ball Bearings* order, falls squarely within the category of "subsequent closely connected measures", it is properly part of these Article 21.5 proceedings.

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[111] Panel Report, *Australia – Salmon (21.5)*, para. 7.10 (sub-paras. 27-28).
[112] Panel Report, para. 7.116 (footnote 142), *citing* Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, para. 74.
[113] Japan's Panel Request, WT/DS322/27, para. 12.
[114] Panel Report, *Australia – Salmon (21.5)*, para. 7.10 (sub-para. 27); Panel Report, *EC – Bananas III (U.S.)*, para. 7.27; Appellate Body Report, *EC – Bananas III*, para. 140.
[115] Japan's Panel Request, WT/DS322/27, para. 12.
[116] Japan's Panel Request, WT/DS322/27, para. 12 (emphases added).
[117] United States' First Written Submission, para. 66, *citing Revocation of Antidumping Duty Orders on Certain Bearings from Hungary, Japan, Romania, Sweden, France, Germany, Italy, and the United Kingdom*, 65 Fed. Reg. 42667, 42668 (July 11, 2000) (Exhibit US-A19).
[118] *See* Panel Report, *EC – Chicken Cuts (Thailand)*, paras. 7.28, 7.32; Panel Report, *U.S. – Zeroing (EC) (21.5)*, para. 8.125 and footnote 690.

Indeed, the United States anticipated the inclusion of subsequent periodic reviews like Review 9.[119]

### (d) *The Ongoing and Continuous Nature of Compliance with the DSB's Recommendations and Rulings Is a Circumstance Warranting Inclusion of Review 9 in the Panel's Terms of Reference*

70. Whether a measure that comes into existence during panel proceedings may be included within the panel's terms of reference depends on the "*circumstances*".[120] The circumstances of the present proceedings, in that they concern review of the consistency with the covered agreements of measures taken to comply pursuant to Article 21.5, warrant inclusion of Review 9. This is because the United States' compliance process is "ongoing or continuous",[121] with each of Reviews 4, 5, 6 and 9 serving as a "replacement" measure that "supersedes" the previous *Ball Bearings* periodic review. A failure to include Review 9, which as the "latest link in the chain"[122] constitutes a "measure taken to comply", would have made the Panel's findings distinctly incomplete, as the "zeroed" cash deposit rate established in Review 6 had ceased to exist during the course of the proceedings.[123] In the words of the *Australia – Salmon (21.5)* panel, to exclude from the terms of reference a post-establishment measure taken to comply, where the panel request is broad enough to cover that measure and the process of achieving and undermining compliance is "ongoing and continuous", "would go against the objective of 'prompt compliance'" in Article 21.1 of the DSU.[124]

### (e) *Including Review 9 in the Panel's Terms of Reference Is Consistent with the Due Process Objectives of Article 6.2*

71. Including a measure adopted during panel proceedings within a panel's terms of reference must not compromise the "due process objective [of Article 6.2] of notifying the parties and third parties of the nature of a complainant's case".[125] In the present case,

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[119] Panel Report, para. 7.105, *quoting* United States' First Written Submission, para. 50. *See also* Panel Report, para. 7.103.
[120] Appellate Body Report, *EC – Chicken Cuts*, para. 156 (emphasis added).
[121] Panel Report, *Australia – Salmon (21.5)*, para. 7.10 (sub-para. 28). *See also Id.*, para. 7.10 (sub-para. 27).
[122] Panel Report, para. 7.114.
[123] Panel Report, para. 8.2.
[124] Panel Report, *Australia – Salmon (21.5)*, para. 7.10 (sub-para. 27).
[125] Appellate Body Report, *EC – Chicken Cuts*, para. 155; Panel Report, *Australia – Salmon (21.5)*, para. 7.10 (sub-paras. 27-28). With respect to the "due process" function served by Article 6.2 generally, *see, e.g.*, Appellate Body Report, *U.S. – Carbon Steel*, para. 126; Appellate Body Report, *Korea – Dairy*, paras. 126-127; Appellate Body Report, *EC – Computer Equipment*, para. 70; Appellate Body Report, *Thailand – H-Beams*, para. 95.

including Review 9 within the Panel's terms of reference did not compromise due process, in the ways suggested by the United States in its Appellant's Submission,[126] or otherwise.

72. The United States was deprived of the opportunity neither to sufficiently "review" Review 9 and understand its legal consequences, nor to prepare and present its defense to claims against Review 9. The sole element of Review 9 subject to Japan's claims was the USDOC's use of the zeroing procedures, and the evidence in this regard was identical to the evidence submitted with respect to Reviews 4, 5 and 6. Moreover, the United States presented a defense with respect to Review 9 that was virtually identical to its defense with respect to all of the subsequent periodic reviews. The United States also exploited ample opportunities to address the one aspect of its defense to Review 9 that varied from its defense to Reviews 4, 5, and 6 – namely, that Review 9 was not properly within the Panel's terms of reference.[127]

73. Further, third parties had the opportunity to present their views, and potential third parties were not deprived of their rights. Three third parties addressed whether Review 9 fell within the Panel's terms of reference, and agreed that it does.[128] There is also no reason to assume that potential third parties did not interpret the phrase "any subsequent closely connected measures" to include Review 9, as the United States had.[129]

74. Finally, including Review 9 in the Panel's terms of reference does not create "asymmetry" in the sense that the Panel would exercise jurisdiction over a post-establishment measure asserted by a *complaining* Member, but not one submitted by a *responding* Member as evidence that an alleged WTO-inconsistency no longer exists.[130] In this case, the United States asserted that it "*came into compliance*"[131] with the DSB's recommendations and rulings by adopting the subsequent periodic reviews, including Review 9, each of which the

[126] *See* United States' Appellant's Submission, para. 57.
[127] United States' First Written Submission, para. 50; United States' Second Written Submission, paras. 29-34; United States' Opening Statement, paras. 13-14; United States' Response to Supplemental Submission of Japan, paras. 8-16; United States' Appellant's Submission, para. 42 (footnote 47); Panel Report, paras. 7.103, 7.105.
[128] European Communities Oral Statement, paras. 47-48; European Communities' Third Party Submission, para. 27; Oral Statement of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, paras. 7, 12-15; Mexico's Oral Statement, para. 12. An additional third party, Norway, expressly declined to offer its views on this issue. *See* Norway's Third Party Submission, para. 7.
[129] Panel Report, para. 7.105, *quoting* United States' First Written Submission, para. 50.
[130] United States' Appellant's Submission, para. 57.
[131] United States' Answers of 26 November 2008, para. 3 (emphasis added). *See also Id.*, paras. 10, 13, 14, 16, 17.

Panel *did* examine and address.[132] Moreover, previous panels *have* examined post-establishment measures offered by a responding Member as evidence that an alleged WTO-inconsistency no longer exists.[133] A failure to do so would constitute legal error. The Panel in the present case in no way deviated from the precedents.

75. Thus, although the United States has raised a "parade of horribles" to illustrate how a decision to include in the terms of reference a measure that comes into existence during panel proceedings could compromise the rights of parties and third parties, and the ability of a panel to properly execute its mandate,[134] the "parade" did not materialize in these proceedings. As such, the Panel properly found Review 9 to be within its terms of reference.

### 3. The Panel Properly Found that the United States Has Acted Inconsistently with Its WTO Obligations by Applying Zeroing in Reviews 4, 5, 6 and 9

#### (a) *The Panel's Findings*

76. Having found that Reviews 4, 5, 6 and 9 are "measures taken to comply",[135] the only remaining issue before the Panel was whether those "measures taken to comply" were inconsistent with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 "because the United States applied zeroing when calculating margins of dumping to determine cash deposit rates and importer-specific assessment rates".[136] The Panel found, based on evidence submitted by Japan, that Japan had established a *prima facie* case that these rates in Reviews 4, 5, 6 and 9 "were affected by USDOC's application of zeroing", and the United States had failed to rebut that *prima facie* case.[137] Indeed, the United States did "not deny that it applied zeroing in these periodic reviews".[138]

#### (b) *The United States Raises Threshold Issues Challenging the Panel's Entitlement to Rule Upon Reviews 4, 5, 6 and 9 Under Article 21.5 of the DSU*

77. The Panel properly found the United States' use of zeroing in Reviews 4, 5, 6 and 9 to be inconsistent with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of

[132] Panel Report, paras. 7.69-7.75.
[133] *See, e.g.*, Panel Report, *India – Autos*, paras. 8.4, 8.5, 8.25 and footnote 461, and 8.28.
[134] United States' Appellant's Submission, paras. 56-57.
[135] Panel Report, paras. 7.82, 7.114, 7.156.
[136] Panel Report, para. 7.157.
[137] Panel Report, para. 7.166.
[138] Panel Report, para. 7.159.

the GATT 1994. The United States does not assert that using zeroing in these Reviews was WTO-consistent, but instead contends that Reviews 4, 5, 6 and 9 "*cannot serve as the basis for a finding of WTO-inconsistency in this dispute*",[139] for three threshold reasons: (1) the entries covered by Reviews 4, 5, 6 and 9 occurred before the end of the RPT;[140] (2) Reviews 4, 5 and 6 were completed before the end of the RPT;[141] and (3) Reviews 4, 5 and 6 had no ongoing effects after the end of the RPT because duty collection had been enjoined pursuant to domestic litigation.[142] None of these threshold issues calls into question the Panel's authority to rule upon the "consistency" of Reviews 4, 5, 6 and 9.

### (i) *The Timing of a Periodic Review Does Not Preclude a Compliance Panel from Ruling upon Its "Consistency" with the Covered Agreements, under Article 21.5 of the DSU*

78. The United States argues that the fact that Reviews 4, 5 and 6 were "concluded long before the end of the RPT" means these reviews "*cannot provide a basis for finding that the United States was acting inconsistently*" with its WTO obligations.[143] However, the Appellate Body has held that the *timing* of a measure "cannot be determinative of" whether it falls within the scope of an Article 21.5 proceeding";[144] it has also ruled that "measures taken to comply" may be taken *before* the DSB's recommendation and rulings are adopted,[145] meaning, *a fortiori*, they may be taken before the end of the RPT. Thus, the U.S. argument that "measures taken to comply" must fall *after* the end of the RPT is without foundation. The Panel properly found Reviews 4, 5 and 6 to be "measures taken to comply", despite their timing, and therefore it was entitled to rule upon their consistency.

### (ii) *Dates of Entry of Imports Have No Relevance for Assessing Whether a Panel Has a "Basis" to Examine the Consistency of "Measures Taken to Comply"*

79. The United States also argues that "because Reviews 4, 5, 6 and 9 do not cover entries occurring after the end of the RPT, the application of zeroing in those reviews … *cannot*

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[139] United States' Appellant's Submission, para. 105 (emphasis added). *See also Id.*, paras. 21, 24, 86, 89.
[140] United States' Appellant's Submission, paras. 60, 86, 89.
[141] United States' Appellant's Submission, paras. 24, 105.
[142] United States' Appellant's Submission, paras. 24, 62, 105.
[143] United States' Appellant's Submission, para. 105 (emphasis added). *See also Id.*, para. 24. The U.S. argument with regard to the date of adoption does not apply to Review 9, since Review 9 was concluded after the end of the RPT.
[144] Appellate Body Report, *U.S. – Zeroing (EC) (21.5)*, para. 224.
[145] *See, e.g.,* Appellate Body Report, *U.S. – Zeroing (EC) (21.5)*, para. 224.

*serve as a basis for a finding of inconsistency*".[146] To the contrary, a panel's authority to rule upon the "consistency" of a "measure taken to comply" is not affected by the fact that goods covered by the measure entered before the end of the RPT. The Panel in this dispute, as well as both the panel and the Appellate Body in *U.S. – Zeroing (EC) (21.5)*, correctly concluded that the date of an entry is not determinative in deciding whether a WTO-inconsistent periodic review must be brought into conformity with WTO law.[147]

### (iii) ***Reviews 4, 5, 6 and 9 Have On-Going Legal Effects***

80. The United States asserts that Reviews 4, 5 and 6 "did not have any effects after the end of the RPT",[148] and in this situation, the Panel should not make any findings of inconsistency.[149]

81. To the contrary, as the Panel found, "importer-specific assessment rates determined in Reviews 4, 5 and 6 continued to have legal effect long after the adoption of the DSB's recommendations and rulings".[150] In making this finding, the Panel referred to its earlier finding that, "[a]s with Review 4, . . . importer-specific assessment rates determined in Reviews 5 and 6 continued to have effects after both the adoption of the DSB's recommendations and rulings, and the expiry of the RPT".[151] With respect to Review 9, it was adopted after the end of the RPT and, hence, *began* to apply, and produce legal effects, after that date. The assessment rates from these Reviews serve as the legal basis for duty collection measures to be taken, after the end of the RPT, with respect to entries covered by these Reviews.

82. The United States is also incorrect in suggesting that the Panel's finding of inconsistency regarding Reviews 4, 5, 6 and 9 was nothing more than "an advisory opinion or *obiter dicta*".[152] These findings are recorded in the Panel's "Conclusions and Recommendations",[153] and give rise to rights under Article 22.1 of the DSU.[154]

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[146] United States' Appellant's Submission, para. 89 (emphasis added). *See also Id.*, paras. 60, 86 and footnote 116.
[147] Panel Report, para. 7.147; Appellate Body Report, *U.S. – Zeroing (EC) (21.5)*, paras. 308-309.
[148] United States' Appellant's Submission, para. 90.
[149] United States' Appellant's Submission, para. 102.
[150] Panel Report, para. 7.79.
[151] Panel Report, para. 7.75. *See also Id.*, para. 7.74.
[152] United States' Appellant's Submission, para. 102.
[153] Panel Report, para. 8.1(b).
[154] Appellate Body Report, *U.S. – Zeroing (EC) (21.5)*, para. 298.

83. Finally, the United States again erroneously seeks to evade the disciplines in Article 22.1, noting that Reviews 4, 5 and 6 only have post-RPT effects because of delays resulting from U.S. court injunctions.[155] However, the text of the DSU does not exonerate an implementing Member from its obligation to bring an original measure into conformity with WTO law, or to ensure that a "measure taken to comply" is consistent with WTO law, in circumstances where the post-RPT legal effects of the measure stem from court injunctions that are the responsibility of the Member.

## E. The Panel Properly Found the United States to Be in Violation of Articles II:1(a) and II:1(b) of the GATT 1994

84. In this Section, Japan addresses the U.S. appeal of the Panel's findings that certain USDOC liquidation instructions and USCBP liquidation notices (collectively, "duty collection measures") taken after the expiry of the RPT with respect to Reviews 1, 2, 7 and 8 are inconsistent with Articles II:1(a) and II:1(b) of the GATT 1994.[156]

85. The United States does not allege that these duty collection measures are *consistent* with Article II:1, but rather argues that the Panel's findings are "entirely derivative",[157] and that the duty collection measures cannot serve as a "basis" for those findings because they relate to entries that took place before the end of the RPT[158] and would have had no ongoing legal effects but for U.S. court injunctions.[159] Japan explains that the Panel properly found these "*new measures*"[160] to be "measures taken to comply", and therefore had a proper "basis" to examine their WTO consistency and find them to be WTO-inconsistent.

### 1. The Panel Properly Found the Duty Collection Measures to Be Measures Taken to Comply

86. Because the United States raises several arguments that implicitly question the Panel's jurisdiction over the duty collection measures, Japan begins by demonstrating that they are "measures taken to comply".

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[155] United States' Appellant's Submission, para. 105. *See also Id.*, paras. 24, 62.
[156] United States' Appellant's Submission, paras. 106-108.
[157] United States' Appellant's Submission, para. 107.
[158] United States' Appellant's Submission, paras. 60, 86, 89.
[159] United States' Appellant's Submission, paras. 24, 62, 105.
[160] Panel Report, para. 7.207 (footnote 219) (emphasis added).

87. The duty collection measures are "the means by which the United States collects the final anti-dumping duties assessed in"[161] Reviews 1, 2, 7 and 8, which were each subject to the DSB's recommendations and rulings and found to be WTO-inconsistent. In terms of their *nature*, the duty collection measures relate to the *same* products and companies as those Reviews, and apply the *same* WTO-inconsistent importer-specific assessment rates determined in those Reviews. In terms of the *effects* of the duty collection measures, they "undermin[e] compliance"[162] with the DSB's recommendations and rulings with respect to Reviews 1, 2, 7 and 8 by securing duty collection at the WTO-inconsistent importer-specific assessment rates determined in those Reviews. As for *timing*, the duty collection measures were all issued *after the end of the RPT*,[163] so their timing does not in any way undermine a finding that they were "taken to comply". Thus, the Appellate Body should confirm that the duty collection measures are "measures taken to comply", and satisfy itself of its jurisdiction to examine their "consistency" with the covered agreements.

### 2. The Panel Properly Found that the Duty Collection Measures Are Inconsistent with Articles II:1(a) and (b) of the GATT 1994 by Effecting Collection of Duties in Excess of Bound Rates

#### (a) *The Panel's Findings*

88. Having found that the duty collection measures are "measures taken to comply", the Panel concluded, based on evidence provided by Japan, that those measures violate Articles II:1(a) and II:1(b) of the GATT 1994.[164] The Panel emphasized that these are "*new measures*"[165] that collect duties, after the end of the RPT, in excess of the bound rates set forth in the U.S. Schedule of Concessions, and that the safe harbour in Article II:2(b) does not apply because these measures are "based entirely" on WTO-inconsistent reviews.[166] The Panel reiterated that the U.S. implementation obligations "apply to actions taken after the expiry of the RPT, even if those actions relate to import entries that occurred at an earlier date",[167] rejecting the U.S. argument in this regard.

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[161] Panel Report, para. 7.200.
[162] Appellate Body Report, *U.S. – Upland Cotton (21.5)*, para. 205. *See also* Appellate Body Report, *U.S. – Zeroing (EC) (21.5)*, paras. 252, 256.
[163] *See* Annexes 1, 2, 7 and 8 submitted with Japan's Updated Answers of 10 December 2008.
[164] Panel Report, para. 7.208.
[165] Panel Report, para. 7.207 (footnote 219) (emphasis added).
[166] Panel Report, para. 7.207.
[167] Panel Report, para. 7.207 (footnote 219).

### (b) *The Panel's Findings Concerning the Duty Collection Measures under Articles II:1(a) and (b) Are Not "Entirely Derivative" of Its Findings Concerning Reviews 1, 2, 7 and 8 Under the Anti-Dumping Agreement and Article VI:2*

89. Japan's claims regarding the duty collection measures are not "entirely derivative"[168] of its claims regarding the periodic reviews, because they involve *different* measures, and *different* claims. The duty collection measures are *separate* acts of the United States as compared to Reviews 1, 2, 7 and 8, taken at a *different* time (after the RPT) by a *different* agency (USCBP), and involving mutually-exclusive legal remedies in U.S. law. These *separate* acts give rise to violations of *separate* WTO obligations, namely Articles II:1(a) and II:1(b) of the GATT 1994.

### (c) *Threshold Issues Raised by the United States Concerning the Panel's Authority to Rule Upon the Duty Collection Measures Under Article 21.5 of the DSU*

90. Rather than contest the WTO-inconsistency of the duty collection measures, the United States raises two threshold issues to argue that these measures cannot serve as a "*basis*" for a finding that the United States acted inconsistently with Articles II:1(a) and II:1(b):[169] (1) the entries covered by these measures occurred before the end of the RPT;[170] and, (2) these measures would have had no ongoing legal effects after the end of the RPT, but for the fact that duty collection had been enjoined by U.S. courts.[171] Neither argument shows that the Panel erred in examining the consistency of these measures.

#### (i) *Dates of Entry of Imports Have No Relevance for Assessing Whether a Panel Has a "Basis" to Examine the Consistency of "Measures Taken to Comply"*

91. The United States relies on the same "date of entry" argument it made with respect to Reviews 1, 2, 3, 7 and 8, and Reviews 4, 5, 6 and 9, to argue that the Panel lacked a "basis" to find the duty collection measures inconsistent with Article II:1 of the GATT 1994, since those measures concern entries that took place prior to the expiration of the RPT.[172] As Japan has already explained, a panel's authority to rule upon the "consistency with the covered

[168] United States' Appellant's Submission, para. 107.
[169] United States' Appellant's Submission, para. 108 (emphasis added).
[170] United States' Appellant's Submission, paras. 60, 86, 89.
[171] United States' Appellant's Submission, paras. 24, 62, 105.
[172] United States' Appellant's Submission, para. 108.

agreements" of a "measure taken to comply", under Article 21.5, is not affected by the fact that goods covered by the measure entered before the end of the RPT.

#### (ii) *The Duty Collection Measures Have Legal Effects after the End of the RPT*

92. The United States suggests that the duty collection measures *would have preceded the RPT*, and *would not have had on-going legal effects after that date*, had it not been for "a delay due to domestic judicial review".[173] Again, this is a reprise of the "ongoing legal effects" argument made by the United States with respect to Reviews 1, 2, 3, 7 and 8, and Reviews 4, 5, 6 and 9. As already explained, injunctions by U.S. courts, under U.S. law, cannot "exonerate" the United States from the requirement to ensure that "measures taken to comply" are "consistent" with WTO law, in circumstances where the measures are adopted after the end of the RPT, even if due to court injunctions that are the responsibility of the United States.

### F. Conclusion

93. In conclusion, Japan requests that the Appellate Body deny the United States' appeal, and uphold the Panel's findings.

## III. OVERVIEW OF THE PROCEEDINGS AND MEASURES AT ISSUE

### A. The Findings in the Original Proceedings

94. In the original proceedings in this dispute, the panel circulated its report on 20 September 2006.[174] Following appeals by both Japan and the United States, the Appellate Body circulated its report on 9 January 2007, modifying the panel report.[175] On 23 January 2007, the DSB adopted the Appellate Body report and the original panel report, as modified by the Appellate Body.[176] In doing so, the DSB requested that the United States bring certain measures found to be inconsistent with the *Anti-Dumping Agreement* and the GATT 1994 into conformity with the United States' obligations under those agreements.[177]

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[173] United States' Appellant's Submission, para. 108.
[174] Panel Report, *U.S. – Zeroing (Japan)*.
[175] Appellate Body Report, *U.S. – Zeroing (Japan)*.
[176] WT/DSB/M/225, para. 96.
[177] *See* Appellate Body Report, *U.S. – Zeroing (Japan)*, para. 191.

95. Specifically, with regard to the "as such" measures challenged by Japan, the DSB ruled as follows:

- By maintaining zeroing procedures in original investigations when calculating margins of dumping on the basis of weighted average-to-weighted average ("W-to-W") comparisons, the United States acts inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement*;[178]
- By maintaining zeroing procedures in original investigations when calculating margins of dumping on the basis of transaction-to-transaction ("T-to-T") comparisons, the United States acts inconsistently with Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement*;[179]
- By maintaining zeroing procedures in periodic reviews under any comparison method, the United States acts inconsistently with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994;[180] and,
- By maintaining zeroing procedures in new shipper reviews under any comparison method, the United States acts inconsistently with Articles 2.4 and 9.5 of the *Anti-Dumping Agreement*.[181]

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

- By applying zeroing procedures in the anti-dumping investigation regarding imports of cut-to-length carbon quality steel products from Japan, the United States acted inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement*;[182]
- By applying zeroing procedures in the 11 periodic reviews identified in Japan's panel request,[183] the United States acted inconsistently with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994;[184] and,
- By relying on margins of dumping calculated in previous proceedings using the zeroing procedures in the two sunset reviews identified in Japan's panel request,[185] the United States acted inconsistently with Article 11.3 of the *Anti-Dumping Agreement*.[186]

[178] Panel Report, *U.S. – Zeroing (Japan)*, para. 7.258(a).
[179] Appellate Body Report, *U.S. – Zeroing (Japan)*, para. 190(b).
[180] Appellate Body Report, *U.S. – Zeroing (Japan)*, para. 190(c).
[181] Appellate Body Report, *U.S. – Zeroing (Japan)*, para. 190(d).
[182] Panel Report, *U.S. – Zeroing (Japan)*, para. 7.258(b).
[183] WT/DS322/8.
[184] Appellate Body Report, *U.S. – Zeroing (Japan)*, para. 190(e).
[185] WT/DS322/8.
[186] Appellate Body Report, *U.S. – Zeroing (Japan)*, para. 190(f).

97. On 4 May 2007, Japan and the United States agreed, pursuant to Article 21.3(b) of the DSU, that the RPT from the date of adoption for the United States to implement the DSB's recommendations and rulings "shall be 11 months, expiring on 24 December 2007".[187]

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

98. The United States undertook declared implementation action in connection with certain of the measures challenged in these proceedings, and failed to take action as to others.

### 1. Zeroing Procedures

99. On 27 December 2006, approximately one month before the DSB's adoption of the original panel and Appellate Body reports in this dispute, the United States Department of Commerce ("USDOC") published a final notice announcing that it would no longer apply the zeroing procedures in W-to-W comparisons in original investigations.[188] However, the USDOC expressly stated that it was not modifying any aspect of its comparison methodologies for calculating dumping, other than the abandonment of zeroing in W-to-W comparisons in original investigations.[189]

100. Nevertheless, the United States informed the DSB that the United States' elimination of zeroing in *W-to-W comparisons in anti-dumping investigations*, in *U.S. – Zeroing (EC)*, constituted full implementation of the DSB's recommendations and rulings in *U.S. – Zeroing (Japan)* with respect to the "as such" measure, *i.e.*, the maintenance of the zeroing procedures in T-to-T comparisons in original investigations, and, under any comparison methodology, in periodic and new shipper reviews.[190]

### 2. Periodic Reviews

101. As noted above, the DSB's recommendations and rulings in the original proceedings required the United States to bring 11 periodic reviews into conformity with WTO law. The United States asserted that no action was required to revise the WTO-inconsistent aspects of these measures because it had adopted subsequent periodic reviews that allegedly

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[187] WT/DS322/20.
[188] Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 Fed. Reg. 77722, 77723 (Dep't of Comm., 27 December 2006) (emphasis added) (Exhibit JPN-25).
[189] Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 Fed. Reg. 77722, 77724 (Dep't of Comm., 27 December 2006) (emphasis added) (Exhibit JPN-25).
[190] WT/DSB/M/245.

"supersede" the WTO-inconsistent periodic reviews. Specifically, on 10 January 2008, the United States informed the DSB, in a status report, that:

> With respect to the assessment reviews at issue in this dispute, in each case the results were *superseded by subsequent reviews*. Because of this, no *further* action is necessary for the United States to bring these challenged measures into compliance with the recommendations and rulings of the DSB.[191]

### 3. Sunset Reviews

102. The DSB's recommendations and rulings also required the United States to bring two sunset reviews into conformity with its WTO obligations. The United States took no action to comply with these obligations, and made no statements to the DSB in this regard. At the DSB meeting on 21 January 2008, Japan noted to the DSB that the United States had not taken any implementation action regarding the individual sunset reviews. The United States did not contradict this view. At the DSB meeting on 19 February 2008, Japan formally requested the United States to clarify its position on the status of implementation of the DSB's recommendations and rulings regarding the two sunset reviews.[192] The United States noted, in reply, that one of the orders in question has been revoked, and the other order, relating to *Ball Bearings and Parts Thereof From Japan*, had been continued through a subsequent sunset review.

## C. The Compliance Panel Proceedings

### 1. The Measures at Issue

103. Given the United States' limited action to implement the DSB's recommendations and rulings, Japan's request for a compliance panel identified several measures, some of which are at issue in this appeal.

#### (a) *Zeroing Procedures*

104. In these compliance proceedings, Japan challenged the United States' omission to take action to implement the DSB's recommendations and rulings that the zeroing procedures are WTO-inconsistent in the following situations: (i) in T-to-T comparisons in original

[191] WT/DS322/22/Add.2 (emphasis added). Similar United States' assertions throughout the compliance panel proceedings are addressed in paragraphs 322-323 and 413-414 below.
[192] WT/DSB/M/245, paras. 27, 29.

investigations; (ii) under any comparison methodology in periodic reviews; and, (iii) under any comparison methodology in new shipper reviews.[193]

105. With respect to the maintenance of the zeroing procedures in all three contexts, Japan alleged that the United States' omission is inconsistent with Articles 17.14, 21.1, and 21.3 of the DSU, Article 2.4 of the *Anti-Dumping Agreement*, and Article VI:2 of the GATT 1994. Additionally, Japan claimed that: with respect to the T-to-T comparisons in original investigations, the United States is in violation of Article 2.4.2 of the *Anti-Dumping Agreement*; with respect to the periodic reviews, the United States is in violation of Article 9.3 of the *Anti-Dumping Agreement*; and, with respect to new shipper reviews, the United States is in violation of Article 9.5 of the *Anti-Dumping Agreement.* [194]

(b) ***Periodic Reviews***

106. In these compliance proceedings, Japan made claims regarding five of the 11 original periodic reviews (numbered (1), (2), (3), (7) and (8), in paragraph 107 below),[195] as well as four subsequent periodic reviews (numbered (4), (5), (6) and (9), in paragraph 107 below) that, in the United States' words, "superseded" the original reviews and constituted "measures taken to comply", within the meaning of Article 21.5 of the DSU.[196]

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

> (1) Ball Bearings and Parts Thereof From Japan (1 May 1999 through 30 April 2000) (JTEKT[197] and NTN);[198]
>
> (2) Ball Bearings and Parts Thereof From Japan (1 May 2000 through 30 April 2001) (NTN);[199]

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[193] WT/DS322/27, paras. 10-12.
[194] WT/DS322/27, para. 12.
[195] Japan did not pursue claims in these compliance proceedings regarding the remainder of the periodic reviews subject to the recommendations and rulings of the DSB because, by the end of the RPT, the United States had completed collecting duties on all entries covered by those remaining reviews. Panel Report, para. 7.66 (footnote 92). *See also* Japan's First Written Submission, para. 90 (footnote 107).
[196] WT/DS322/22/Add.2.
[197] As of 1 January 2006, Koyo Seiko Co. Ltd. changed its name to JTEKT Corporation. For the purposes of this submission and Japan's exhibits, we refer to the company as "JTEKT".
[198] *See* Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from Japan, final results for the period 1 May 1999 through 30 April 2000 (USDOC annual review of ball bearings in case number A-588-804), 66 Fed. Reg. 36551 (12 July 2001) (JTEKT) (Exhibit JPN-16); Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from Japan, amended final results for the period 1 May 1999 through 30 April 2000 (USDOC annual review in case number A-588-804), 72 Fed. Reg. 67892, 3 December 2007 (NTN) (Exhibit JPN-29).

(3) Ball Bearings and Parts Thereof From Japan (1 May 2002 through 30 April 2003) (JTEKT, NSK, and NTN);[200]

(4) Ball Bearings and Parts Thereof From Japan (1 May 2003 through 30 April 2004) (JTEKT, NSK, NPB, and NTN);[201]

(5) Ball Bearings and Parts Thereof From Japan (1 May 2004 through 30 April 2005) (JTEKT, NSK, NPB, and NTN);[202]

(6) Ball Bearings and Parts Thereof From Japan (1 May 2005 through 30 April 2006) (Asahi Seiko, JTEKT, NSK, NPB, and NTN);[203]

(7) Cylindrical Roller Bearings and Parts Thereof From Japan (1 May 1999 through 31 December 1999) (JTEKT and NTN);[204]

(8) Spherical Plain Bearings and Parts Thereof From Japan (1 May 1999 through 31 December 1999) (NTN);[205] and,

(9) Ball Bearings and Parts Thereof From Japan (1 May 2006 through 30 April 2007) (JTEKT, NPB, and NTN).[206]

108. Three of the five original periodic reviews challenged in the compliance proceedings,[207] and all four subsequent reviews, relate to a single U.S. anti-dumping order,

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

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

[201] *See* Ball Bearings and Parts Thereof from Japan, final results for the period 1 May 2003 – 30 April 2004 (USDOC annual review in case number A-588-804), 70 Fed. Reg. 54711, 16 September 2005 (Exhibit JPN-32); Ball Bearings and Parts Thereof from Japan, amended final results for the period 1 May 2003 – 30 April 2004 (USDOC annual review in case number A-588-804), 70 Fed. Reg. 61252, 21 October 2005 (NSK) (Exhibit JPN-32.A); Ball Bearings and Parts Thereof from Japan, amended final results for the period 1 May 2003 – 30 April 2004 (USDOC annual review in case number A-588-804), 70 Fed. Reg. 69316, 15 November 2005 (NPB) (Exhibit JPN-32.B).

[202] *See* Ball Bearings and Parts Thereof from Japan, final results for the period 1 May 2004 – 30 April 2005 (USDOC annual review in case number A-588-804), 71 Fed. Reg. 40064, 14 July 2006 (Exhibit JPN-33).

[203] *See* Ball Bearings and Parts Thereof From Japan, final results for the period 1 May 2005 – 30 April 2006 (USDOC annual review in case number A-588-804), 72 Fed. Reg. 58053, 12 October 2007 (Exhibit JPN-34).

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

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

[206] *See* 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).

[207] The assessment rates in Reviews 1, 2 and 3 were amended either during or after the end of the RPT. *See* Japan's Answers of 26 November 2008, para. 35. The Panel held that these amended rates were within its terms of reference and ruled upon these rates. *See* Panel Report, para. 7.139 (footnote 148) ("Japan's claims also refer to certain amendments to Reviews 1, 2 and 3 (para. 35 of Japan's replies to Questions from the Panel). These amendments are covered by Japan's request for establishment (see the reference to 'any amendments to the

*Ball Bearings and Parts Thereof From Japan*. These seven reviews, together with the 2001/2002 review (which was found to be WTO-inconsistent in the original proceedings)[208] form a continuous chain of reviews under the *Ball Bearings* order – namely, original Reviews 1, 2 and 3; the original review for 2001/2002; and the subsequent Reviews 4, 5, 6 and 9. The two remaining original periodic reviews at issue in these compliance proceedings (Reviews 7 and 8) were adopted pursuant to two different orders.[209]

109. At the request of the Panel, for all nine periodic reviews at issue in these proceedings and identified in paragraph 107 above, and for the companies concerned by Japan's claims, Japan calculated 25 exporters' margins of dumping, with and without zeroing, following the methodology described in detail in its responses to the Panel's questions.[210] These margins are listed in Revised Table 3, which is included in Japan's Updated Answers of 12 December 2008.[211] Japan recalls that the exporter's margin of dumping constitutes the "ceiling" on the maximum amount of duties that may be collected with respect to imports from that exporter.[212]

110. As Revised Table 3 shows, the impact of zeroing is very considerable, across all nine of the periodic reviews at issue. Double-digit margins determined by the USDOC routinely disappear when zeroing is removed from the calculation, such that the United States has no basis whatsoever to collect any anti-dumping duties when it complies with its WTO obligations. The consequence of the USDOC's distorted calculation methodology is that Japanese exports have been burdened every year by inflated, excessive and illegal duties, totaling many tens of millions of dollars.

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eight periodic reviews' at para. 12 thereof) …. We note that the importer-specific assessment rates resulting from Reviews 1, 2 and 3 were recalculated following the amendments challenged by Japan (Exhibits US-A28 and A29, for example). *We therefore include these recalculated importer-specific assessment rates in the scope of our findings, since the recalculated importer-specific assessment rates replace those initially determined by USDOC. In other words, it is the recalculated importer-specific assessment rates that should have been brought into conformity.* We note in this regard that the United States has not formally challenged the inclusion of the amendments in this proceeding") (emphasis added).

[208] Japan did not pursue claims regarding the 2001/2002 review in these compliance proceedings, because the United States had liquidated all entries covered by the review by the end of the RPT. *See* footnote 195 above.

[209] The subject products are, respectively, "Cylindrical Roller Bearings and Parts Thereof From Japan" and "Spherical Plain Bearings and Parts Thereof From Japan".

[210] A description of the calculation methodology is provided in Japan's Answers of 26 November 2008, paras. 57-59. These calculations were performed by Ms. Owenby, an expert in USDOC computer programming, and are explained in detail in her statement in Exhibit JPN-91.

[211] Japan's Updated Answers of 10 December 2008, para. 6.

[212] See Appellate Body Report, *U.S. – Stainless Steel (Mexico)*, para. 102.

111. Specifically, Revised Table 3 demonstrates that for 22 of the 25 exporters' margins, the margin of dumping is *zero* when calculated without the United States' zeroing procedures, showing that *no* duties may be collected. The three positive exporter's margins would be significantly reduced – by 48 to 55 percent – where the zeroing procedures are not used.[213] These results are shown in final program "outputs" for these calculations, generated by Japan's expert in USDOC computer programming, Ms. Owenby.[214]

112. Although it requested Japan to undertake these calculations to measure the quantitative impact of the zeroing procedures,[215] the Panel ultimately concluded that demonstrating the quantitative impact of zeroing in the challenged periodic reviews was not necessary to meet the elements of Japan's claims:

> [W]e note that the Appellate Body's findings in the original proceeding were not based on evidence that particular importers had sales with negative margins or that individual importer-specific assessment rates were affected by the application of zeroing procedures. We do not consider, therefore, that Japan must show that given importers had sales with negative margins under Reviews 4, 5, 6 and 9, or the effect of zeroing on the importer-specific assessment rates determined in those Reviews.[216]

113. Nonetheless, the Panel reviewed the evidence submitted by Japan for the purpose of its findings regarding Reviews 4, 5, 6 and 9. The Panel noted that the United States challenged "neither the results of the calculations performed by Japan, nor the accuracy of the data set used in those calculations".[217] The Panel approved Japan's calculation methodology, concluding that Japan had established "a *prima facie* case that the exporter-specific margins of dumping and importer-specific assessment rates determined pursuant to Reviews 4, 5, 6 and 9 were affected by USDOC's application of zeroing".[218]

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[213] Japan's Answers of 26 November 2008, para. 60; Japan's Updated Answers of 10 December 2008, para. 6 (Revised Table 3); Fourth Supplemental Statement of Valerie Owenby, para. 16 (Exhibit JPN-140).
[214] Exhibits JPN-92.1.F, JPN-92.2.F, JPN-92.2.L, JPN-93.1.F, JPN-93.1.L, JPN-94.1.F, JPN-94.1.L, JPN-94.2.F, JPN-94.3.F, JPN-95.1.F, JPN-95.2.F, JPN-95.3.F, JPN-96.1.F, JPN-96.2.F, JPN-96.3.F, JPN-97.1.F, JPN-97.2.F, JPN-97.3.F, JPN-100.1.F and JPN-100.2.F.
[215] *See*, *e.g.*, Questions 19(b), 19(c), 19(d), 23(a), 23(b), 23(c) from the Panel to Japan.
[216] Panel Report, para. 7.162.
[217] Panel Report, para. 7.163.
[218] Panel Report, para. 7.166.

114. By the end of the RPT, the United States was still to take action to collect anti-dumping duties on entries subject to each one of the nine WTO-inconsistent periodic reviews challenged by Japan.[219]

115. With respect to the five original periodic reviews at issue in the compliance proceedings, Japan claimed that the United States failed to comply with the requirement to bring the measures into conformity with its WTO obligations by the end of the RPT. Implementation action by the United States was required because the five original reviews continued to produce legal effects after the end of the RPT. Specifically, the reviews provide the legal basis in U.S. law for actions taken by the United States, after the end of the RPT, to collect definitive anti-dumping duties at WTO-inconsistent assessment rates. Yet, with respect to the five original reviews, no implementation action had been taken by the end of the RPT to bring the reviews fully into conformity with WTO law, ensuring collection of duties at WTO-consistent assessment rates.

116. Accordingly, Japan claimed that the United States' omission to eliminate the effects of zeroing on the importer-specific assessment rates calculated in the five periodic reviews challenged in the original proceedings (Reviews 1, 2, 3, 7 and 8) is inconsistent with Articles 17.14, 21.1, and 21.3 of the DSU, such that the United States continued to violate Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.[220]

117. Moreover, by relying upon zeroing to calculate cash deposit and importer-specific assessment rates in the subsequent periodic reviews (Reviews 4, 5, 6 and 9), Japan explained that the United States had adopted "measures taken to comply" that were inconsistent with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement*, and Article VI:2 of the GATT 1994.[221]

118. Additionally, Japan brought claims under Articles II:1(a) and (b) of the GATT 1994 against separate "measures taken to comply" adopted by the United States pursuant to certain of the five original reviews at issue in these compliance proceedings (Reviews 1, 2, 7 and 8).[222]

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[219] Panel Report, paras. 7.74 (footnote 101) (Reviews 4 and 5), 7.75 (footnote 102) (Review 6), and 7.139 (footnote 149) (Reviews 1, 2, 3, 7 and 8). Review 9 was issued after the end of the RPT and, therefore, duty collection had not occurred by that time.
[220] Panel Report, para. 7.117.
[221] Panel Report, para. 7.157.
[222] Panel Report, paras. 7.191-7.192.

119. Specifically, the United States had adopted measures, subsequent to the end of the RPT, to collect definitive anti-dumping duties at WTO-inconsistent assessment rates established pursuant to original Reviews 1, 2, 7 and 8. Japan claimed that these measures, which it referred to as "duty collection measures", violate Articles II:1(a) and (b) of the GATT 1994, because the duties collected, or to be collected, exceed the bound tariffs on the subject goods. Japan argued that the duty collection measures cannot be justified under Article II:2(b) of the GATT 1994, because they are based on WTO-inconsistent periodic reviews that, as explained in the paragraphs above, have not been brought into conformity with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.

(c) ***Sunset Reviews***

120. Japan challenged the United States' omission to take action to implement the DSB's recommendations and rulings with respect to the sunset review determination of 4 November 1999 in relation to *Anti-Friction Bearings*, which sunset review included the *Ball Bearings* order. This sunset review determination was found to be WTO-inconsistent in the original proceedings.[223] The United States' omission resulted in inconsistencies with Articles 17.14, 21.1, and 21.3 of the DSU, and a continued violation of Article 11.3 of the *Anti-Dumping Agreement*.[224]

2. **The Compliance Panel's Findings**

(a) ***Jurisdictional Findings***

121. As an initial matter, the Panel considered the question whether the subsequent periodic reviews, Reviews 4, 5, 6 and 9, constituted "measures taken to comply" subject to its review under Article 21.5 of the DSU. For reasons explained in Section V.B below, the Panel answered this inquiry in the affirmative.[225]

122. The Panel also concluded that Review 9, which was adopted during the panel proceedings, was identified in Japan's panel request with sufficient specificity to satisfy the requirement, in Article 6.2 of the DSU, to "identify the specific measure[] at issue".[226]

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[223] WT/DS322/27, para. 16 and Annex 2. The anti-dumping order relating to the other sunset review subject to the DSB's recommendations and rulings has since been revoked; accordingly, Japan did not challenge that sunset review in these compliance proceedings.
[224] WT/DS322/27, para. 16 and Annex 2.
[225] Panel Report, paras. 7.82, 7.114.
[226] Panel Report, paras. 7.107, 7.116.

(b) ***Substantive Findings***

123. On the substantive issues raised by Japan in these compliance proceedings, the Panel made the following findings:

- The United States "failed to comply with the DSB's recommendations and rulings regarding the importer-specific assessment rates determined in Reviews 1, 2, 3, 7 and 8 that apply to entries covered by those Reviews that were, or will be, liquidated after the expiry of the RPT" and, accordingly, the United States "is in continued violation of its obligations under Articles 2.4 and 9.3 of the *AD Agreement* and Article VI:2 of the GATT 1994";[227]
- The United States "acted inconsistently with Articles 2.4 and 9.3 of the *AD Agreement* and Article VI:2 of the GATT 1994 by applying zeroing in the context of Reviews 4, 5, 6 and 9";[228]
- The United States "has failed to comply with the recommendations and rulings of the DSB regarding the United States' maintenance of zeroing procedures challenged 'as such' in the original proceedings" – in particular "in the context of T-to-T comparisons in original investigations and under any comparison methodology in periodic and new shipper reviews" – such that the United States remains in violation of Articles 2.4, 2.4.2, 9.3 and 9.5 of the *AD Agreement* and Article VI:2 of the GATT 1994;[229]
- With respect to the duty collection measures, "the United States is in violation of Articles II:1(a) and II:1(b) of the GATT 1994 with respect to certain liquidation actions taken after the expiry of the RPT";[230] and,
- The United States "has failed to comply with the DSB's recommendations and rulings with respect to the 1999 sunset review" and, therefore, remains in violation of Article 11.3 of the *AD Agreement*".[231]

124. With respect to Reviews 1, 2, 3, 7 and 8, the Panel concluded that "[t]o the extent that the United States has failed to comply with the recommendations and rulings of the DSB in the original dispute, the recommendations and rulings remain operative".[232] With respect to Reviews 4, 5, 6 and 9, as well as the duty collection measures associated with Reviews 1, 2, 7

[227] Panel Report, para. 8.1(a).
[228] Panel Report, para. 8.1(b).
[229] Panel Report, para. 8.1(c).
[230] Panel Report, para. 8.1(d). These liquidation actions were identified by the Panel as the USDOC liquidation instructions set forth in Exhibits JPN-40A and JPN-77 to JPN-80 and the USCBP liquidation notices set forth in Exhibits JPN-81 to JPN-87.
[231] Panel Report, para. 8.1(e).
[232] Panel Report, para. 8.2.

and 8, the Panel additionally recommended that the DSB request the United States to bring those measures into conformity with the *Anti-Dumping Agreement* and the GATT 1994.[233]

## D. The Issues Raised by the United States in this Appeal

125. The United States has appealed the following findings and conclusions of the Panel:

- That Review 9 was within the Panel's terms of reference;
- That the United States failed to comply with the DSB's recommendations and rulings regarding the importer-specific assessment rates determined in Reviews 1, 2, 3, 7 and 8, which apply to entries not yet liquidated by the expiry of the RPT;
- That the United States is in continued violation of its obligations under Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, also with regard to Reviews 1, 2, 3, 7 and 8;
- That the United States acted inconsistently with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 by applying the zeroing procedures to calculate WTO-inconsistent cash deposit and importer-specific assessment rates in Reviews 4, 5, 6 and 9; and,
- That the United States is in violation of Articles II:1(a) and II:1(b) of the GATT 1994 with respect to duty collection measures adopted after the expiry of the RPT.[234]

126. The United States has not appealed the Panel's finding that the United States has failed to implement the DSB's recommendation that it bring the zeroing procedures "as such", in the context of T-to-T comparisons in original investigations and under any comparison methodology in periodic and new shipper reviews, into conformity with its WTO obligations.

127. Nor has the United States appealed the Panel's finding that the United States has failed to implement the DSB's recommendation that it bring the 1999 sunset review into conformity with its WTO obligations.

[233] Panel Report, para. 8.2.
[234] United States' Appellant's Submission, Section VI.

## IV. THE PANEL PROPERLY FOUND THAT THE UNITED STATES FAILED TO COMPLY WITH THE DSB'S RECOMMENDATIONS AND RULINGS WITH REGARD TO REVIEWS 1, 2, 3, 7 AND 8, AND IS IN CONTINUED VIOLATION OF ITS OBLIGATIONS UNDER ARTICLES 2.4 AND 9.3 OF THE *ANTI-DUMPING AGREEMENT* AND ARTICLE VI:2 OF THE GATT 1994

### A. Introduction and Summary of U.S. Arguments

128. The United States presents its arguments as to the Panel's alleged legal errors with respect to Reviews 1 through 9 in a single consolidated section of its Appellant's Submission.[235] This presentation is confused, given the important differences between Reviews 1, 2, 3, 7 and 8, on the one hand, and Reviews 4, 5, 6 and 9, on the other hand.

129. Reviews 1, 2, 3, 7 and 8 are *original measures* that were found to be WTO-inconsistent in the original proceedings. The DSB recommended that the United States bring these measures into conformity with its WTO obligations. With respect to these Reviews, the question before the Panel was whether the United States had taken action to comply fully with the DSB's recommendations and rulings. The Panel found that it had not.[236]

130. By contrast, Reviews 4, 5, 6 and 9 are "measures taken to comply", as explained below in Section V.B. Under Article 21.5 of the DSU, the question before the Panel was whether the United States had acted "consisten[tly]" with the covered agreements in taking these compliance measures. The Panel found that it had not.[237]

131. Given the differences between these two groups of reviews, and the differences between Japan's claims regarding them, the Panel correctly examined them separately. Japan similarly does so in this Appellee's Submission.

132. In this Section of its Appellee's Submission, Japan demonstrates that the Panel properly found that the United States had failed to comply with the DSB's recommendations and rulings regarding the importer-specific assessment rates determined in Reviews 1, 2, 3, 7 and 8, which cover entries that were, or will be, liquidated after the expiry of the RPT.[238] Accordingly, the Panel properly found that the United States is in continued violation of its

[235] United States' Appellant's Submission, Section IV.
[236] Panel Report, para. 7.154.
[237] Panel Report, paras. 7.166, 7.168.
[238] Panel Report, para. 8.1(a).

obligations under Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.[239]

133. With respect to Reviews 1, 2, 3, 7 and 8, the United States makes two overarching arguments as to why it should be excused from any implementation obligations with respect to the importer-specific assessment rates determined in these five original reviews. The United States considers that: *first*, the dates of entry of the goods covered by these Reviews are the decisive dates for purposes of determining a WTO Member's implementation obligations;[240] and, *second*, its own decision to delay, beyond the expiry of the RPT, the collection of duties because of domestic court proceedings, relieves it from its implementation obligations.[241]

134. For reasons explained below, both arguments lack merit, and the Panel correctly concluded that the United States must bring the five original reviews fully into compliance with its obligations under the *Anti-Dumping Agreement* and the GATT 1994. Accordingly, Japan requests that the Appellate Body reject the United States' appeal, and uphold the Panel's findings with respect to the United States' failure to bring Reviews 1, 2, 3, 7 and 8 into conformity with the covered agreements.

## B. Overview of the Imposition and Collection of Anti-Dumping Duties in U.S. Law

135. Before turning to the issues on appeal, Japan begins with an overview of the provisions of U.S. law regarding the imposition and collection of anti-dumping duties, to allow for a proper consideration of the United States' arguments.

### 1. The Imposition of Duties under an Anti-Dumping Duty Order

136. Under U.S. law, the USDOC and the United States International Trade Commission ("USITC") are responsible for conducting investigations into whether to impose anti-dumping duties on foreign products sold in the United States.[242] When the USDOC determines that an imported product is being dumped, and the USITC determines that the domestic industry producing the like product has been injured, or threatened with injury, as a

[239] Panel Report, para. 8.1(a)(i).
[240] United States' Appellant's Submission, para. 60.
[241] United States' Appellant's Submission, para. 62.
[242] *See generally* 19 U.S.C. § 1673, at http://www4.law.cornell.edu/uscode/html/uscode19/usc_sec_19_00001673----000-.html.

result of the importation of that product, the USDOC will publish an anti-dumping order imposing anti-dumping duties on the product subject of the original investigation.[243]

137. An anti-dumping order directs United States Customs and Border Protection ("USCBP") to "assess" anti-dumping duties on subject goods, based on the dumping margins calculated by the USDOC, at a time when USCBP has sufficient information to enable assessment to occur.[244] Because the information needed to assess duties is not available at the time of importation, the final liability for duties is not assessed at that time. Instead, on importation, importers are required by U.S. law to make cash deposits of the estimated anti-dumping duties due on the entry, and liquidation of the entry is suspended.[245]

### 2. **Periodic Reviews**

138. The final assessment of liability by the USDOC, and the collection of anti-dumping duties by the USCBP, do not occur until some time after importation. Specifically, pursuant to U.S. law, interested parties may request, typically during the anniversary month of the order, that the USDOC conduct a periodic review and calculate the final liability.[246]

139. During a periodic review, the USDOC makes determinations of dumping in connection with the entries that occurred during the review period. Specifically, the USDOC makes two different determinations: it calculates, *first*, an exporter-specific cash deposit rate; and, *second*, an importer-specific assessment rate for each company that imports the subject product from an exporter for which a cash deposit rate is calculated. The calculation of an exporter-specific cash deposit rate and an importer-specific assessment rate both involve dumping determinations, although the weighted average-to-transaction methodology by which the United States makes those dumping determinations is not WTO-consistent because of the use of zeroing.

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[243] 19 U.S.C. §§ 1673d(c)(2), 1673e(a), at http://www4.law.cornell.edu/uscode/search/display.html?terms=1673d&url=/uscode/html/uscode19/usc_sec_19_00001673---d000-.html and http://www4.law.cornell.edu/uscode/search/display.html?terms=1673e&url=/uscode/html/uscode19/usc_sec_19_00001673---e000-.html, respectively.
[244] 19 U.S.C. § 1673e(a)(1). *See also Id.*, 19 U.S.C. § 1673d(c)(1)(B)(i). *See* the URLs provided in footnote 243.
[245] 19 U.S.C. §§ 1673d(c)(1)(B)(ii), 1673e(a)(3). *See* the URLs provided in footnote 243.
[246] 19 U.S.C. § 1675(a), at http://www4.law.cornell.edu/uscode/search/display.html?terms=1675a&url=/uscode/html/uscode19/usc_sec_19_00001675---a000-.html.

140. The determinations made by the USDOC in a periodic review serve two legal purposes. *First*, where the cash deposit rate is greater than zero, "estimated"[247] anti-dumping duties are collected on all future entries of the subject product at the cash deposit rate, pending the completion of the next periodic review. When the next periodic review is completed, the previous cash deposit rate ceases to operate, and is replaced by the new cash deposit rate.

141. *Second*, the importer-specific assessment rate establishes the rate at which anti-dumping duties will subsequently be collected by the USCBP from importers, on entries covered by the review. The importer-specific assessment rate does *not* cease to operate when a further importer-specific assessment rate is determined in a subsequent review. Instead, the earlier importer-specific assessment rate provides the legal basis for the collection of anti-dumping duties on each entry covered by that rate, and continues to operate until the definitive amount of duties due on those entries is collected through a process known in U.S. law as "liquidation". When all the entries covered by an importer-specific assessment rate have been liquidated, the rate effectively expires.

### 3. Collection of Anti-Dumping Duties and Liquidation of Entries

142. After the final results of a periodic review are published, the USDOC issues "instructions" to USCBP authorizing the liquidation of the entries at the importer-specific assessment rate ("liquidation instructions").[248] USCBP, in turn, is required to liquidate the entries, "to the greatest extent practicable", within 90 days of receiving the USDOC's liquidation instructions.[249]

143. In U.S. law, USCBP is responsible for "assessing" the amount of anti-dumping duties due on imports, and then collecting the duties through "liquidation". The USCBP's regulations define the term "liquidation" as "the *final computation or ascertainment of the duties* (not including vessel repair duties) or drawback accruing on an entry".[250] Thus, liquidation includes the USCBP's process of assessing the amount of duties owing on a

[247] 19 U.S.C. § 1675(a)(2)(C). *See* the URL provided in footnote 246.
[248] If no administrative review takes place, the USDOC issues instructions for the USCBP to liquidate entries at the cash deposit rate that applied at the time of importation and, for all subsequent entries, the cash deposit rate remains unchanged. 19 U.S.C. § 1504(a), at http://www4.law.cornell.edu/uscode/search/display.html?terms=1504&url=/uscode/html/uscode19/usc_sec_19_00001504----000-.html.
[249] 19 U.S.C. § 1675(a)(3)(B). *See* the URL provided in footnote 246.
[250] 19 C.F.R. § 159.1 (Exhibit JPN-115) (emphasis added).

particular entry, pursuant to the assessment rate determined by the USDOC in a periodic review.

144. The legal basis for the USCBP's "computation"[251] of the duties is two-fold: (1) USDOC's determination of the assessment rate ***and*** (2) USCBP's own determination of the value of the entered goods. To assess the amount of duties owed, USCBP multiplies the assessment rate by the value. In other words, as the United States recognizes, the final determination of the amount of duty is made by USCBP "*based upon*" the assessment rate provided by USDOC.[252]

145. To collect the duties and effect liquidation, USCBP issues a notice to importers of the amount of definitive duties for each entry covered by the importer-specific assessment rate ("liquidation notice").[253] When the amount of the cash deposit paid at the time of importation equals the amount of definitive duties due, the importer receives only a liquidation notice from the USCBP. When the amount of the cash deposit exceeds the amount due at liquidation, a refund check accompanies the USCBP's liquidation notice. And when the amount of the cash deposit is less than the amount due at liquidation, a request for payment is provided.

146. Decisions by the USCBP to liquidate entries are "final and conclusive" as to all parties, including the United States, with limited exceptions.[254] While limited grounds are

[251] 19 C.F.R. § 159.1 (Exhibit JPN-115) (emphasis added).
[252] United States' Answers of 26 November 2008, para. 27.
[253] 19 U.S.C. § 1673f(b), at http://www4.law.cornell.edu/uscode/search/display.html?terms=1673f&url=/uscode/html/uscode19/usc_sec_19_00001673---f000-.html.
[254] 19 U.S.C. § 1514(a), at http://www.law.cornell.edu/uscode/search/display.html?terms=1514&url=/uscode/html/uscode19/usc_sec_19_00001514----000-.html. Under U.S. law, an importer wishing to protest USCBP's liquidation notice for entries made prior to 18 December 2004 must do so within 180 days; for entries made after that date, an importer has 90 days after the date of liquidation to file a protest with the USCBP. *See* 19 U.S.C. § 1514(c)(3), at the same URL. If the USCBP approves the protest, it revises the liquidation result. *See* 19 U.S.C. § 1515, at http://www.law.cornell.edu/uscode/search/display.html?terms=1515&url=/uscode/html/uscode19/usc_sec_19_00001515----000-notes.html. If the USCBP denies the protest, an importer may challenge certain aspects of the denial in U.S. courts. *Id*. *See also* 28 U.S.C. § 1581(a), and 19 C.F.R. § 174.11, at http://www4.law.cornell.edu/uscode/html/uscode28/usc_sec_28_00001581----000-.html and http://frwebgate1.access.gpo.gov/cgi-bin/TEXTgate.cgi?WAISdocID=966954137273+9+1+0&WAISaction=retrieve, respectively.

available to an importer to protest USCBP's liquidation notice, an importer cannot protest the USDOC's determination of the dumping margin.[255]

### 4. The Impact of Domestic Litigation on the Collection of Anti-Dumping Duties and the Liquidation of Entries

147. According to U.S. law, neither the USDOC's final determination of liability, nor USCBP's assessment and collection of duties, are automatically delayed as a result of domestic legal proceedings regarding the USDOC's determinations in periodic reviews. Rather, under the U.S. anti-dumping statute, such delay occurs only in the event that a U.S. court issues an injunction preventing the USDOC from taking action during the pendency of judicial review of the USDOC's final determination.

148. Specifically, the statute grants the United States Court of International Trade ("USCIT") the authority to issue injunctions preventing "liquidation" of entries of merchandise covered by a USDOC determination that is the subject of judicial review.[256] A decision by a U.S. court to issue an injunction is not granted automatically, but only after the court has determined "that there is a likelihood of success on the merits".[257]

149. The statute further explains that, in the absence of such an injunction, entries of merchandise "shall be liquidated in accordance with the USDOC determination", if they were entered prior to a court decision that is "not in harmony" with the determination of the USDOC that is the subject of the appeal.[258] Thus, if no injunction is issued, the USDOC will instruct USCBP to assess and collect duties, without awaiting the completion of the domestic legal proceedings.

150. Conversely, if the reviewing court issues an injunction, the USDOC's determination cannot be considered final and conclusive until the "final court decision" at the end of the

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[255] The following decisions by USCBP may be protested: "(a) The appraised value of merchandise; (b) The classification and rate and amount of duties chargeable; (c) All charges or exactions of whatever character including the accrual of interest within the jurisdiction of the Secretary of the Treasury; (d) The exclusion of merchandise from entry or delivery under any provision of the Customs laws; (e) The liquidation or reliquidation of an entry, or any modification thereof; (f) The refusal to pay a claim for drawback; and (g) The refusal to reliquidate an entry under section 520(c), Tariff Act of 1930, as amended (19 U.S.C. 1520(c))". 19 C.F.R. § 174.11. *See* the URL provided at footnote 254 above.

[256] The rules governing the issuance of injunctions in the course of litigation challenging the final results of administrative reviews are specified in 19 U.S.C. § 1516a(c)(2), at http://www4.law.cornell.edu/uscode/html/uscode19/usc_sec_19_00001516---a000-.html (Exhibit JPN-36).

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

[258] 19 U.S.C. § 1516a(c)(1), (e) (Exhibit JPN-36).

litigation, because, in the course of the litigation, a reviewing court could issue a decision that is "not in harmony" with the USDOC's determination.

151. The process of revising, through domestic litigation, the USDOC's final determination in a periodic review is as follows. If a domestic court finds that a periodic review is inconsistent with U.S. law or unsupported by record evidence, the court does not determine the cash deposit or assessment rates. Instead, it remands the final results of the review to the USDOC for re-consideration, directing the agency to address the inconsistency found or the evidentiary inadequacy.

152. The USDOC then undertakes a remand re-determination. At that stage, the original final results of the periodic review are not amended by the USDOC's remand re-determination, and the re-determination provides no legal basis for the collection of anti-dumping duties. Instead, the re-determination is submitted to the court by the USDOC, where the parties are given an opportunity to comment on the re-determination.

153. Thereafter, the court rules whether the re-determination is consistent with U.S. law and supported by substantial evidence on the record. If the court finds that the re-determination is inconsistent with U.S. law or unsupported by record evidence, the re-determination is remanded again to the USDOC for further re-consideration, with further litigation on a new re-determination. This process is repeated until, at the conclusion of litigation, the reviewing court (the USCIT, or if further appeals occur, the U.S. Court of Appeals for the Federal Circuit) affirms a USDOC re-determination.

154. Thus, after the litigation is complete, the USDOC formally issues an amended final determination that has been approved by the court. In that determination, the USDOC may establish a revised cash deposit rate, a revised importer-specific assessment rate, or both. The USDOC's amended final results become legally effective upon publication in the Federal Register.[259] The notice in the Federal Register signifies that the injunction is dissolved, and commences the time period within which USCBP is to liquidate the relevant entries. The statute provides that the entries whose liquidation was enjoined during the pendency of the litigation are to be liquidated according to the USDOC's amended final determination.[260]

[259] Exhibits JPN-39, JPN-40 and JPN-114.
[260] 19 U.S.C. § 1516a(c)(1), (e) (Exhibit JPN-36).

155. Thereafter, the process of liquidating the entries and collecting the anti-dumping duties occurs according to exactly the same process that occurs in the absence of litigation (or in the absence of an injunction). That is, (1) the USDOC issues liquidation instructions to USCBP identifying the importer-specific assessment rates that provide the basis for the "computation" of the duties; (2) USCBP's "computation" of the duties derives mechanically from the USDOC's assessment rate, which the USCBP multiplies by the entered value; and, (3) USCBP issues liquidation notices to importers of the amount of the definitive duties due for the covered entries, collecting the duties and effecting liquidation.[261]

156. In sum, this process occurs in precisely the same manner whether: (1) there is no litigation; (2) there is litigation and no injunction is issued; (3) there is litigation, an injunction is issued, and USDOC's original determination is affirmed; or, (4) there is litigation, an injunction is issued, USDOC's original determination is remanded, and a re-determination is affirmed.

157. Against this backdrop, Japan now turns to a discussion of the Panel's findings that the United States failed to comply with the DSB's recommendations and rulings with regard to Reviews 1, 2, 3, 7 and 8, and is in continued violation of its obligations under Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.

## C. Summary of the Panel's Findings

158. With respect to Reviews 1, 2, 3, 7 and 8, the sole issue before the Panel was whether the United States had complied with the DSB's recommendations and rulings as to importer-specific assessment rates determined in those Reviews, which continued to apply to entries on which definitive duties remained to be collected after the end of the RPT.[262] The Panel determined that the United States had failed to comply with the recommendations and rulings because it had not taken action to revise the assessment rates to exclude zeroing.[263] The United States, therefore, remained in violation of Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.[264]

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[261] *See supra* paras. 142-146.
[262] Panel Report, para. 7.139. *See also Id.*, para. 7.155 ("The basic issue before us is whether or not the United States has complied with the recommendations and rulings of the DSB regarding the relevant importer-specific assessment rates").
[263] Panel Report, para. 7.154.
[264] Panel Report, para. 7.154.

159. The Panel noted that, for purposes of Articles 3.7, 19.1, and 21.3 of the DSU, where immediate compliance is impracticable, the relevant date for a WTO Member to implement the DSB's recommendations and rulings is *the expiry of the RPT*, which in this case was 24 December 2007.[265] The Panel stated: "If a measure found to be WTO-inconsistent *is to be applied* after the expiry of the RPT, that measure must have been brought 'into conformity'" with the DSB's recommendations and rulings.[266]

160. In the present case, the Panel recalled that Reviews 1, 2, 3, 7 and 8 had established both exporter-specific cash deposit rates and importer-specific assessment rates and, for each Review, both rates were found to be WTO-inconsistent in the original proceedings, and were subject to the DSB's recommendations and rulings.[267] In particular, the Panel stated that:

> the United States was required to have *brought* the importer-specific assessment rates determined in Reviews 1, 2, 3, 7 and 8 (and subsequent amendments thereto) "*into conformity*" with the covered agreements by 24 December 2007.[268]

161. The Panel found the United States' assertion that it had complied by withdrawing Reviews 1, 2, 3, 7 and 8 by the end of the RPT may have involved action taken with respect to cash deposit rates, but not with respect to the importer-specific assessment rates.[269]

162. The Panel held that the United States "has done '*nothing*' in respect of" the DSB's recommendations and rulings as to importer-specific assessment rates in Reviews 1, 2, 3, 7 and 8.[270] It found:

> the importer-specific assessment rates determined in Reviews 1, 2, 3, 7 and 8 that Japan has challenged in this compliance proceeding had not been withdrawn by that date. Rather, those importer-specific assessment rates continued to have legal effect after the end of the RPT, in the sense that they continued to provide the authority for the collection of anti-dumping duties in respect of the relevant (unliquidated) import entries.

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[265] Panel Report, paras. 7.144, 7.148.
[266] Panel Report, para. 7.148 (emphasis added).
[267] Panel Report, para. 7.146.
[268] Panel Report, para. 7.149 (emphasis added). In a footnote, the Panel referred to "the amendments cited at para. 35 of Japan's Replies to Questions from the Panel". These relate to Reviews 1, 2 and 3. The amended final results in these three original reviews were adopted on, respectively: 3 December 2007 (just before the end of the RPT on 24 December 2007); 24 March 2008; and, 15 August 2008.
[269] Panel Report, paras. 7.145-7.146.
[270] Panel Report, para. 7.146 (emphasis added).

163. Thus, the Panel concluded that "the United States failed to bring those importer-specific assessment rates 'into conformity' by 24 December 2007".[271]

164. The Panel suggested that the United States had not modified any of the assessment rates established in the five original reviews. In fact, during and after the RPT, the United States revised assessment rates with respect to Reviews 1, 2 and 3.[272] However, in doing so, the United States maintained its use of zeroing. Thus, instead of taking action to bring the assessment rates into conformity with its WTO obligations, the United States took action to pursue further the WTO-inconsistency declared by the DSB.

165. In reaching its conclusion that the United States had failed to comply with the DSB's recommendations and rulings with respect to importer-specific assessment rates in Reviews 1, 2, 3, 7 and 8, the Panel rejected several arguments raised by the United States because they had no basis in the DSU or the *Anti-Dumping Agreement*. These are the very same arguments that the United States raises in this appeal.

166. *First*, the United States argued that Japan's claim should be rejected because Japan was seeking a "retrospective" remedy, rather than a "prospective" remedy. The Panel found that "neither the DSU nor the *AD Agreement* uses the terms 'prospective' or 'retrospective' to describe Members' implementation obligations", and those obligations should instead be determined on the basis of the language in the covered agreements.[273]

167. *Second*, citing several provisions of the *Anti-Dumping Agreement* and the GATT 1994, the United States argued that the "legal regime in existence at the time of entry" determines the scope of implementation obligations. The Panel found that "not a single word of those provisions [cited by the United States] addresses the issue of how a Member should implement the recommendations and rulings of the DSB", and "[a]ccordingly, the *AD Agreement* does not require that the 'scope of applicability' of implementation action be based on the date of import entry".[274]

168. *Third*, the United States argued that a finding in favor of Japan would result in inequality between retrospective and prospective anti-dumping systems – an argument with

[271] Panel Report, para. 7.149.
[272] *See* Japan's Answers of 26 November 2008, para. 35. *See also* Panel Report, para. 7.149 (footnote 164).
[273] Panel Report, para. 7.140.
[274] Panel Report, para. 7.147.

which Japan disagreed. The Panel found no need to resolve this disagreement, since its task was to apply the DSU, not to "ensure that the implementation obligations under prospective and retrospective assessment systems are identical".[275] For the Panel, "the fact is that the two systems are different, and it is presumably such differences that lead Members to choose one system over the other".[276] Members retain the choice between the two systems; but "[h]aving chosen one system over the other, Members must respect the consequences of that choice".[277] To the Panel, that differences between the two systems "may have practical consequences for how Members come into compliance with the recommendations and rulings of the DSB does not mean that the DSU favours one system over the other", but "is simply a reflection of those underlying differences".[278]

169. *Fourth*, the United States argued that bringing periodic reviews into conformity with its obligations where duty collection was delayed by domestic litigation would amount to using "U.S. litigation to *alter*" the United States' rights and obligations under the covered agreements.[279] The Panel did not agree

> that the United States' implementation obligations may be said to have been altered by virtue of the relevant injunctions. The United States' basic implementation obligation is to bring the relevant measures into conformity by the end of the RPT. That obligation derives from the abovementioned provisions of the DSU [*i.e.*, Articles 3.7, 19.1 and 21.3]. It does not result from US domestic law.[280]

170. The Panel found that these provisions of the DSU "require universal compliance by the end of the RPT, no matter the *factual circumstances* of any given case".[281] The Panel also noted that "[t]he reasons why the United States finds itself in continuing violation are not pertinent to our findings".[282]

171. Having rejected all of the arguments raised by the United States, the Panel concluded that the United States had failed to comply with the DSB's recommendations and rulings with respect to importer-specific assessment rates in Reviews 1, 2, 3, 7 and 8 and, therefore,

[275] Panel Report, paras. 7.150-7.152.
[276] Panel Report, para. 7.152.
[277] Panel Report, para. 7.152.
[278] Panel Report, para. 7.152.
[279] United States' Second Written Submission, para. 51.
[280] Panel Report, para. 7.153 (footnote 166).
[281] Panel Report, para. 7.153 (emphasis added).

remained in violation of Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.

## D. Legal Argument

172. The United States offers two over-arching arguments as to why it should be excused from its implementation obligations with respect to the importer-specific assessment rates in Reviews 1, 2, 3, 7 and 8, neither of which has merit. They are: (1) the dates of entry of the merchandise covered by a periodic review are the decisive dates for determining a Member's implementation obligations;[283] and, (2) delays in the collection of duties because of injunctions issued under domestic law by domestic courts in domestic court proceedings relieve the United States of its implementation obligations.[284] The Panel correctly rejected these arguments.

173. In the sections below, Japan first reviews the textual basis for the United States' implementation obligations. Japan then explains why the United States is not excused from its implementation obligations in the present case.

### 1. The United States Must "Bring" the Importer-Specific Assessment Rates in Reviews 1, 2, 3, 7 and 8 "Into Conformity" with Its WTO Obligations

174. As the Panel properly found, a WTO Member's implementation obligations should be determined with regard to the provisions of the covered agreements that explicitly address them.[285] In the present case, this means that, pursuant to the text of the DSU, the United States was obliged to "bring" the importer-specific assessment rates in Reviews 1, 2, 3, 7 and 8 "into conformity" with its WTO obligations by the end of the RPT. In the sections below, Japan addresses the obligations imposed on the United States by the text of the DSU.

#### (a) *The DSU Specifies What Implementation Action Must Be Taken (Bring into Conformity) and with Respect to Which Measures (Original Measures Found to Be WTO-Inconsistent)*

##### (i) *Overview of the Remedial Provisions in the DSU*

175. When a panel or the Appellate Body finds that a measure is inconsistent with the covered agreements, the implementing Member is required to take action to remedy the

[282] Panel Report, para. 7.153 (footnote 167).
[283] United States' Appellant's Submission, para. 60.
[284] United States' Appellant's Submission, para. 62.

inconsistency. In terms of what the implementing Member must achieve during implementation, Article 3.7 of the DSU specifies that "the first objective of the dispute settlement system is usually to secure the *withdrawal* of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements".[286]

176. In addition, the first sentence of Article 19.1 of the DSU provides:

> Where a panel or the Appellate Body concludes that *a measure is inconsistent with a covered agreement*, it shall recommend that the Member concerned *bring the measure into conformity* with that agreement.[287]

The recommendations and rulings made by the panel and/or the Appellate Body under Article 19.1 of the DSU become the DSB's own recommendations and rulings upon adoption.

177. Like Article 19.1, Articles 22.1, 22.2 and 22.8 describe implementation in terms of "bring[ing] a measure into conformity with the covered agreements", and Article 22.8 also speaks of the "remov[al]" of "the measure found to be inconsistent".

178. With respect to the particular "measure" subject of the DSB's recommendations and rulings, Articles 3.7 and 19.1 state that it is a "*measure*" that the panel and/or the Appellate Body found to be inconsistent with the covered agreements. In these provisions, the word "measure" refers to a "specific measure at issue", identified in the original panel request under Article 6.2 of the DSU, which the panel and/or the Appellate Body found to be WTO-inconsistent in the original proceedings.

179. Thus, numerous remedial provisions of the DSU specify a particular *measure that is the subject of* the DSB's recommendations and rulings, and also the *implementation actions that must be taken with respect to that measure*.

#### (ii) ***The Action that the Implementing Member Must Take with Respect to the Measure Found to Be WTO-Inconsistent***

180. Pursuant to Article 19.1 of the DSU, the DSB's recommendations and rulings require the implementing Member to "*bring the measure [found to be WTO-inconsistent] into*

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[285] Panel Report, para. 7.140. *See also* Appellate Body Report, *U.S. – Zeroing (EC) (21.5)*, para. 297.
[286] Emphasis added.
[287] Footnotes omitted, emphasis added.

*conformity*".[288] The action that the implementing Member must take is, therefore, expressed by the drafters through the verb "*bring*".

181. The ordinary meaning of this verb is "to cause to come *from, into, out of, to,* etc. a certain state or condition" and "to cause to become".[289] 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.

182. 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".[290] Similarly, the Appellate Body has remarked: "Through the recommendation under Article 19.1, the Member found to have violated a provision of a covered agreement is required to take *corrective action to remove* the violation".[291]

183. The context in the remainder of the DSU 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.

184. 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-

[288] Emphasis added.
[289] 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) (emphasis in original) (Exhibit JPN-69).
[290] Appellate Body Report, *U.S. – OCTG Sunset Reviews (21.5)*, para. 173 (footnote 367).
[291] Appellate Body Report, *EC – Selected Customs Matters*, para. 134 (emphasis added).

inconsistency and the resulting nullification or impairment, thereby restoring the "balance" of the Members' rights and obligations, as required by Article 3.3.

185. 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";[292] 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, without any right to offset that through suspension of concessions.

186. Accordingly, the Appellate Body should reject the United States' absurd interpretation of the term "bring into conformity", as the Panel rightly did.

### (b) ***Implementation Must Be Achieved by the End of the RPT***

187. Timing is, of course, relevant to implementation. Article 21.1 of the DSU requires "[p]rompt compliance" with the DSB's recommendations and rulings. 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 bring a measure found to be WTO-inconsistent into conformity. However, by the end of that period, a measure must be WTO-consistent, so that it applies henceforth (prospectively) in a WTO-consistent fashion, and does not nullify or impair benefits. As the Panel correctly found:

> The relevant date for the purposes of Articles 3.7, 19.1 and 21.3 of the DSU (in cases where immediate compliance is impracticable) is … the expiry of the RPT. If a measure found to be WTO-inconsistent is to be applied after the expiry of the RPT, that measure must have been brought "into conformity", irrespective of the date of entry of the imports covered by that measure.[293]

188. Similarly, the Appellate Body in *U.S. – Zeroing (EC) (21.5)* concluded:

> When a reasonable period of time for implementation has been determined, Article 21.3 of the DSU implies that the obligation to comply with the recommendations and rulings of the DSB has to be fulfilled by the end of the reasonable period of time at

[292] Appellate Body Report, *U.S. – Upland Cotton (21.5)*, paras. 245-246.
[293] Panel Report, para. 7.148.

> the latest, and that the WTO-inconsistency has to cease by the end of the reasonable period of time with prospective effect.[294]

189. Thus, the original measures must be revised with prospective effect from the end of the RPT.

190. As a result, when an implementing Member takes action, pursuant to a revised measure after the end of the RPT, that measure – and the Member's actions under that measure – are WTO-consistent, and no longer nullify or impair benefits with effect from the end of the RPT. In other words, the obligation to withdraw, modify or revise[295] a WTO-inconsistent measure requires only that the implementing Member's *future actions*, with effect from the end of the RPT, be WTO-consistent, but not its past actions. The modified or revised measure need only govern *future actions* following the end of the RPT, and not past actions.

191. In the present case, the United States is, therefore, not required to repay inflated duties that were collected through duty collection actions completed *before* the end of the RPT pursuant to Reviews 1, 2, 3, 7 and 8. By reference to the end of the RPT, these duty collection actions were completed in the past and need not be undone.

192. However, if the United States had not yet taken action to collect duties by the end of the RPT, the United States must revise the original measures to bring them, and the United States' post-RPT actions pursuant to those measures, into conformity with WTO law. This is a *prospective*, not retrospective, remedy because it governs the implementing Member's *future actions* under the original measure following the end of the RPT, and not its past actions.

193. In *U.S. – Zeroing (EC) (21.5)*, based on Articles 3.7, 19.1, 21.1 and 21.3 of the DSU, the Appellate Body held that implementation obligations "extend to the actual collection and liquidation of duties, and to the issuance of assessment or liquidation instructions [issued after the end of the RPT[296]], when these actions result from administrative review determinations made before the end of the reasonable period of time".[297]

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[294] Appellate Body Report, *U.S. – Zeroing (EC) (21.5)*, para. 299.
[295] *See* Appellate Body Report, *U.S. – OCTG Sunset Reviews (21.5)*, para. 173 (footnote 367).
[296] This statement was made in a portion of the Appellate Body report addressing the European Communities' claims regarding "the collection (or liquidation) of duties, assessment instructions, or liquidation instructions

194. This ruling ensures that duty collection actions taken after the end of the RPT are based on assessment rates in periodic reviews that have been fully brought into conformity with a Member's WTO obligations.

### (c) *Implementation Action Is Required When Measures Continue to Produce Legal Effects*

195. In a very small minority of original proceedings, panels and the Appellate Body have found that a measure is WTO-inconsistent, but condoned *inaction* by the respondent during implementation through a decision *not* to recommend that a measure be brought into conformity. No recommendation has been made in disputes where the original WTO-inconsistent measure has *already ceased to produce legal effects that nullify or impair benefits* because, for example, the measure has already been withdrawn or modified while the original proceedings are pending.[298]

196. However, in the vast majority of disputes, where the original WTO-inconsistent measure continues to produce WTO-inconsistent legal effects, the original measure must be brought into conformity. For example, in *EC – Commercial Vessels*, the panel observed that certain WTO-inconsistent subsidy measures had "expired", and not been "renewed".[299] Nonetheless, because the panel recognized that these measures might still produce legal effects, the EC was obliged to take implementation action "to the extent that [the measures] *continue to be operational*".[300]

197. The panel in *India – Autos* reached a similar conclusion, finding that the duty to bring a WTO-inconsistent measure into conformity depends on whether the measure continues to be "*binding*" and "*enforceable*", and "to *produce effects*" in domestic law.[301] Such a duty does *not* arise if the original measures "have *ceased to have an effect*".[302]

198. It is worth exploring *India – Autos* further because there are very close parallels between the original periodic reviews at issue in these proceedings (*i.e.*, Reviews 1, 2, 3, 7

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issued *after the end of the reasonable period of time*, when such actions result from determinations of final duty liability made before that date". Appellate Body Report, *U.S. – Zeroing (EC) (21.5)*, para. 310.
[297] Appellate Body Report, *U.S. – Zeroing (EC) (21.5)*, para. 311. *See also Id.*, para. 297.
[298] *See, e.g.*, Appellate Body Report, *U.S. – Certain EC Products*, para. 81; Panel Report, *Dominican Republic – Cigarettes*, para. 419. For additional discussion on this issue, *see also* para. 450 of this Appellee's Submission.
[299] Panel Report, *EC – Commercial Vessels*, para. 8.4.
[300] Panel Report, *EC – Commercial Vessels*, para. 8.4 (emphasis added).
[301] Panel Report, *India – Autos*, paras. 7.235, 8.58 (emphasis added).
[302] Panel Report, *India – Autos*, para. 8.26 (emphasis added).

and 8) and the WTO-inconsistent measures at issue in *India – Autos* (*i.e.,* certain Memorandums of Understanding ("MOUs")).

199. As also discussed briefly at paragraphs 448-449, in *India – Autos*, through a general measure known as Public Notice No. 60, India subjected the importation of auto-parts to the fulfillment of certain WTO-inconsistent conditions, including an indigenization requirement and a trade balancing obligation. Pursuant to the trade balancing obligation, Public Notice No. 60 provided that the importation of auto-parts was permitted only on condition that importers sign an agreement (an "MOU") undertaking to export finished production with a value equal to the value of the imported parts.[303] The measures at issue in the dispute included both Public Notice No. 60 "as such", and individual MOUs "as applied".[304]

200. During the panel proceedings, India withdrew Public Notice No. 60 such that *new* entries of auto-parts were no longer subject to the WTO-inconsistent conditions. India argued that there was, therefore, no duty to bring its measures into conformity, because *new* entries were not subject to restrictions.[305] This argument is very similar to the argument that the United States has made in these proceedings; namely, that the date of entry is the decisive criterion in assessing the scope of its obligation to bring its measures into conformity.

201. The panel in *India – Autos* rejected this argument, focusing on the *continuing legal effects* of the MOUs. Although Public Notice No. 60 no longer applied to new entries, India would continue to "execute" the MOUs.[306] Under these MOUs, in order to secure a right to import auto-parts into India, importers had previously undertaken to export finished production pursuant to the WTO-inconsistent trade balancing obligation.[307] Even though Public Notice No. 60 had been withdrawn with respect to new entries, India indicated that it would continue to enforce the trade balancing obligation previously undertaken in the MOUs at issue, and would insist upon the performance of as-yet-unfulfilled exportation commitments undertaken in these measures.[308]

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[303] Panel Report, *India – Autos*, para. 2.5.
[304] *See* Panel Report, *India – Autos*, paras. 7.251-7.253, for the Panel's finding that the individual "as applied" MOUs are "measures".
[305] Panel Report, *India – Autos*, paras. 8.4, 8.5.
[306] Panel Report, *India – Autos*, paras. 8.53-8.55.
[307] Panel Report, *India – Autos*, paras. 7.24, 8.55.
[308] Panel Report, *India – Autos*, para. 7.24 ("[S]ignatories of existing MOUs under Public Notice No. 60 would continue to be required to discharge outstanding obligations under the MOUs they had entered into. In particular, they would continue to be required to meet the indigenization condition foreseen in Public Notice No.

202. The panel indicated that the duty to bring WTO-inconsistent measures into conformity does *not* arise if the original measures "have *ceased to have an effect*".[309] However, that was not the case with respect to the MOUs, which "*remain binding and enforceable*".[310] Specifically, the panel found that "*[s]ignatories [of the MOUs] continue to be bound to the execution of conditions which were found to be inconsistent* with the provisions of Articles III:4 and XI:1 of the GATT 1994".[311] The panel continued:

> The essential issue here is that the [trade balancing obligation] foreseen in [Public Notice No. 60], which was found to be inconsistent, *continues to be binding and to produce effects* on those signatories who have not yet fully discharged their export obligations. This issue does not relate to whether any past execution of trade balancing obligations 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.[312]

203. Thus, in both *India – Autos* and the present case, the legal question is whether an original WTO-inconsistent measure must be brought into conformity, where that measure continues to be "*binding*" and "*enforceable*", and "*produce effects*" in domestic law. In language strongly echoing Japan's arguments, the panel in *India – Autos* found that implementation action *is required* to bring such a measure into conformity with WTO law, thereby ensuring that *future actions* taken to enforce the original measures are WTO-consistent, and preventing further nullification or impairment.

204. In *India – Autos*, the continuing legal effects consisted in the *future "execution" or enforcement* of the WTO-inconsistent MOUs; India was not required to "undo" its *past* enforcement of MOUs. In the present case, the continuing legal effects of Reviews 1, 2, 3, 7 and 8 consist in the *"execution" or enforcement* of WTO-inconsistent assessment rates, after the end of the RPT, in collecting excessive duties. Implementation would not require the

60 and their MOU and to discharge export obligations accrued in relation to previously restricted imports under the 'trade balancing' condition").
[309] Panel Report, *India – Autos*, para. 8.26 (emphasis added).
[310] Panel Report, *India – Autos*, para. 7.235 (emphasis added).
[311] Panel Report, *India – Autos*, para. 8.56 (emphasis added).
[312] Panel Report, *India – Autos*, para. 8.58 (emphasis added).

United States to "undo" the "past execution" of assessment rates through the repayment of duties that had been collected before the end of the RPT.

205. *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 this dispute. 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 [Reviews 1, 2, 3, 7 and 8] into conformity" with WTO law, under Article 19.1 of the DSU.

### (d) *The Terms "Retrospective" and "Prospective" Are Not Treaty Terms, and Do Not Guide a Panel's Analysis*

206. The United States has argued that it need not bring the importer-specific assessment rates in Reviews 1, 2, 3, 7 and 8 into conformity, because such action would impose a "retrospective", rather than "prospective" remedy, given that the rates were established in the past, and relate to past entries.[313] However, the terms "retrospective" and "prospective" do not assist in determining the scope of a WTO Member's implementation obligations, because they are not treaty terms.

207. Neither the DSU nor the *Anti-Dumping Agreement* uses these words to describe a Member's implementation obligations, as the Panel rightly observed.[314] Instead, these terms are merely informal labels used to describe the effect of relief available in WTO law. The Panel, therefore, properly appreciated that it was not called upon to interpret either of these labels under the *Vienna Convention on the Law of Treaties* ("*Vienna Convention*"), much less apply them to the facts.

208. The difficulties of relying on non-treaty labels, such as the words "retrospective" and "prospective", are evident in these proceedings. These two words are not easy to interpret or apply, and give rise to considerable controversy. The same actions may reasonably be seen as both "retrospective" and "prospective", depending upon the perspective taken and the criteria used to judge the question. For example, in these proceedings, the United States argues that bringing assessment rates into conformity with WTO law would involve a retrospective remedy, whereas Japan believes that the remedy would be prospective.

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[313] *See, e.g.,* United States' Appellant's Submission, paras. 60-61, 63-66.
[314] Panel Report, para. 7.140.

209. In short, in common parlance, the words "retrospective" and "prospective" have many shades of meaning. For such words, the rules of treaty interpretation take on particular significance, to narrow the meaning through holistic reference to text, context, and object and purpose, and to arrive at a coherent and harmonious interpretation of the words that "fits comfortably in the treaty as a whole".[315] Yet, the rules of treaty interpretation do not apply to words that do not figure in the treaty. There is no text, placed in a particular context by the drafters, that can be interpreted.

210. Indeed, an important way in which the treaty interpreter interprets a treaty word with many shades of meaning is through the contextual relationship of that word to other words and phrases in the treaty: where is the word being interpreted located in a particular provision?; what words surround the word in that provision?; how does that provision relate to other provisions in the treaty?; and so on. When a word is not part of the treaty, like the words "retrospective" and "prospective", it is simply impossible to engage in this important exercise and, therefore, impossible to arrive at a meaning that "fits comfortably in the treaty as a whole".[316]

211. The United States' reliance on *U.S. – Section 129* and *EC – Chicken Cuts* in support of its argument for "prospective implementation obligations"[317] is also inapposite.

212. In the passage of *U.S. – Section 129* cited by the United States,[318] the panel simply reiterated *the United States' views* that its implementation obligations did not extend to unliquidated entries that occurred prior to the end of the RPT. The panel passed no judgment on the correctness of the United States' views.[319] Japan notes that one member of the panel in *U.S. – Section 129* was also a member of the compliance Panel.

213. With respect to *EC – Chicken Cuts*, the European Communities revised its measure so its post-RPT actions under the measure were WTO-consistent, consistent with Japan's views. The United States has not demonstrated that the European Communities took action, *after the*

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[315] Appellate Body Report, *U.S. – Continued Zeroing*, para. 268.
[316] Appellate Body Report, *U.S. – Continued Zeroing*, para. 268.
[317] United States' Appellant's Submission, paras. 74-76.
[318] United States' Appellant's Submission, para. 74, *citing* Panel Report, *U.S. – Section 129*, para. 5.52. Incidentally, there is no paragraph 5.52 to this Panel Report, so Japan assumes the United States intended to cite to paragraph 6.52.
[319] Panel Report, *U.S. – Section 129*, para. 6.52 (noting only that "[i]t should be recalled, in this regard, that, *in the view of the United States*, there is no obligation under WTO law to implement adverse DSB rulings with respect to 'prior unliquidated entries'") (emphasis added).

*end of the RPT*, to enforce any WTO-inconsistent elements of the original measure, as the United States does in this dispute.

214. Japan notes that, in any event, the United States relies only on the European Communities' actions, and not a panel or Appellate Body decision, because there were no compliance proceedings.[320] The European Communities' actions in that dispute are not decisive with respect to the Appellate Body's interpretation of the covered agreements. Indeed, the United States has not even offered to demonstrate that the practice of one Member – the European Communities – is relevant under the *Vienna Convention* rules of treaty interpretation. In *EC – Chicken Cuts* itself, the Appellate Body stated that the practice of *one* or *only a few* WTO Members was not sufficient to establish "subsequent practice" under Article 31(3)(b) of the *Vienna Convention*.[321]

215. In any event, as discussed above, the requirement for the United States to take action to bring the importer-specific assessment rates in Reviews 1, 2, 3, 7 and 8 into conformity with its WTO obligations, in accordance with the text of DSU Article 19.1, is entirely *prospective* in nature.[322] The United States is not required to repay inflated duties that were collected through actions taken *before* the end of the RPT, pursuant to importer-specific assessment rates determined in Reviews 1, 2, 3, 7 and 8. Rather, where the United States has not yet collected duties pursuant to those rates by the end of the RPT, the United States is required to take action to modify or revise the original measures to ensure that any *future* definitive anti-dumping duties collected do not exceed the properly determined margins of dumping. Only then will the United States "bring" its measures "into conformity" with its WTO obligations.

### (e) *Application of the DSU's Implementation Obligations to the Present Case*

216. In the original proceedings in this dispute, the DSB recommended that the United States "*bring*" the original Reviews 1, 2, 3, 7 and 8 "*into conformity*" with its WTO obligations.[323] As the Panel held[324] – and the United States did not dispute[325] – the DSB's

[320] United States' Appellant's Submission, paras. 75-76.
[321] Appellate Body Report, *EC – Chicken Cuts*, paras. 259, 262, 263, 266.
[322] *See* Appellate Body Report, *U.S. – Zeroing (EC) (21.5)*, para. 309.
[323] Appellate Body Report, *U.S. – Zeroing (Japan)*, para. 191.
[324] Panel Report, para. 7.146.
[325] Panel Report, para. 7.146 and footnote 157.

recommendations and rulings applied to the *importer-specific assessment rates* in these Reviews, because the Appellate Body expressly found that these rates were WTO-inconsistent.[326]

217. Pursuant to Articles 3.7, 19.1, 21.1 and 21.3 of the DSU, the United States was, therefore, obliged to take transformative or "corrective action"[327] to "bring" the importer-specific assessment rates in these Reviews "into conformity" with WTO law by the end of the RPT.

218. The Panel held that all five of these original reviews continued to produce legal effects after the expiry of the RPT. As the Panel put it:

> … the importer-specific assessment rates determined in Reviews 1, 2, 3, 7 and 8 that Japan has challenged in this compliance proceeding had not been withdrawn by that date. Rather, *those importer-specific assessment rates continued to have legal effect after the end of the RPT, in the sense that they continued to provide the authority for the collection of anti-dumping duties in respect of the relevant (unliquidated) import entries*.[328]

219. In other words, following the expiry of the RPT, the United States has taken, or will take, action to collect inflated duties pursuant to the WTO-inconsistent importer-specific assessment rates calculated in Reviews 1, 2, 3, 7 and 8. The evidence presented by Japan demonstrated that, if the United States had eliminated zeroing from these measures, the exporter-specific margin of dumping would have been *zero* in all cases.[329] Because this margin constitutes the "ceiling"[330] on the maximum amount of duties that may be collected, had the United States brought its measures into conformity, it would have collected *no* duties on entries subject to these Reviews after the end of the RPT.

220. The Panel correctly held that, although the United States was obliged to take transformative action to revise the importer-specific assessment rates in these five original

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[326] Appellate Body Report, *U.S. – Zeroing (Japan)*, para. 175.
[327] Appellate Body Report, *EC – Selected Customs Matters*, para. 134 (emphasis added).
[328] Panel Report, para. 7.149 (emphasis added). At footnote 162 to this paragraph of its report, the Panel noted that "[t]he United States has not alleged that the importer-specific assessment rates expired before the end of the RPT".
[329] Japan's Updated Answers of 10 December 2008, para. 6 (Revised Table 3).
[330] Appellate Body Report, *U.S. – Zeroing (EC)*, para. 130; and Appellate Body Report, *U.S. – Zeroing (Japan)*, para. 155.

reviews, it failed to do so.[331] The Panel, therefore, properly held that the United States failed to comply with the DSB's recommendations and rulings.[332]

221. We turn now to an explanation why the United States is incorrect in its arguments that it was not required to bring Reviews 1, 2, 3, 7 and 8 fully into conformity with its WTO obligations.

### 2. The United States Is Not Excused from Its Implementation Obligations in the Present Case

222. The United States offers two reasons why it should be excused from its obligation to "bring" the importer-specific assessment rates in Reviews 1, 2, 3, 7 and 8 "into conformity" with its obligations. They are: (1) the dates of entry of the merchandise covered by these Reviews pre-date the end of the RPT;[333] and, (2) duty collection with respect to these reviews was delayed by actions of U.S. domestic courts.[334] Neither reason exonerates the United States from its implementation obligations under Articles 3.7, 19.1, 21.1 and 21.3 of the DSU.

#### (a) *The Date of Entry Is Not the Decisive Moment for Determining the Temporal Scope of a Member's Implementation Obligations*

##### (i) *Introduction*

223. Before turning to the United States' arguments, Japan recalls relevant facts relating to original Reviews 1, 2, 3, 7 and 8. The Panel noted that "[t]he United States has not alleged that the importer-specific assessment rates expired before the end of the RPT".[335] It bears repeating that the Panel also found that the:

> *importer-specific assessment rates [established in Reviews 1, 2, 3, 7 and 8] continued to have legal effect after the end of the RPT*, in the sense that they *continued to provide the authority for the collection of anti-dumping duties* in respect of the relevant (unliquidated) import entries.[336]

224. The ongoing legal effects of the assessment rates are demonstrated by the fact that USCBP has taken duty collection measures pursuant to Reviews 1, 2, 7 and 8 since the end of

[331] Panel Report, para. 7.149.
[332] Panel Report, paras. 7.154 and 8.1(a).
[333] United States' Appellant's Submission, para. 60.
[334] United States' Appellant's Submission, para. 62.
[335] Panel Report, para. 7.149 (footnote 162).
[336] Panel Report, para. 7.149 (emphasis added).

the RPT, collecting inflated anti-dumping duties under assessment rates that should, by then, have been brought into conformity.[337]

225. The evidence shows that, *without zeroing*, the assessment rates in all five original reviews would have been *zero*,[338] and the United States would have collected *no anti-dumping duties*. Instead, by failing to bring its measures into conformity, the United States will take, or has taken, *new measures*, *after the end of the RPT*, to collect tens of millions of dollars of excessive anti-dumping duties *on the legal basis of assessment rates found to be WTO-inconsistent*.

226. This serves as important background to the United States' argument that revising the importer-specific assessment rates in Reviews 1, 2, 3, 7 and 8 would involve retrospective relief. In the United States' view, a prospective remedy is one that applies solely to *new entries that occur on or after the end of the RPT*.[339] Thus, the United States believes that action is *never* required to bring importer-specific assessment rates into conformity with WTO obligations, because these rates always apply to entries that occurred long before the end of the RPT. Instead, it considers that an implementing Member can continue to collect duties, after the end of the RPT, on the basis of WTO-inconsistent assessment rates that are subject to DSB recommendations and rulings.

227. In other words, with respect to the importer-specific assessment rates, the United States treats the DSB's recommendations and rulings as purely "declaratory"[340] and, ultimately, legally irrelevant, because they concern entries that pre-date the end of the RPT.

228. This U.S. argument is flawed for several reasons:

- *First*, the legal provisions of the GATT 1994 and the *Anti-Dumping Agreement* cited by the United States do not support its position that the date of entry is the decisive moment in determining the scope of a Member's implementation obligations.

[337] Panel Report, paras. 7.206, 7.208.
[338] A WTO-consistent exporter's margin of dumping serves as the "ceiling" on the maximum amount of duties that may be collected. *See* Appellate Body Report, *U.S. – Stainless Steel (Mexico)*, para. 102. For each of these five original reviews, the export-specific margins of dumping would have been zero if zeroing had not been used. *See* Japan's Updated Answers of 10 December 2008, para. 6 (Revised Table 3). The Panel expressly approved Japan's methodology for determining the dumping margins without zeroing. *See* Panel Report, para. 7.166.
[339] United States' Appellant's Submission, paras. 60-61.
[340] Appellate Body Report, *U.S. – Upland Cotton (21.5)*, para. 245.

- *Second*, relying on the date of entry as the decisive moment for determining the scope of a Member's implementation obligations nullifies rights and obligations under Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, and compromises the effectiveness of dispute settlement.

- *Third*, the Panel's findings ensure the equality of retrospective and prospective duty collection systems.

- *Fourth*, the International Law Commission's ("ILC") *Articles on Responsibility of States for Internationally Wrongful Acts* ("*ILC Articles*") confirm the Panel's findings.

229. Japan addresses these issues in turn, in the sections that follow.

### (ii) *The Legal Provisions in the GATT 1994 and the Anti-Dumping Agreement on which the United States Relies Do Not Support Its Position*

230. The United States argues that "[t]he text of the GATT 1994 and the Anti-Dumping Agreement confirms that it is *the legal regime in existence at the time that an import enters* the Member's territory that determines whether the import is liable for the payment of anti-dumping duties".[341] Because liability for duties arises on the date of entry, the United States argues that this date is decisive in assessing whether implementation involves retrospective or prospective relief.[342] In making this argument, the United States relies on Articles VI:2 and VI:6(a) of the GATT 1994, the Interpretive Note to paragraphs 2 and 3 of Article VI, and Articles 8.6, 10.1, 10.6 and 10.8 of the *Anti-Dumping Agreement*.[343] The United States' arguments are misplaced.

231. The Panel in this dispute, and both the panel and the Appellate Body in *U.S. – Zeroing (EC) (21.5)*, dismissed this argument.[344] As the Panel in the present case found:

> We do not consider that the United States' views concerning the "legal regime in existence at the time of entry" provides support for its argument that no implementation obligations exist in respect of the importer-specific assessment rates at issue. Rather, *this assertion seems to be no more than a statement of a basic rule that import entries should only be liable for anti-dumping duties if an anti-dumping measure (or "order", in U.S. parlance) was in place at the time of entry.* If no such antidumping "regime" were in place at that time, the

[341] United States' Appellant's Submission, para. 67 (emphasis added).
[342] United States' Appellant's Submission, para. 67.
[343] United States' Appellant's Submission, paras. 67-72.
[344] Panel Report, para. 7.147; Appellate Body Report, *U.S. – Zeroing (EC) (21.5)*, paras. 308-309.

> relevant entries should not be liable for anti-dumping duties. In addition, while the United States contends that the text of the abovementioned *AD Agreement* and GATT 1994 provisions "confirms that the focus for implementation purposes should be on the time of entry of merchandise", in fact *not a single word of those provisions addresses the issue of how a Member should implement the recommendations and rulings of the DSB*. Thus, although the United States may be correct in asserting that "whenever the AD Agreement specifies an applicable date for an action, the scope of applicability is based on entries occurring on or after that date", the point is that the *AD Agreement* does not specify any applicable date for implementation action. Accordingly, the *AD Agreement* does not require that the "scope of applicability" of implementation action be based on the date of import entry.[345]

232. Contrary to the United States' view, the Panel did not dismiss the U.S. textual arguments "because they were based in the AD Agreement and the GATT 1994 rather than the DSU".[346] Rather, the Panel dismissed these arguments because they lacked merit. The provisions cited from the *Anti-Dumping Agreement* and the GATT 1994 address the date on which an anti-dumping order can be applied to an entry and, in that regard, they set forth limits on the retroactive application of an anti-dumping order. These provisions do not address in any way the "applicable date for implementation action",[347] and are irrelevant to the issue before the Appellate Body.

233. To elaborate further, the United States argues that the "legal regime" in place at the time of importation is determinative. However, this legal regime was merely *provisional*, establishing a potential liability for duties, and is replaced by the legal regime subsequently established in a periodic review under Article 9.3 of the *Anti-Dumping Agreement*, which Japan explores further below.

234. At the time of importation, there is "uncertainty" regarding the extent of liability, if any, for the payment of anti-dumping duties on an entry.[348] The United States recognizes that the imposition of cash deposits on importation "serve[s] as a *placeholder* for the *liability* which is incurred at the time of entry".[349] Long after importation, the *provisional* legal regime that applied at the time of importation is replaced by a *new "legal regime"* that

[345] Panel Report, para. 7.147 (emphasis added).
[346] United States' Appellant's Submission, para. 73.
[347] Panel Report, para. 7.147.
[348] Appellate Body Report, *U.S. – Customs Bond Directive*, para. 226.
[349] United States' First Written Submission, para. 61 (emphasis added in part and removed in part).

determines the final liability. Because the provisional legal regime is replaced, it is not a determinative regime. As the panel in *U.S. – Zeroing (EC) (21.5)* said:

> … the U.S. arguments disregard the fundamental fact that, in a retrospective duty assessment system, the duties applicable to specific imports of a product are not determined at the time of entry, but rather, are determined at a later date.[350]
>
> …
>
> The legal regime that was in place at the time of the importation of the products at issue in that review is not dispositive as to whether duties are due, and if so, in what amount. The legal regime in place at the time of importation is, at most, a provisional one as concerns the final anti-dumping duty liability incurred by the imports.[351]

235. There is also a logical inconsistency in the United States' argument. The United States' excuse for not bringing the WTO-inconsistent periodic reviews into conformity with WTO law is that the *provisional* "legal regime" that applied on the date of entry is *fixed*, and cannot be changed. However, that provisional "legal regime" *has already been changed, as a result of the original periodic reviews at issue*. There is, therefore, no logical or legal basis to argue that the legal regime in force on the date of entry cannot be changed during implementation – because it has already been changed.

236. The essence of the U.S. argument seems to be that – so long as it respects the provisions it cites from the *Anti-Dumping Agreement* and the GATT 1994 when goods are imported – no other WTO obligations discipline its actions *after importation* with respect to subject imports.

237. However, the United States entirely ignores the disciplines in Article 9.3 of the *Anti-Dumping Agreement*, the very provision that the United States was found to have violated. Under that provision, irrespective of the "legal regime" that applied on the date of importation, a Member is required to take action, long after importation, to ensure that the amount of anti-dumping duties collected does not exceed the margin of dumping. The mere fact that a Member correctly applies the provisions cited by the United States at the time of importation does not mean that it is liberated from its obligations under Article 9.3.

238. The Panel, therefore, correctly rejected the U.S. argument that the date of entry is decisive in establishing the scope of implementation obligations with respect to periodic reviews. For the reasons provided above, Japan requests that the Appellate Body also reject the United States' appeal against these findings by the Panel.

### (iii) *Relying on the Date of Entry as Decisive Nullifies Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994*

239. The United States' argument that its implementation obligations apply solely to *new entries that occur on or after the end of the RPT* nullifies the disciplines in Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.

240. The *chapeau* of Article 9.3 provides that "[t]he amount of anti-dumping duty shall not exceed the margin of dumping as established under Article 2". Article VI:2 of the GATT 1994 limits the amount of duties that a Member "may *levy*" to the margin of dumping; the word "levy" is defined in this context as including the "*collection*" of anti-dumping duties.[352]

241. The Appellate Body has held that 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, as established under Article 2.[353] The Appellate Body 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".[354]

242. Before the Panel, the United States expressly stated its agreement with the Appellate Body's interpretation of the *chapeau* of Article 9.3:

> 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.[355]

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[350] Panel Report, *U.S. – Zeroing (EC) (21.5)*, para. 8.173.
[351] Panel Report, *U.S. – Zeroing (EC) (21.5)*, para. 8.176.
[352] *Anti-Dumping Agreement*, footnote 12.
[353] Appellate Body Report, *U.S. – Zeroing (Japan)*, para. 155 (emphasis added). *See also* Appellate Body Report, *U.S. – Zeroing (EC)*, para. 130.
[354] Appellate Body Report, *U.S. – Zeroing (Japan)*, para. 155 (emphasis added). *See also* Appellate Body Report, *U.S. – Zeroing (EC)*, para. 130.
[355] United States' Second Written Submission, para. 64 (emphasis added).

243. Yet, the United States' argument that the date of entry is decisive nullifies the disciplines imposed by Article 9.3 on the amount of duties actually "collected" by the importing Member. The crucial obligation under Article 9.3 does not apply on the date of entry but, as the United States recognizes, at the later time of duty assessment and collection. Specifically, *long after importation*, Article 9.3 requires Members to ensure that the total amount of duties finally "collected" on *past entries* does not exceed the dumping margin.[356] It is only *after* an entry has occurred that the duties provisionally collected can be reviewed. Moreover, it is only *after* the entries have occurred that a dumping margin can be calculated, in a review, *for those entries*.

244. By definition, therefore, a periodic review determines an importer-specific assessment rate for entries that all occurred *long before the end of the RPT*. As a result, on the U.S. theory, new entries occurring after the end of the RPT are *never* covered by an assessment rate found to be WTO-inconsistent in the original proceedings. Thus, even though Members have assumed specific obligations under Article 9.3 *in relation to the duties to be finally collected on past entries*, those obligations become unenforceable *precisely because they relate to past entries*.

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

246. On the U.S. view, a WTO-inconsistent importer-specific assessment rate need *never* be brought into conformity with Article 9.3, and the importing Member can *always* collect inflated anti-dumping duties under an original periodic review. As a result, when adopting a periodic review, an importing Member can ignore the constraints in Article 9.3, safe in the knowledge that there is *never* an enforceable WTO obligation limiting the amount of duties collected or entitling the complainant to suspend concessions to offset the nullification or impairment.

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[356] The word "refund" appears in Articles 9.3.1 and 9.3.2 of the *AD Agreement*. *See also* Appellate Body Report, *U.S. – Zeroing (EC)*, para. 130; United States' Second Written Submission, para. 64 ("The United States does not dispute that Article 9.3 of the AD Agreement obliges WTO Members to ensure that the amount of antidumping duty collected not exceed the margin of dumping established under Article 2 of the AD Agreement").

247. In short, an importer-specific assessment rate is *immune* from the disciplines in Article 9.3. Instead, WTO-inconsistent domestic rules prevail over WTO law. The Appellate Body must reject such an interpretation, which would liberate Members from their obligations under Article 9.3.

### (iv) *Relying on the Date of Entry as the Decisive Moment Is Contrary to the Object and Purpose of Dispute Settlement*

248. The United States' approach is contrary to the object and purpose of the dispute settlement system. WTO dispute settlement provides a forum for panels and the Appellate Body to rule upon the WTO-consistency of measures that are allegedly nullifying or impairing benefits. If an original measure is found to be WTO-inconsistent, it is deemed to nullify or impair benefits unless proven otherwise. The measure must then be withdrawn or revised during the RPT, under Articles 3.7, 19.1, 21.1 and 21.3 of the DSU. This implementation action eliminates the WTO-consistency in the original measure, and ends the resulting nullification or impairment, by the end of the RPT.

249. For the United States, however, no implementation action is ever required with respect to its assessment rates. Consequently, the WTO-inconsistency in these rates is never eliminated and, after the end of the RPT, the implementing Member remains free to enforce rates already found to be WTO-inconsistent. The Member may collect excessive anti-dumping duties through the adoption of new WTO-inconsistent duty collection measures, without facing suspension of concessions to offset the ongoing nullification or impairment.

250. On this view, the implementing Member is permitted to behave as if no dispute settlement proceedings had ever occurred, and no DSB recommendations and rulings had ever been made with respect to that measure. The nullification or impairment entailed by the original measures is never terminated, and continues after the end of the RPT, without being offset by the suspension of concessions.

251. This argument undermines the implementation obligations in Articles 3.7, 19.1, 21.1 and 21.3 of the DSU. It is also contrary to the entire purpose of the rules-based system, and must be rejected. In the words of the Appellate Body, the United States' interpretation of the DSU "compromise[s] the effectiveness" of the disciplines in Article 9.3 of the *Anti-Dumping*

*Agreement*, and is, to say the least, "difficult to reconcile with the objectives of the DSU".[357] The United States has failed to demonstrate how the text of the DSU or the *Anti-Dumping Agreement* requires the extreme interpretation that it proposes.

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

252. Japan disagrees with the United States' argument that the Panel's interpretation, which is in concert with the Appellate Body's interpretation in *U.S. – Zeroing (EC) (21.5)*, treats retrospective and prospective duty collection systems unequally, and "[u]nfairly disadvantages" Members with retrospective systems.[358] The United States asserts that "the main distinction between retrospective and prospective systems" is that, in a prospective system, definitive duties are fixed and collected at the time of importation, while in a retrospective system, "[d]etermination of final liability and collection [occur] at some point after importation".[359] The United States contends that "only in retrospective systems does entry of merchandise trigger *potential* liability, because only in retrospective systems is *final* liability determined and collected at a later date".[360] The United States bases its argument on the text of Articles 9.3.1 and 9.3.2 of the *Anti-Dumping Agreement*.

253. The United States' argument[361] under Articles 9.3.1 and 9.3.2 is without basis. The fundamental premise of the United States' argument is that, in a prospective system, the amount of duties collected at the time of importation is not subject to review under Article 9.3. That is incorrect. The Appellate Body has held that in prospective systems, "under Article 9.3.2, the amount of duties collected is *subject to review* so as to ensure that, pursuant to Article 9.3 of the Anti-Dumping Agreement, the amount of the anti-dumping duty collected does not exceed the margin of dumping as established under Article 2".[362]

254. Following such a review, the importing Member may be required to "refund" some or all of the duties "paid" on importation. Accordingly, in a prospective duty collection system, the definitive amount of duties due is determined in a review, if requested, and not on importation.

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[357] Appellate Body Report, *U.S. – Upland Cotton (21.5)*, para. 246, *citing* to Articles 3.3 and 21.1 of the DSU.
[358] United States' Appellant's Submission, Heading IV.B.2, paras. 77-83.
[359] United States' Appellant's Submission, para. 80.
[360] United States' Appellant's Submission, para. 82.
[361] United States' Appellant's Submission, paras. 80-81.

255. The United States places a great deal of emphasis on the absence of the words "final liability" in Article 9.3.2, and their inclusion in Article 9.3.1.[363] However, the use of other words in Article 9.3.2 shows that the amount of duties initially collected is not final, and that the extent of final liability may be determined in a review. In particular, as noted, the obligation to "*refund*" duties "*paid*" in excess of the margin of dumping demonstrates that the duties initially "paid" may not be final.

256. The same interpretive principles, therefore, apply to both retrospective and prospective systems. A review may occur under either system, and that review determines the definitive amount of duties finally due. Under either system, if a review is found to be WTO-inconsistent, it must be brought into conformity with WTO law to the extent that the review remains legally operational after the end of the RPT.

257. In both systems, a review could continue to produce legal effects well after the end of the RPT because, for example, a Member's actions pursuant to that review are delayed by domestic litigation regarding the review. Indeed, delay as a result of "judicial review proceedings" is expressly foreseen in footnote 20 of the *Anti-Dumping Agreement*, *with respect to both Articles 9.3.1 and 9.3.2*. Thus, in a prospective system, a "refund" of duties paid on pre-RPT entries may need to be made after the end of the RPT, pursuant to a revised dumping determination.

258. Japan notes that its interpretation is shared by the European Communities, which also operates a prospective system. In its Third Party Submission to the Panel, the European Communities observed that, "if … the result of a refund investigation … is still pending" at the end of the RPT, it must be brought into conformity with WTO law.[364]

259. Finally, if the United States' argument were accepted, it may even advantage a retrospective system. In *U.S. – Zeroing (EC) (21.5)*, the Appellate Body remarked that "the approach based on the date of entry advocated by the United States would allow a WTO Member operating a retrospective duty assessment system to resort to a methodology for

[362] Appellate Body Report, *U.S. – Zeroing (Japan)*, para. 160 (emphasis added). *See also* Appellate Body Report, *U.S. – Continued Zeroing*, para. 294; Appellate Body Report, *U.S. – Stainless Steel (Mexico)*, para. 121.
[363] United States' Appellant's Submission, para. 81.
[364] European Communities' Third Party Submission, para. 51.

assessing duty liability that has been found WTO-inconsistent beyond the end of the reasonable period of time".[365]

260. The Appellate Body should, therefore, reject the United States' argument that Japan's interpretation unfairly disadvantages Members that apply retrospective duty collection systems.

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

261. In Japan's view, Articles 13, 14 and 15 of the *ILC Articles* are helpful in confirming that Articles 3.7, 19.1, 21.1 and 21.3 of the DSU requires the United States to bring Reviews 1, 2, 3, 7 and 8 into conformity with its WTO obligations when they continue to produce legal effects after the end of the RPT, regardless of the dates of entry.[366]

#### (vi)(a) *Overview of the ILC Articles on When an Internationally Wrongful Act Occurs*

262. The *ILC Articles* have been frequently relied on by the Appellate Body, panels, and arbitrators acting under Article 22.6 of the DSU in interpreting WTO law.[367] In these decisions, provisions of the *ILC Articles* have been cited as "rules of general international law",[368] under Article 31(3)(c) of the *Vienna Convention*, and as reflective of "customary international law".[369] The official *Commentary* to the *ILC Articles* states that the *Articles*

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[365] Appellate Body Report, *U.S. – Zeroing (EC) (21.5)*, para. 309.

[366] The *ILC Articles* were adopted by the International Law Commission on 9 August 2001, and by Resolution 56/83 of 12 December 2001, the General Assembly took note of the Articles and recommended them to the attention of Governments; these are available at: http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf (Exhibit JPN-65). The official Commentaries to the *ILC Articles*, adopted by the ILC at its 2702nd to 2709th meetings, held from 6 to 9 August 2001 ("ILC Commentaries"), are available at: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (Exhibit JPN-66).

[367] Appellate Body Report, *U.S. – Cotton Yarn*, para. 120; Appellate Body Report, *U.S. – CVDs on DRAMS*, para. 112 (footnote 179), 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 – Retreaded 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 (U.S.)*, para. 7.50 (footnote 361); Panel Report, *Korea – Procurement*, para. 6.5 (footnote 683); Panel Report, *Mexico – Taxes on Soft Drinks*, para. 8.180; Panel Report, *Turkey – Textiles*, paras. 9.42, 9.43; Panel Report, *U.S. – Certain EC Products*, para. 6.23 (footnote 100); Panel Report, *U.S. – Gambling*, para. 6.128; Decision by the Arbitrators, *Brazil – Aircraft (22.6)*, para. 3.44; Decision by the Arbitrators, *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 (footnote 68).

[368] Appellate Body Report, *U.S. – Cotton Yarn*, para. 120; Panel Report, *Australia – Salmon (21.5)*, para. 7.12 (footnote 146).

[369] 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

codify the rules of international law concerning State responsibility.[370] 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".[371]

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

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

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

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

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

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

266. Pursuant to these provisions, a breach of international law results from a wrongful act of a State (which act may or may not be continuing in nature) or from a series of actions. A breach of international law occurs *when a wrongful act takes place* (Article 14(1)). In the event that a wrongful act continues in time (Article 14(2)), or that a breach arises from a

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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).

[370] ILC Commentaries, para. 1, available at: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (Exhibit JPN-66).

[371] Decision by the Arbitrator, *U.S. – FSC (22.6)*, para. 5.59 (footnote 68); Decision by the Arbitrators, *Brazil – Aircraft (22.6)*, para. 3.44.

series of actions (Article 15), *the breach persists throughout the continuing act or series of actions*. Article 13 provides that, for an act to be wrongful, the State must be subject to the treaty obligation breached *either* when the breach occurs *or* during the time that the breach is occurring.

267. Accordingly, Articles 13, 14 and 15 of the *ILC Articles* set forth rules on the *moment in time* when an act breaches an international obligation (*e.g.*, whether an act breaches WTO law after the end of the RPT), and on the *extension in time* of that breach (*e.g.*, whether an act continues to breach WTO law after the end of the RPT).

268. These temporal rules show that U.S. duty collection measures (liquidation instructions and notices), taken after the end of the RPT pursuant to the original periodic reviews, involve either the *commission of a new breach of WTO obligations at that time*, or the *continuation of an existing breach of WTO obligations*, in both cases on the basis of the original reviews. For purposes of Article 13 of the *ILC Articles*, the five original periodic reviews were, of course, subject to the *Anti-Dumping Agreement* at the time they were conducted.

269. The *ILC Articles*, therefore, confirm that implementation action to "bring the measure[s] into conformity", with *prospective effect* from the end of the RPT, is essential to prevent *post-RPT conduct*, under the original measures, from giving rise to WTO-inconsistencies that *occur newly or continue after the end of the RPT*. As a result, the *ILC 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.

270. In the following Sections, Japan analyzes the U.S. duty collection measures, that have been or will be taken after the end of the RPT pursuant to Reviews 1, 2, 3, 7 and 8, from the perspective of Articles 14(1), 14(2), and 15(1) of the *ILC Articles*. Japan shows that, irrespective of whether these post-RPT duty collection measures are characterized as completed acts (Article 14(1)), as part of a continuous act (Article 14(2)), or as part of a series of actions (Article 15(1)), the United States' failure to bring these Reviews into conformity with its WTO obligations, by the end of the RPT, results in the commission or continuation of WTO-inconsistent acts, after the end of the RPT, on the basis of the original reviews.

(vi)(b) *Argument Assuming that the Duty Collection Measures Are Completed Acts under Article 14(1) of the ILC Articles*

271. The U.S. duty collection measures might be considered as "act[s] … *not* having a *continuing character*" in terms of Article 14(1) of the *ILC Articles*. Assuming for these purposes that these new measures are "completed" acts when they occur, for purposes of Article 14(1), they give rise to a new breach of WTO law at that time. In particular, the collection of excessive anti-dumping duties on the basis of these measures, after the end of the RPT, violates Article 9.3 of the *Anti-Dumping Agreement* and Articles II:1 and VI:2 of the GATT 1994.

(vi)(c) *Argument Assuming that the Duty Collection Measures Are Part of a Continuing Act under Article 14(2) of the ILC Articles*

272. The duty collection measures might also be regarded as part of a continuing act under Article 14(2) of the *ILC Articles*. The continuing act would be the ongoing process by which the United States imposes and collects definitive anti-dumping duties. The earliest moment this continuing act could begin would be the date of entry, when the liability for the payment of duties arises, and a cash deposit is collected. On this view, the duty collection act would continue during the completion of the periodic review and culminate in the collection of anti-dumping duties. If a WTO-inconsistent periodic review is part of a continuing act for purposes of Article 14(2) of the *ILC Articles*, the wrongful character of this act would begin when that review is adopted and extend until the collection of excessive anti-dumping duties on the basis of the review.

273. By failing to bring the assessment rate into conformity with WTO law by the end of the RPT, the United States failed to terminate its continuing WTO-inconsistent act, as it was required to do by the DSB's recommendations and rulings. Instead, the United States continues the inconsistent act after the end of the RPT. Through the "continuing" duty collection act, the United States collects anti-dumping duties in excess of the proper margin of dumping under Article 9.3 and Article VI:2, and in excess of bound tariff rates under Article II:1.

(vi)(d) *Argument Assuming that the Duty Collection Measures Are Part of a Series of Composite Actions under Article 15(1) of the ILC Articles*

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

275. Assuming Article 15(1) of the *ILC Articles* is relevant, the United States' series of actions became wrongful when a WTO-inconsistent periodic review was adopted and, under Article 15(2), that wrongfulness "lasts for as long as these actions or omissions are *repeated and remain not in conformity* with the international obligation". Thus, the series of actions is wrongful after the end of the RPT, when the United States collects an amount of anti-dumping duties, on the basis of the periodic review, in excess of the proper margin of dumping under Article 9.3 and Article VI:2, and in excess of bound tariffs under Article II:1.

(vi)(e) *Conclusion on the ILC Articles*

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

(b) ***Actions by U.S. Courts Do Not Excuse the United States from the Requirement to Bring Reviews 1, 2, 3, 7 and 8 into Conformity with Its WTO Obligations***

(i) ***Court Injunctions Issued by a Member's Own Courts Do Not Exonerate the Member from Complying with Its WTO Obligations***

277. The second overarching argument that the United States makes in a bid to be excused from its obligation to "bring" the original assessment rates "into conformity" with its WTO obligations is based on domestic court proceedings.[372] The United States argues that, where a Member maintains a system of judicial review, it should not be subject "to findings that it failed to comply based on a delay that is a consequence of judicial review".[373] Before the Panel, the United States explained that, if it were subject to implementation obligations in this situation, it would amount to using "U.S. litigation to *alter*" the United States' rights and obligations under the covered agreements.[374]

278. This U.S. argument appears to be premised on the assumption that the alternative "date of entry" argument fails. If the "date of entry" argument fails, as it did in *U.S. – Zeroing (EC) (21.5)* – the United States would, in principle, be obliged by Articles 3.7, 19.1, 21.1 and 21.3 of the DSU to bring the five original periodic reviews into conformity with its WTO obligations. Thus, the United States seeks to be exonerated from implementation obligations that would otherwise apply, because of domestic court proceedings.

279. In *Brazil – Retreaded Tyres*, the panel held that a Member is not "exonerate[d] from its obligation to comply with the requirements" of WTO law because of court injunctions.[375] In that dispute, both the panel and the Appellate Body concluded that Brazilian measures had to be assessed in WTO law, taking court injunctions fully into account.[376] Although the injunctions precluded Brazil from satisfying the requirements of Article XX, the injunctions and their effects could not be disregarded, and did not excuse Brazil from complying with the requirements of WTO law. This was not deemed to "alter" Brazil's rights and obligations under the covered agreements, as the United States has alleged in this dispute.[377]

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[372] United States' Appellant's Submission, para. 95.
[373] United States' Appellant's Submission, para. 95.
[374] United States' Second Written Submission, para. 51.
[375] Panel Report, *Brazil – Retreaded Tyres*, para. 7.305.
[376] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 252.
[377] United States' Second Written Submission, para. 51.

280. The United States effectively asks the Appellate Body to disregard the U.S. court injunctions, and their effects, in deciding whether the United States has complied with its obligation to bring the five original reviews into conformity with WTO law. In essence, the United States invites the Appellate Body to pretend that no injunctions were issued, and treat the United States as if liquidation had occurred before the end of the RPT. As the United States says, "but for judicial proceedings, the Member would have liquidated prior to the RPT".[378]

281. The status of a measure under domestic law – including the existence of domestic litigation affecting that measure – is a fact.[379] In making an objective assessment of the matter, panels must rule upon measures as they stand, without distorting or disregarding any facts – such as court injunctions – that do not suit one party. This is precisely what the panel and Appellate Body did in *Brazil – Retreaded Tyres*,[380] and what the Panel did in these proceedings, concluding that the "factual circumstances" or "reasons why the United States finds itself in continuing violation are not pertinent to our findings".[381] The Panel also rightly found that "the United States' implementation obligations" were not "altered" by ruling upon the measures as they stand, and taking account of the injunctions.[382]

282. The United States insinuates that it cannot be held responsible in WTO law for actions by "private parties", who it considers "control" domestic litigation.[383] However, the injunctions are not issued by, and are not in the control of, private parties. They are acts of the United States' own courts, taken pursuant to powers conferred by U.S. law, and attributable to the United States under WTO law. Further, a decision by a U.S. court to issue

[378] United States' Appellant's Submission, para. 96. *See also Id*., paras. 4, 100.
[379] *See* Appellate Body Report, *Dominican Republic – Cigarettes*, para. 46 ("In this case, the Panel correctly treated the meaning of the Dominican Republic's municipal law as a fact whose meaning was to be proved by evidence"); Appellate Body Report, *India – Patents (U.S.)*, paras. 65-71, *citing Certain German Interests in Polish Upper Silesia*, [1926], PCIJ Rep., Series A, No. 7, p. 19 ("From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions and administrative measures"). The United States itself has previously argued that "the meaning of a WTO Member's municipal law [including the United States' own municipal law] is a question of fact that requires an examination of the status and meaning of the measure at issue within the municipal legal system of the Member concerned". Appellate Body Report, *U.S. – OCTG Sunset Reviews*, para. 26.
[380] Panel Report, *Brazil – Retreaded Tyres*, para. 7.305; Appellate Body Report, *Brazil – Retreaded Tyres*, para. 252.
[381] Panel Report, para. 7.153 and footnote 167.
[382] Panel Report, para. 7.153 (footnote 166).
[383] United States' Appellant's Submission, paras. 98-99.

an injunction is taken after determining "that there is a likelihood of success on the merits", a legal standard developed by the United States and forming part of U.S. law.[384]

283. 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*".[385] Consequently, any delay in the collection of duties under the original periodic reviews is attributable to the United States, and the United States bears responsibility for the consequences of its decision to delay duty collection. The United States' decision, through its own courts, in the application of the United States' own domestic law, to suspend USCBP's collection of duties, cannot simply be ignored or wished away.

284. The United States is fully responsible for the consequences of any decisions taken by its courts, and it cannot ask panels and the Appellate Body to disregard or ignore actions attributable to the United States. Nor can it plead domestic law or the actions of its courts under domestic law – *which are, legally, its own action* – as an excuse for not complying with its WTO obligations. In other words, the United States' responsibility for its duty collection actions taken after the end of the RPT is not diminished, or otherwise altered, because of U.S. court conduct that is attributable to the United States.

285. The United States suggests that attributing responsibility to it for court injunctions would create "perverse incentives" for private parties "to manufacture domestic litigation".[386] With respect to the original periodic reviews at issue, interested parties incurred considerable expense in pursuing judicial proceedings, which included challenges to the use of zeroing.[387] In some instances, parties have pursued their argument that the United States must implement

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[384] U.S. Court of Appeals for the Federal Circuit, *Zenith Radio Corp. v. United States*, 710 F.2d 806 (Fed. Cir. 1983), at 809, and Nies J., concurring, at 812 (Exhibit JPN-70). *See* Japan's Opening Statement, para. 80.
[385] Appellate Body Report, *U.S. – Shrimp*, para. 173 (emphasis added), *citing* Appellate Body Report, *U.S. – Gasoline*, p. 28; Jennings and Watts (eds.), *Oppenheim's International Law*, 9th ed., Vol. I (Longman's 1992), p. 545; and I. Brownlie, *Principles of Public International Law*, 4th ed. (Clarendon Press, 1990), p. 450.
[386] United States' Appellant's Submission, para. 99.
[387] Zeroing was raised by JTEKT in Review (1) (*see* 341 F. Supp. 2d 1334 (CIT 2004), 210 Fed. Appx. 992 (Fed. Cir. 2006) and JTEKT's brief before the Court of Appeals for the Federal Circuit (June 27, 2005), 128 S. Ct. 486 (U.S. 2007) and JTEKT's petition for certiorari before the Supreme Court (June 6, 2007), joined by NTN (Exhibits JPN-71.A, JPN-71.B, JPN-71.C, JPN-71.D and JPN-71.E)); raised by NTN in Review (2) (*see* 128 S. Ct. 1121 (U.S. 2008) and NTN's petition for certiorari before the Supreme Court (September 28, 2007) (Exhibits JPN-72.A and JPN-72.B)); raised by JTEKT, NTN and NSK in Review (3) (*see* 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 JTEKT in Review (7) (*see* 341 F. Supp. 2d 1334 (CIT 2004), 210 Fed. Appx. 992 (Fed. Cir. 2006) and JTEKT's brief before the Court of Appeals for the Federal Circuit (June 27, 2005), 128 S. Ct. 486 (U.S. 2007) and JTEKT's petition for certiorari before the Supreme Court (June 6, 2007), joined by NTN (Exhibits JPN-71.A, JPN-71.B, JPN-71.C, JPN-71.D and JPN-71.E)).

its zeroing-related WTO obligations in domestic law all the way to the U.S. Supreme Court.[388] The United States surely does not suggest that it is "perverse" for private parties to seek to enjoin enforcement of *WTO-inconsistent* periodic reviews, such as those at issue here. There is nothing "perverse" about such litigation, nor about delaying the collection of duties pending the outcome of that litigation.

286. In sum, it is a fact that the United States' own courts decided to suspend enforcement of the five original periodic reviews, and the Panel correctly assessed the reviews in light of that fact. The United States is not "exonerate[d]"[389] 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.

### (ii) *Footnote 20 of the Anti-Dumping Agreement Does Not Excuse a Member from Complying with the DSB's Recommendations and Rulings*

287. The United States has pointed to no text in the DSU to support the view that different – *diminished* – implementation obligations apply where the continuing legal effects of an inconsistent measure linger due to actions by the Member's own courts, acting under the Member's own laws.

288. However, and although it did not do so before the Panel, the United States now cites footnote 20 of the *Anti-Dumping Agreement* as textual support for its argument that because domestic litigation has delayed duty collection in Reviews 1, 2, 7 and 8 beyond the end of the RPT, the United States need not bring those Reviews into conformity with its WTO obligations by the end of the RPT.[390]

289. Footnote 20 does not support the U.S. argument. Article 13 of the *Anti-Dumping Agreement* requires Members to provide judicial review of anti-dumping measures, including periodic reviews. Under this provision, judicial review is part and parcel of the Members' process of arriving at a WTO-consistent determination. Where Members are unable to comply with the deadlines in Article 9.3 due to judicial review, footnote 20 excuses a delay. The United States believes that, because of a limited exception to the deadlines in Article 9.3,

[388] *See* JTEKT's and NTN's joint petition for certiorari before the Supreme Court in connection with Reviews (1) and (7) (Exhibit JPN-71.E); and NTN's petition for certiorari before the Supreme Court in connection with Review (2) (Exhibit JPN-72.B).
[389] *See* Panel Report, *Brazil – Retreaded Tyres*, para. 7.305.

it need never comply with the DSB's recommendations and rulings. There are at least two problems with this argument.

290. *First*, although footnote 20 provides an *explicit* exception authorizing non-compliance with the deadlines in Article 9.3 of the *Anti-Dumping Agreement*, the text of footnote 20 does not provide any exception to the obligations in the DSU to bring WTO-inconsistent periodic reviews into conformity with WTO law. There is simply no authorization for non-compliance with the DSB's recommendations and rulings.

291. *Second*, although footnote 20 excuses a departure from the deadlines in Article 9.3 and a consequent delay in compliance with the *substantive obligations* in that provision to refund excessive anti-dumping duties, it does not excuse a Member from meeting those substantive obligations once the delay has passed. The delay, which is authorized to facilitate compliance with the judicial review requirements of the *Anti-Dumping Agreement*, does not grant authority to ignore the substantive obligations in Article 9.3 once the judicial review requirements have been met and the delay passed. Instead, after judicial review proceedings have been completed, compliance with Article 9.3 is still required.

292. In contrast, the United States' arguments significantly expand the scope of the exception in footnote 20, by using the footnote to excuse compliance with the *substantive obligations* in Article 9.3, and also with the DSB's recommendations and rulings. The United States seeks to use the delay afforded by footnote 20 not simply to facilitate compliance with the judicial review requirements of the *Anti-Dumping Agreement*, but also to relieve itself of the substantive obligations in Article 9.3, and of the requirement to bring its measures into conformity. In other words, the United States' proposed extension of footnote 20 to the DSU – which has no basis in the treaty text – would function to permanently evade obligations in the *Anti-Dumping Agreement* and Articles 3.7, 19.1 and 21.1 of the DSU, in so doing rendering the DSB's recommendations and rulings "declaratory".[391] The U.S. argument must be rejected.

[390] United States' Appellant's Submission, paras. 95-96.
[391] Appellate Body Report, *U.S. – Upland Cotton (21.5)*, para. 245.

### (iii) *USCBP Duty Collection Measures Derive Mechanically from the USDOC's Assessment Rates Whether or Not Litigation Occurs*

293. The United States contends that "judicial review severs any so-called 'mechanical' link between the assessment of liability in the original review determination and the liquidation instructions".[392] However, judicial review does not alter either the manner by which USCBP takes measures to collect duties, or the interaction between the USDOC and USCBP. In other words, following litigation, duty collection occurs automatically, through new duty collection measures, with the USDOC and USCBP playing the same roles that they always play.

294. With or without litigation, the mechanism for duty collection takes exactly the *same* ordinary course. The legal basis for USCBP's measures is *always* a determination of the assessment rate by the USDOC, and not a U.S. court; the USDOC *always* communicates its assessment rates to USCBP through liquidation instructions; and, USCBP *always* computes the amount of duties by multiplying the USDOC's assessment rate by the entered value of the goods. Thus, USCBP's duty collection measures *always* derive mechanically from the USDOC's assessment rate through the straightforward application of the basic laws of arithmetic.

295. If the original assessment rate is amended following judicial review, that could be relevant in Article 21.5 proceedings.[393] However, the amended rate would not be relevant because USCBP's duty collection measures cease to derive mechanically from that rate, but because the amendment might bring the measure into conformity with WTO law.

296. Unfortunately, in this case, that did not occur. Although the United States revised the assessment rates in Reviews 1, 2 and 3 either during or after the RPT, *it did so using the same zeroing methodology that rendered the original assessment rate WTO-inconsistent.*[394] As the Panel found, these amendments did not "constitute withdrawal of the relevant WTO-

[392] United States' Appellant's Submission, para. 97.
[393] *See* Panel Report, para. 7.139 (footnote 148).
[394] Panel Report, paras. 7.139 (footnote 148), 7.154.

inconsistent measures".[395] In fact, they demonstrate the United States' failure to comply with the DSB's recommendations and rulings.

## V. THE PANEL PROPERLY FOUND THAT THE UNITED STATES HAS ACTED INCONSISTENTLY WITH ARTICLES 2.4 AND 9.3 OF THE *ANTI-DUMPING AGREEMENT* AND ARTICLE VI:2 OF THE GATT 1994 BY APPLYING ZEROING IN REVIEWS 4, 5, 6 AND 9

### A. Introduction and Summary of U.S. Arguments

297. The United States challenges two aspects of the Panel's findings with respect to Reviews 4, 5, 6 and 9.

298. **First**, the United States appeals[396] the Panel's decision[397] to include within its terms of reference the USDOC's periodic review for *Ball Bearings and Parts Thereof from Japan* (1 May 2006 through 30 April 2007) (JTEKT, Nippon Pillow Block, and NTN) ("Review 9").[398] The USDOC's determination in Review 9 was issued on 11 September 2008, subsequent to the establishment of the Panel.

299. The United States asserts that the Panel's decision to include Review 9 in its terms of reference is inconsistent with Article 6.2 of the DSU. To the United States, outside of particular exceptions identified to date by the Appellate Body, measures coming into existence during panel proceedings can not, by definition, be identified with the specificity required by Article 6.2, and therefore can not properly be included within a panel's terms of reference.[399]

300. The Panel concluded that including Review 9 within its terms of reference is consistent with Article 6.2, in light of the particular circumstances at hand. In reaching this conclusion, the Panel found that Japan's panel request was sufficiently specific to include Review 9, and that doing so compromised none of the due process objectives of Article 6.2. While the Panel acknowledged that circumstances could arise in which a post-establishment

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[395] Panel Report, para. 7.149 (footnote 164). The amended periodic reviews were included in the Panel's terms of reference. *See* WT/DS322/27, para. 12, Annex I. The Panel included these amended periodic reviews in the scope of its findings. Panel Report, para. 7.139 (footnote 148).
[396] United States' Appellant's Submission, paras. 43-58.
[397] Panel Report, paras. 7.100-7.116.
[398] 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).
[399] United States' Appellant's Submission, paras. 43-58.

measure is introduced too late in the proceedings to safeguard the due process objectives of Article 6.2, it concluded that it did not face those circumstances in these proceedings.[400]

301. The Panel also properly took into account the particular procedural setting in which these proceedings arose; namely, under Article 21.5 of the DSU. In that regard, the Panel referred to the Appellate Body's finding that it was appropriate, in the particular context of compliance proceedings, for the panel in *Australia – Salmon (21.5)* to include within its terms of reference a "measure taken to comply" that came into existence subsequent to establishment of the panel, where the panel request encompassed this measure.[401]

302. Accordingly, and for the reasons explained below, Japan requests that the Appellate Body reject the United States' appeal, and uphold the Panel's finding that, consistent with Article 6.2 of the DSU, Review 9 was properly within its terms of reference.

303. **Second**, the United States challenges[402] the Panel's findings that Reviews 4, 5, 6 and 9 are inconsistent with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.[403]

304. The United States argues that these four subsequent reviews "*cannot serve as the basis for a finding of WTO-inconsistency in this dispute*".[404] As explained below, in Section V.D.2, the United States' arguments lack merit. The Panel had a proper "basis" to examine the consistency of Reviews 4, 5, 6 and 9 with the United States' WTO obligations, because it found that those Reviews are "measures taken to comply", within the meaning of Article 21.5 of the DSU.

305. Having established that Reviews 4, 5, 6 and 9 are "measures taken to comply", the Panel's mandate was to rule upon the "consistency" of these measures with the *Anti-Dumping Agreement* and the GATT 1994. The Panel reviewed the evidence offered by Japan to demonstrate that the zeroing procedures were applied, and correctly found that having done

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[400] Panel Report, para. 7.116 ("In reaching the conclusion that in some circumstances, including in the present dispute, it is possible to challenge a measure that does not exist at the time of a panel request, we note that a measure needs to have come into existence in order for a panel to make a ruling on it. We do not speculate here regarding the point in time by which a challenge must be raised in relation to a measure not in existence at the time of a panel request, for a panel to include a ruling on it within its report").
[401] Panel Report, paras. 7.115-7.116 and footnote 142.
[402] United States' Appellant's Submission, Section VI(4).
[403] Panel Report, paras. 7.166, 8.1(b).
[404] United States' Appellant's Submission, para. 105. *See also Id.*, paras. 21, 24, 86 and 89.

so, the United States had acted inconsistently with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 by applying zeroing in these Reviews.[405]

306. Contrary to the United States' arguments, the Panel's findings do not constitute error. Accordingly, and for the reasons explained below, Japan requests that the Appellate Body reject the United States' appeal, and uphold the Panel's findings that the United States acted inconsistently with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 by applying zeroing in Reviews 4, 5, 6 and 9.

307. In Section V.B, Japan begins by demonstrating that the Panel correctly found Reviews 4, 5, 6 and 9 to be "measures taken to comply", within the meaning of Article 21.5 of the DSU. Japan does so because the United States' appeal against the Panel's "basis" for its finding of WTO-inconsistency with respect to Reviews 4, 5, 6 and 9 essentially constitutes a challenge to the Panel's finding that those Reviews constitute "measures taken to comply".[406]

308. In Section V.C, Japan then shows that the Panel correctly found that Review 9 was within its terms of reference, under Article 6.2 of the DSU.

309. Finally, in Section V.D, Japan demonstrates that the Panel properly concluded that the United States has acted inconsistently with its WTO obligations by applying zeroing in Reviews 4, 5, 6 and 9.

## B. The Panel Properly Found Reviews 4, 5, 6 and 9 to Be Measures Taken to Comply

310. As described at paragraph 304, the United States does not formally challenge the Panel's findings that Reviews 4, 5, 6 and 9 are "measures taken to comply" with the DSB's recommendations and rulings, within the meaning of Article 21.5 of the DSU.[407] Nonetheless, in Section IV of its Appellant's Submission, the United States raises several arguments that question the Panel's findings, and that, as such, question the Panel's jurisdiction over Reviews 4, 5, 6 and 9, under Article 21.5.[408]

311. The Appellate Body has previously found that panels and, presumably, the Appellate Body itself, must verify its jurisdiction before proceeding to assess a matter on the merits:

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[405] Panel Report, para. 8.1(b).
[406] *See* paragraphs 460 *et seq*. of this Appellee's Submission.

> [P]anels have to address and dispose of certain issues of a fundamental nature, even if the parties to the dispute remain silent on those issues. In this regard, we have previously observed that "[t]he vesting of jurisdiction in a panel is a fundamental prerequisite for lawful panel proceedings." For this reason, panels cannot simply ignore issues which go to the root of their jurisdiction – that is, to their authority to deal with and dispose of matters. Rather, panels must deal with such issues – if necessary, on their own motion – in order to satisfy themselves that they have authority to proceed.[409]

312. To ensure the Appellate Body that it enjoys the authority to deny the United States' appeal concerning Reviews 4, 5, 6 and 9, and to uphold the Panel's findings on the merits, Japan explains below why Reviews 4, 5, 6 and 9 are "measures taken to comply".

### 1. Scope of Article 21.5 Proceedings

313. Article 21.5 provides, in relevant part:

> Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including whenever possible resort to the original panel.

314. As such, proceedings under Article 21.5 concern a disagreement about either the "existence", or the "consistency with a covered agreement", of "measures taken to comply" with the recommendations and rulings of the DSB. By virtue of the text, a panel's jurisdiction is limited to the consideration of measures taken to comply, or measures that should have been taken to comply, with those recommendations and rulings.[410]

315. The text of Article 21.5 accords particular relevance, in determining whether measures are "taken to comply", to the recommendations and rulings of the DSB. The Appellate Body has stated that Article 21.5 requires an "express link" between measures alleged to be "taken to comply", and the recommendations and rulings of the DSB.[411] The recommendations and rulings must, in turn, "be interpreted in the light of the particular

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[407] Panel Report, para. 7.82 (with respect to Reviews 4, 5 and 6) and para. 7.114 (with respect to Review 9).
[408] *See* paragraphs 460 *et seq*. of this Appellee's Submission.
[409] Appellate Body Report, *Mexico – Corn Syrup (21.5)*, para. 36 (footnotes omitted). *See also* Appellate Body Report, *U.S. – 1916 Act*, para. 54.
[410] Appellate Body Report, *U.S. – Zeroing (EC) (21.5)*, para. 199; Appellate Body Report, *Canada – Aircraft (21.5)*, para. 36.

factual and legal circumstances in the original proceedings, including the original measures at issue".[412] Together, these considerations mean that "[t]he scope of measures 'taken to comply' … should be determined with reference to the recommendations and rulings of the DSB in the original proceedings and to the original measures at issue".[413]

316. The Appellate Body has confirmed that "measures taken to comply" are not solely those declared by an implementing Member as taken "in the direction of", or "for the purpose of achieving", compliance with the DSB's recommendations and rulings. Even measures that move away from compliance, or that are not taken with the objective, purpose or intent to comply with the recommendations and rulings can be "measures taken to comply", within the meaning of Article 21.5.[414] To determine whether such measures are, nonetheless, subject to a panel's mandate under Article 21.5, "an examination of the effects of" the measures is required.[415]

317. The Appellate Body and several panels have, by now, elaborated and refined a standard to determine whether measures not declared to be "taken to comply" are, nonetheless, subject to a compliance panel's mandate.[416] Japan recalls the Appellate Body's findings in *U.S. – Softwood Lumber IV (21.5)* that:

> Some measures with a *particularly close relationship* to the declared "measure taken to comply", and to the recommendations and rulings of the DSB, may also be susceptible to review by a panel acting under Article 21.5. Determining whether this is the case requires a panel to scrutinize these relationships, which may, depending on the particular facts, call for an examination of the *timing, nature, and effects* of the various measures. This also requires an Article 21.5 panel to examine the *factual and legal background* against which a declared "measure taken to comply" is adopted. Only then is a panel in a position to take a view as to whether there are *sufficiently close links* for it to characterize such an *other* measure as one "taken to comply" and, consequently, to

[411] Appellate Body Report, *U.S. – Zeroing (EC) (21.5)*, para. 200; Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, para. 68.
[412] Appellate Body Report, *U.S. – Zeroing (EC) (21.5)*, para. 200. *See also* Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, para. 68.
[413] Appellate Body Report, *U.S. – Zeroing (EC) (21.5)*, para. 201.
[414] Appellate Body Report, *U.S. – Zeroing (EC) (21.5)*, para. 202.
[415] Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, para. 67.
[416] *See, e.g.*, Appellate Body Report, *U.S. – Zeroing (EC) (21.5)*, paras. 198-207; Appellate Body Report, *EC – Bananas III (21.5)*, para. 245; Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, para. 77; Panel Report, *Australia – Salmon (21.5)*, para. 7.10 (sub-para. 22); Panel Report, *Australia – Automotive Leather II (21.5)*, para. 6.5. The Panel assessed this case-law at paragraphs 7.51-7.62 of its Report.

> assess its consistency with the covered agreements in an Article 21.5 proceeding.[417]

318. Most recently, in *U.S. – Zeroing (EC) (21.5)*, the Appellate Body confirmed its observations from *U.S. – Softwood Lumber IV (21.5)*:

> [A] party seeking recourse to Article 21.5 of the DSU may request the compliance panel to examine measures that the implementing Member maintains are *not* measures "taken to comply". In that event, the compliance panel should seek to determine whether such distinct measures are particularly closely connected to the measures the implementing Members asserts [sic] are "taken to comply", and to the recommendations and rulings of the DSB, so as to fall within the purview of the compliance panel. Determining whether this is the case may call for an examination of the timing, nature, and effects of the various measures.[418]

In that same report, and reflecting again on the standard set out in *U.S. – Softwood Lumber IV (21.5)*, the Appellate Body subsequently stated that:

> [I]n determining whether measures that are ostensibly not "taken to comply" with the recommendations and rulings of the DSB have a particularly close connection to the declared measure "taken to comply", and to the recommendations and rulings of the DSB, a panel is required to scrutinize the links, in terms of *nature, effects, and timing*, between those measures, the declared measures "taken to comply", and the recommendations and rulings of the DSB. Only then is a panel in a position to determine whether there are sufficiently close links for it to characterize such other measures as "taken to comply" and, consequently, to assess their consistency with the covered agreements.[419]

319. In Japan's view, the Panel properly applied this standard in determining that Reviews 4, 5, 6 and 9 are "measures taken to comply", within the meaning of Article 21.5. Japan demonstrates below that: (i) Reviews 4, 5, 6 and 9 are "declared" measures "taken to comply"; and, (ii) should the Appellate Body consider these Reviews not to be "declared" measures "taken to comply", they are, nonetheless, measures "taken to comply" because of

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[417] Panel Report, para. 7.59, *quoting* Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, para. 77 (emphases added).
[418] Appellate Body Report, *U.S. – Zeroing (EC) (21.5)*, para. 207 (emphasis in original).
[419] Appellate Body Report, *U.S. – Zeroing (EC) (21.5)*, para. 229, *citing* Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, para. 77.

their close substantive connections to the recommendations and rulings of the DSB in the original proceedings and the measures at issue in those proceedings.

### 2. Reviews 4, 5, 6 and 9 Are "Declared" Measures "Taken to Comply"

320. The United States repeatedly declared that Reviews 4, 5, 6 and 9 – *i.e.*, the periodic reviews subsequent to the original measures – were taken "to comply" with the DSB's recommendations and rulings.

321. Specifically, in a status report on its implementation efforts in this dispute, the United States informed the DSB that "[w]ith respect to the assessment reviews at issue in this dispute, in each case the results were *superseded by subsequent reviews*".[420] The United States asserted that "[b]ecause of this, *no further action is necessary* for the United States *to bring these challenged measures into compliance* with the recommendations and rulings of the DSB".[421]

322. Additionally, in its submissions to the Panel, the United States argued that the periodic reviews at issue in the original proceedings were "withdrawn",[422] "superceded",[423] "eliminated",[424] "replaced",[425] and "removed"[426] by the subsequent periodic reviews challenged by Japan in these compliance proceedings, *i.e.*, Reviews 4, 5, 6 and 9.

323. Significantly, the United States asserted that, with the adoption of the subsequent reviews, it "has *taken measures to comply with [the DSB's] recommendations and rulings*".[427] It added that, with the subsequent reviews, "compliance was accomplished".[428] Remarkably, the United States even held 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

[420] WT/DS322/22/Add.2 (emphasis added).
[421] WT/DS322/22/Add.2 (emphasis added).
[422] United States' Second Written Submission, para. 28; United States' First Written Submission, paras. 39, 52, 54, 58, 65, 66, 67.
[423] United States' First Written Submission, paras. 3, 44.
[424] United States' Second Written Submission, para. 8; United States' First Written Submission, paras. 44, 54.
[425] United States' Second Written Submission, para. 18; United States' First Written Submission, para. 44.
[426] United States' Second Written Submission, paras. 18, 26.
[427] United States' First Written Submission, para. 51 (emphasis added).
[428] United States' Second Written Submission, para. 18; United States' First Written Submission, paras. 52, 67.

> 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.[429]

324. In Japan's view, where subsequent periodic reviews are offered to rebut arguments "as to the *existence* of measures taken to comply",[430] these measures cannot be anything *but* declared "measures taken to comply".

325. In response to Japan's arguments to the compliance Panel on this issue, the United States argued that its measure to comply was "the act of removing the WTO-inconsistent border measure" (*i.e.*, the WTO-inconsistent cash deposit rates), while the results of subsequent periodic reviews were "separate" measures.[431] The Panel rejected the United States' argument that Reviews 4, 5, 6 and 9 were separate from the measures effecting removal of the WTO-inconsistent cash deposit rates in the periodic reviews at issue in the original proceedings.[432] Noting the United States' statement that "Reviews 1, 2 and 3 'were superceded by subsequent reviews",[433] the Panel found:

> [S]ince it is the subsequent administrative review that eliminates the cash deposit rates imposed by a prior review (and replaces them with updated cash deposit rates), the elimination of existing cash deposit rates may not be viewed separately from the superseding administrative review.[434]

The Panel went on to conclude:

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

[429] United States' Second Written Submission, para. 18 (emphasis in original).
[430] United States' Second Written Submission, para. 18 (emphasis in original).
[431] United States' Answers of 26 November 2008, Reply to Question 3, para. 10.
[432] Panel Report, paras. 7.69-7.73.
[433] Panel Report, para. 7.71, *quoting* United States' First Written Submission, para. 44.
[434] Panel Report, para. 7.71.

> *replacing cash deposit rates inherent therein, that constitutes the "measure[] taken to comply".*[435]

326. As the United States declared its removal of the border measure to be its measure taken to comply, and as the Panel found that the subsequent periodic reviews could not be "viewed separately" from the removal of the border measure,[436] the Panel effectively found Reviews 4, 5, 6 and 9 to be the United States' declared measures to comply. The Appellate Body should confirm this finding and, accordingly, be satisfied of its jurisdiction to examine and uphold the Panel's finding that Reviews 4, 5, 6 and 9 are inconsistent with the covered agreements.

### 3. Reviews 4, 5, 6 and 9 Are Closely Connected to the DSB's Recommendations and Rulings and the Periodic Reviews Subject to Those Recommendations and Rulings

327. Should the Appellate Body consider that Reviews 4, 5, 6 and 9 are not "declared" measures "taken to comply", they are nonetheless "measures taken to comply" within the meaning of Article 21.5 of the DSU, because they bear a "particularly close relationship"[437] to the DSB's recommendations and rulings, and the original measures that were the subject of those recommendations and rulings. Japan demonstrates below that the Panel correctly found, after scrutinizing the factual and legal background, nature, effects, and timing of Reviews 4, 5, 6 and 9,[438] that they are "measures taken to comply".

#### (a) *The Factual and Legal Background of Reviews 4, 5, 6 and 9 Support a Conclusion that They Are "Measures Taken to Comply"*

328. In terms of the factual and legal background of Reviews 4, 5, 6 and 9, it is noteworthy that each of those Reviews was conducted pursuant to the same 1989 Anti-Dumping Order on "*Ball Bearings and Parts Thereof From Japan*" as Reviews 1, 2 and 3, which were original measures subject to the DSB's recommendations and rulings. Reviews 4, 5, 6 and 9 also followed consecutively from Review 3, the latest periodic review at issue in the original proceeding.[439]

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[435] Panel Report, para. 7.73 (emphasis added).
[436] Panel Report, para. 7.71.
[437] Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, para. 77.
[438] Panel Report, paras. 7.63-7.82.
[439] Japan recalls that five consecutive periodic reviews relating to *Ball Bearings* were at issue in the original dispute: the reviews for 1998-1999, 1999-2000, 2000-2001, 2001-2002, and 2002-2003. *See* WT/DS322/8. Of these, only three are at issue in these compliance proceedings: the reviews for 1999-2000 (Review 1), 2000-

329. As the Panel recalled, in the U.S. retrospective duty assessment system, initially an Anti-Dumping Order is issued following an investigation of dumping by the USDOC and injury by the USITC, establishing initial exporter-specific cash deposit rates. Subsequently, the USDOC conducts annual periodic reviews, pursuant to requests by interested parties, to determine two items: (i) the exporter-specific cash deposit rates that will apply prospectively to future import entries; and, (ii) the importer-specific assessment rates for previous entries imported during the review period.[440] Thus, exporter-specific cash deposit rates determined in one review replace those rates determined in the prior review, and importer-specific assessment rates determined in one review are applied to entries that were subject to the exporter-specific cash deposit rates from the prior review.[441] In this sense, there is "substantive continuity" between consecutive periodic reviews.[442]

330. Accordingly, the Panel rightly found:

> Reviews 1, 2, 3, 4, 5 and 6 (together with two additional administrative reviews found to be inconsistent in the original proceedings but not at issue in these proceedings) [as well as Review 9] therefore form part of a continuum, the purpose of which is the ongoing assessment of anti-dumping duties owed under the 1989 Anti-Dumping Order.[443]

331. The Panel also rightly explained:

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

2001 (Review 2), and 2002-2003 (Review 3). The reviews for 1998-1999 and 2001-2002 are not at issue in these proceedings because the United States had already collected definitive duties on all entries covered by these reviews by the end of the RPT. *See* Panel Report, para. 7.66 (footnote 92). Nonetheless, taken together, the five *Ball Bearings* reviews at issue in the original proceeding and the four subsequent *Ball Bearings* reviews at issue in these proceedings form a consecutive chain dating back to 1998-1999.

[440] Panel Report, paras. 7.63-7.68.

[441] For additional detail, *see* Section IV.B.2.

[442] Panel Report, para. 7.67.

[443] Panel Report, para. 7.65. With respect to Review 9, *see Id.*, paras. 7.65 (footnote 90), 7.114.

> "measures taken to comply" with the recommendations and rulings resulting from that dispute.[444]

332. Thus, the factual and legal background of Reviews 4, 5, 6 and 9 demonstrates that those Reviews bear a "particularly close relationship" to Reviews 1, 2 and 3, and, consequently, to the DSB's recommendations and rulings in respect of Reviews 1, 2 and 3.

#### (b) *The Nature of Reviews 4, 5, 6 and 9 Support a Conclusion that They Are "Measures Taken to Comply"*

333. The nature of Reviews 4, 5, 6 and 9 is identical to that of Reviews 1, 2 and 3. The Panel rightly reached this conclusion,[445] on the basis, in particular, of the following factors:

- the original and subsequent measures all resulted from anti-dumping proceedings conducted by the USDOC and, in particular, the same type of proceeding, namely periodic reviews;
- the four subsequent reviews were all conducted pursuant to the same 1989 Anti-Dumping Order, namely "*Ball Bearings and Parts Thereof From Japan*", and they all, therefore, concern the same subject product as the five *Ball Bearings* reviews challenged in the original proceedings;[446] and,
- the original and subsequent *Ball Bearings* reviews concern dumping determinations made with respect to exports from the same companies.

334. Moreover, as in Reviews 1, 2 and 3, the USDOC used zeroing to calculate cash deposit rates and importer-specific assessment rates in Reviews 4, 5, 6 and 9.[447] The Panel noted that this is the only aspect of Reviews 4, 5, 6 and 9 challenged by Japan.[448]

335. In a similar circumstance, in *U.S. – Zeroing (EC) (21.5)*, the Appellate Body found these facts relevant to an assessment of the links, in terms of "*nature* or subject matter", between the alleged measures taken to comply and the recommendations and rulings of the DSB:

> In our view, the use of zeroing in the excluded subsequent reviews provides the necessary link, in terms of *nature* or subject matter, between such measures, the declared measures "taken to comply", and the recommendations and rulings of the

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[444] Panel Report, para. 7.75.
[445] Panel Report, paras. 7.65 (with respect to Reviews 4, 5 and 6), 7.114 (with respect to Review 9).
[446] As reviewed in footnote 439 above, three of the five original *Ball Bearings* reviews are at issue in these proceedings.
[447] Panel Report, para. 7.166.
[448] Panel Report, para. 7.68 (footnote 95).

> DSB. All the excluded subsequent reviews were issued under the same respective anti-dumping duty order as the measures challenged in the original proceedings, and therefore constituted "connected stages ... involving the imposition, assessment and collection of duties under the same anti-dumping order". Moreover, as the Panel correctly noted, the issue of zeroing was the precise subject of the recommendations and rulings of the DSB, the only aspect of the original measures that was modified by the United States in its Section 129 determinations, and is the only aspect of the excluded subsequent reviews challenged by the European Communities in these proceedings. These pervasive links, in our view, weigh in favour of a sufficiently close nexus, in terms of *nature* or subject matter, between the excluded subsequent reviews, the declared measures "taken to comply", and the recommendations and rulings of the DSB, insofar as the use of zeroing is concerned.[449]

336. As in *U.S. – Zeroing (EC) (21.5)*, the use of zeroing in the present case provides the necessary link between Reviews 1, 2 and 3 and Reviews 4, 5, 6 and 9, and the use of zeroing is the only aspect of Reviews 4, 5, 6 and 9 challenged by Japan. Thus, by their nature, Reviews 4, 5, 6 and 9 are sufficiently closely connected to the DSB's recommendations and rulings to be "measures taken to comply", within the meaning of DSU Article 21.5.

#### (c) *The Effects of Reviews 4, 5, 6 and 9 Support a Conclusion that They Are "Measures Taken to Comply"*

337. In terms of effects, Reviews 4, 5, 6 and 9 have identical effects to Reviews 1, 2 and 3. The Panel properly found that the effect of Reviews 4, 5, 6 and 9 is to perpetuate the use of the WTO-inconsistent zeroing methodology in periodic reviews.[450] In so doing, Reviews 4, 5, 6 and 9 have, in the Appellate Body's words, "the effect of undermining compliance", and of "circumvent[ing]" the DSB's recommendations and rulings.[451]

338. Instead of revising the cash deposit and importer-specific assessment rates established in the original reviews so that they are no longer affected by zeroing, the United States

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[449] Appellate Body Report, *U.S. – Zeroing (EC) (21.5)*, para. 230 (emphasis in original) (citations omitted).
[450] Panel Report, para. 7.65 (with respect to Reviews 4, 5 and 6) and para. 7.114 (with respect to Review 9).
[451] Appellate Body Report, *U.S. – Upland Cotton (21.5)*, para. 205. *See also* Appellate Body Report, *U.S. – Zeroing (EC) (21.5)*, para. 252 ("In our view, the use of zeroing to calculate assessment rates in administrative reviews issued after the end of the reasonable period of time is an indication that these reviews could undermine the compliance allegedly achieved by the United States"), para. 256 ("In our view, the United States misinterprets the findings of the Appellate Body in *U.S. – Softwood Lumber IV (Article 21.5 – Canada)* as requiring that the 'closely connected' measures actually undermine the compliance otherwise achieved by the implementing Member").

simply replaced those rates with new rates determined in the subsequent reviews, using the same WTO-inconsistent zeroing methodology. Thus, the measures found to be WTO-inconsistent have been withdrawn and replaced by new measures that simply perpetuate the WTO-inconsistency that the United States was obliged to eliminate. The Panel found that those new measures – the subsequent periodic reviews – have on-going effects after the end of the RPT, because entries covered by those reviews had not been liquidated.[452]

339. Again, the Appellate Body's conclusions in *U.S. – Zeroing (EC) (21.5)* are equally applicable in the present case. As the Appellate Body concluded in that dispute:

> [T]o the extent that these administrative reviews generated assessment rates and cash deposit rates calculated with zeroing that replaced those found to be WTO-inconsistent in the original proceedings with the effects of assessment rates and cash deposit rates that continued to reflect the zeroing methodology, this would provide a sufficient link, in terms of *effects*, between those administrative reviews and the recommendations and rulings of the DSB, insofar as the requirement to cease using the zeroing methodology is concerned.[453]

340. This is precisely the situation in the present case. The United States simply replicated the effects of the zeroing methodology, used to calculate WTO-inconsistent assessment rates and cash deposit rates in Reviews 1, 2 and 3, by calculating similarly WTO-inconsistent assessment rates and cash deposit rates in Reviews 4, 5, 6 and 9.

341. Thus, based on their effects, Reviews 4, 5, 6 and 9 are sufficiently closely connected to the DSB's recommendations and rulings to be "measures taken to comply".

### (d) *The Timing of Reviews 4, 5, 6 and 9 Is Not Determinative*

342. Although Reviews 6 and 9 post-dated adoption of the DSB's recommendations and rulings, Reviews 4 and 5 pre-dated adoption of those rulings and recommendations. The United States asserted that Reviews 4 and 5 could have "no connection with the DSB's recommendations and rulings", because they were made before those recommendations and rulings were adopted, and thus "could not logically have taken into consideration", or been "taken for the purpose of achieving compliance" with, the recommendations and rulings.[454]

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[452] Panel Report, paras. 7.74 and footnote 101, 7.75 and footnote 102, 7.79 and 7.112.
[453] Appellate Body Report, *U.S. – Zeroing (EC) (21.5)*, para. 231 (emphasis in original).
[454] Panel Report, para. 7.76, *quoting* United States' First Written Submission, paras. 34, 39, 33.

With respect to Reviews 6 and 9, the United States argued that they were not sufficiently proximate in time to the expiry of the "reasonable period of time" accorded the United States to bring its measures into conformity, to qualify them as "measures taken to comply".[455]

343. The Appellate Body has made clear that the timing of a measure, although a relevant factor in the analysis, is not determinative of whether a measure is "taken to comply". In *U.S. – Zeroing (EC) (21.5)*, the Appellate Body stated:

> [T]he *timing* of a measure cannot be determinative of whether it bears a sufficiently close nexus with a Member's implementation of the recommendations and rulings of the DSB so as to fall within the scope of an Article 21.5 proceeding. Since compliance with the recommendations and rulings of DSB can be achieved *before* the recommendations and rulings of the DSB are adopted, a compliance panel may have to review events pre-dating the adoption of those recommendations and rulings in order to resolve a disagreement as to the "existence" or "consistency with a covered agreement" of such measures.[456]

344. Similarly, in the present case, the Panel concluded:

> We do not understand the Appellate Body to have concluded that timing was determinative. Nor do we understand the Appellate Body to have concluded that measures taken by a Member prior to adoption of a dispute settlement report might never constitute "measures taken to comply".[457]

345. Indeed, both the Appellate Body in *U.S. – Zeroing (EC) (21.5)* and the Panel in the present case noted the United States' position in *U.S. – Gambling (21.5)* that "compliance need not necessarily occur subsequent to the DSB recommendation and rulings, as a WTO Member might modify or remove measures at issue after establishment of a panel but prior to adoption of the panel or Appellate Body report".[458]

346. Accordingly, the Panel correctly found that "the fact that Reviews 4 and 5 pre-dated adoption of the DSB's recommendations and rulings is not sufficient to break the very strong

[455] United States' First Written Submission, para. 39 (concerning Review 6); United States' Supplemental Submission, para. 5 (concerning Review 9).
[456] Appellate Body Report, *U.S. – Zeroing (EC) (21.5)*, para. 224 (emphases in original) (internal citations omitted).
[457] Panel Report, para. 7.78.

substantive links between those measures and the original dispute".[459] Amongst others, the Panel noted that Reviews 4 and 5, like Reviews 6 and 9, "continue the chain of assessment through, and beyond, the 'reasonable period of time' allowed to the United States for implementing the recommendations and rulings of the DSB".[460]

347. Accordingly, the Panel properly concluded that timing did not bar Reviews 4, 5, 6 and 9 from being "measures taken to comply".

### (e) *The United States' Intent behind Reviews 4, 5, 6 and 9 Is Also Not Decisive*

348. Before the Panel, the United States suggested that its *lack of intent* to use, in particular, Reviews 4 and 5 (the pre-adoption subsequent periodic reviews), to comply with the DSB's recommendations and rulings, meant that these measures could not qualify as "taken to comply".[461]

349. Specifically, as part of its argument regarding the timing of the measures, the United States had asserted that "[m]easures taken by a Member prior to adoption of a dispute settlement report typically are not taken for the *purpose* of achieving compliance".[462] The United States had also argued that none of the subsequent periodic reviews challenged by Japan "'was a voluntary action taken by the United States around the time of implementation to circumvent or undermine declared compliance with the DSB's recommendations and rulings'".[463] Moreover, the United States claimed that Reviews 4, 5, 6 and 9 "only accomplished compliance as an 'incidental consequence' of the operation of the United States' anti-dumping duty assessment system".[464]

350. The Panel rejected these arguments, finding correctly that a Member's intent is not determinative of whether a measure is "taken to comply" within the meaning of DSU Article

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[458] Panel Report, para. 7.78 (footnote 110), *quoting* Panel Report, *U.S. – Gambling (21.5)*, para. 5.11; Appellate Body Report, *U.S. – Zeroing (EC) (21.5)*, para. 224 (footnote 316), *quoting* Panel Report, *U.S. – Gambling (21.5)*, para. 5.11.
[459] Panel Report, para. 7.79.
[460] Panel Report, para. 7.79. Concerning Review 9, *see Id.*, para. 7.114 (Review 9 "is therefore the latest link in the chain of assessment …").
[461] Panel Report, para. 7.80 ("[W]e are concerned that the United States' argument regarding timing seems to suggest that Article 21.5 should be applied in light of the intent of the implementing Member").
[462] Panel Report, para. 7.80 (emphasis in original), *quoting* United States' First Written Submission, para. 33.
[463] Panel Report, para. 7.80, *quoting* United States' First Written Submission, para. 43.
[464] Panel Report, para. 7.81. Concerning Review 9, *see* United States' Supplemental Submission, para. 3.

21.5. As the Panel wrote, based on the Appellate Body's guidance in *U.S. – Softwood Lumber IV (21.5)*[465] and the panel report in *U.S. – Gambling (21.5)*:[466]

> We agree that Article 21.5 should not be interpreted and applied on the basis of the intent of the implementing Member. For this reason, we should not exclude any particular subsequent administrative review as a "measure[] taken to comply" simply because the United States may not have adopted that measure for the purpose, or in view, of implementing the recommendations and rulings of the DSB.[467]

351. The Panel's finding on this issue concurs with the Appellate Body's explanation, in *U.S. – Zeroing (EC) (21.5)*, that:

> The relevant inquiry was not whether the subsequent reviews were taken with the intention to comply with the recommendations and rulings of the DSB; rather, in our view, the relevant inquiry was whether the subsequent reviews, despite the fact that they were issued before the adoption of the recommendations and rulings of the DSB, still bore a sufficiently close nexus, in terms of *nature, effects, and timing*, with those recommendations and rulings, and with the declared measures "taken to comply", so as to fall within the scope of Article 21.5 proceedings.[468]

352. Thus, whatever the United States' intent behind Reviews 4, 5, 6 and 9, these Reviews are "measures taken to comply" based on their substantive connection to the DSB's recommendations and rulings with regard to Reviews 1, 2 and 3, as demonstrated above.

### (f) *Conclusion as to Close Connections of Reviews 4, 5, 6 and 9 to the DSB's Recommendations and Rulings*

353. In conclusion, each review in the chain of Reviews 1, 2, 3, 4, 5, 6 and 9 (together with two other reviews challenged in the original proceeding[469]) *supersedes* the prior review, and perpetuates the United States' use of the WTO-inconsistent zeroing procedure. As such, the

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[465] Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, para. 67 ("The fact that Article 21.5 mandates a panel to assess 'existence' and 'consistency' tends to weigh against an interpretation of Article 21.5 that would confine the scope of a panel's jurisdiction to measures that *move in the direction of*, or *have the objective of achieving*, compliance") (emphasis in original).
[466] Panel Report, *U.S. – Gambling (21.5)*, para. 6.24 (declining to "exclude any potential 'measures taken to comply' due to the *purpose* for which they may have been taken") (emphasis in original).
[467] Panel Report, para. 7.80.
[468] Appellate Body Report, *U.S. – Zeroing (EC) (21.5)*, para. 226 (emphasis in original).
[469] These two additional original periodic reviews, found to be inconsistent in the original proceedings but not challenged in these compliance proceedings, are the 1998-1999 and 2001-2002 *Ball Bearings* reviews. *See supra* footnote 439.

Panel properly found that Reviews 4, 5, 6 and 9 are "measures taken to comply" because they bear a "particularly close relationship" to Reviews 1, 2 and 3, and the DSB's recommendations and rulings relating to those Reviews, based on an examination of their factual and legal background, nature, effects, and timing. The Appellate Body should confirm this finding and, accordingly, be satisfied of its jurisdiction to examine and uphold the Panel's findings concerning the "consistency" of Reviews 4, 5, 6 and 9 with the covered agreements.

## C. The Panel Properly Found Review 9 to Be within Its Terms of Reference

354. To recall, the United States appeals the Panel's decision to include Review 9, which was adopted by the USDOC during the panel proceedings, in its terms of reference.[470] The United States asserts that the Panel's decision to include Review 9 in its terms of reference is inconsistent with Article 6.2 of the DSU.[471] Japan demonstrates below that the Panel's decision to include Review 9 in its terms of reference was consistent with Article 6.2.

### 1. Summary of the Panel's Findings

355. In considering the United States' request that the Panel exclude Review 9 from its terms of reference, the Panel recalled that Article 6.2 of the DSU requires a panel request to "identify the specific measures at issue".[472] The Panel referred to case-law highlighting two objectives of Article 6.2: the "due process" objective of giving parties and third parties information sufficient to enable a response; and, the objective of defining the scope of the matter subject to the panel's jurisdiction.[473] The Panel noted that because Article 6.2 includes "no generally applicable rules to govern whether a measure is identified with sufficient specificity", each case requires "a close examination of the relevant facts".[474]

356. In light of the objectives of Article 6.2 and the relevant facts at hand, the Panel found Review 9 to be within its terms of reference because: (i) Japan's request for establishment, in accordance with Article 6.2 of the DSU, had specifically identified a category of measures that was broad enough to include Review 9; (ii) Review 9 was the "latest link" in an ongoing chain of "measures taken to comply" adopted by the United States; and, (iii) although

[470] Panel Report, paras. 7.100-7.116.
[471] United States' Appellant's Submission, paras. 43-58.
[472] Panel Report, paras. 7.101, 7.104.
[473] Panel Report, para. 7.104.
[474] Panel Report, para. 7.101.

concerning a measure that came into existence during the panel proceedings, Review 9 was predictable at the time of establishment, rather than speculative.[475]

(a) ***Japan's Panel Request, in Light of the Characteristics of the U.S. Retrospective Anti-Dumping System and the Circumstances of Review 9, Satisfied the Article 6.2 Requirement to "Identify the Specific Measures at Issue"***

357. To begin, the Panel found that the category of "subsequent closely connected measures" identified in Japan's panel request satisfied the Article 6.2 requirement to "identify the specific measures at issue", and that the category was broad enough to include Review 9.[476] The Panel based its conclusion on the terms used in the panel request, the predictability of the U.S. retrospective anti-dumping duty assessment system, and the particular circumstances of Review 9.

358. The Panel noted that in the United States' retrospective anti-dumping system, "there is a high degree of predictability regarding the future occurrence of subsequent administrative reviews", which "take[] place each year in the anniversary month of the publication of the anti-dumping duty order".[477] Predictability was enhanced in these proceedings for at least two reasons.

359. First, the Panel reasoned that predictability regarding the occurrence of subsequent periodic reviews is "even higher where a review has already been initiated at the time of the request for panel establishment", as in the case of Review 9.[478]

360. Second, the Panel reasoned that the future occurrence of subsequent periodic reviews, already predictable in the context of the U.S. retrospective anti-dumping duty assessment system, becomes even more predictable when the particular order, and the chain of periodic reviews at issue, is clearly identified.

361. In this regard, the Panel found significant the fact that Japan's panel request, after identifying the original periodic reviews at issue in the proceedings, identified two additional categories of measures similarly at issue, each of which was termed "closely connected" to

[475] Panel Report, paras. 7.100-7.116.
[476] Panel Report, paras. 7.101-7.107, 7.110-7.111.
[477] Panel Report, para. 7.102.
[478] Panel Report, para. 7.111.

the original reviews:[479] "three *closely connected* periodic reviews that the United States argues 'superseded' the original reviews"; and, "any subsequent *closely connected* measures".[480] The common use of the phrase "closely connected", and the fact that the panel request specified that it "relates to periodic reviews stemming from a specific anti-dumping duty order, namely the 1989 Anti-Dumping Order" on *Ball Bearings*, made it clear that among the "closely connected" measures at issue was Review 9, which had, again, been initiated at the time of establishment.[481]

362. Importantly, the Panel stated that:

> In the circumstances of this case, given the terms of the panel request and the nature of the United States anti-dumping system, in particular the regularity and predictability associated with administrative reviews under an anti-dumping order, the United States should reasonably have expected that future administrative reviews may fall within the panel's jurisdiction.[482]

363. The Panel found that the United States' own submissions verified the "regularity and predictability" of the periodic review process in the particular context of these proceedings. Specifically, the Panel noted that the United States had interpreted the phrase "subsequent closely connected measures", from Japan's panel request, to include future reviews like Review 9:

> Indeed, in its first written submission, the United States clearly anticipates its inclusion by expressing concern "that Japan is trying to include in the panel's terms of reference *any future administrative reviews related to the eight identified in its panel request*".[483]

364. The Panel considered that the United States' interpretation of Japan's panel request to refer to and include future closely-related periodic reviews also confirmed that the United States was on notice that Review 9 was covered by the terms of reference, ensuring adherence to the "due process objective" of Article 6.2.[484]

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[479] Panel Report, para. 7.103.
[480] WT/DS322/27, para. 12 (emphasis added).
[481] Panel Report, para. 7.103.
[482] Panel Report, para. 7.105, *quoting* United States' First Written Submission, para. 50.
[483] Panel Report, para. 7.105 (emphasis added), *quoting* United States' First Written Submission, para. 50.
[484] Panel Report, para. 7.105.

365. Accordingly, on the basis of all of these considerations, the Panel concluded that "the phrase 'subsequent closely connected measures' meets the Article 6.2 requirement to identify the specific measures at issue".[485]

### (b) *Review 9 Was the "Latest Link" in an Ongoing Chain of "Measures Taken to Comply" Adopted by the United States*

366. The Panel considered it important that Review 9 was the "latest link" in an ongoing chain of "measures taken to comply", within the meaning of Article 21.5.[486] After recalling its finding that Reviews 4, 5 and 6 were "measures taken to comply", the Panel noted that:

> Review 9 is identical in nature and effect to Reviews 4, 5 and 6. Review 9 supersedes those measures, and is therefore the latest link in the chain of assessment incorporating those measures. Review 9 also continues to apply the zeroing methodology found to be WTO-inconsistent in the original proceeding. Like Reviews 4, 5 and 6, therefore, Review 9 is sufficiently closely connected to the original dispute to constitute a "measure taken to comply" within the meaning of Article 21.5. For the reasons set forth above, therefore, we find that Japan's claims regarding Review 9 are also properly within the scope of this proceeding.[487]

367. Review 9 was, therefore, the "latest link" in an ongoing and continuous chain of "measures taken to comply" that, like Reviews 4, 5 and 6 before it, undermined the DSB's recommendations and rulings with the continued use of the United States' zeroing methodology.

### (c) *Review 9 Was Not "Speculative" at the Time of Establishment*

368. Finally, the Panel noted that although Review 9 came into existence during the panel proceedings and was at the time of establishment a "future measure", the fact that it would come into existence "was entirely predictable, rather than 'entirely speculative'", as had been alleged by the United States.[488]

369. In reaching this conclusion, and as discussed previously,[489] the Panel considered it important that Review 9 had already been initiated at the time of Japan's panel request, and

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[485] Panel Report, para. 7.107.
[486] Panel Report, para. 7.114. *See also Id.*, paras. 7.112-7.113.
[487] Panel Report, para. 7.114.
[488] Panel Report, paras. 7.115-7.116.
[489] Panel Report, 7.111. *See also* para. 359 above.

was "entirely predictable" executive action that would supersede prior reviews under the 1989 Anti-Dumping Order on *Ball Bearings*.[490] In this regard, the Panel considered the situation in the present case to be different from the situation in *U.S. – Upland Cotton*, where the panel had found the measure at issue to be "'entirely speculative'" because it had been "implemented under legislation which, at the time of the panel request, 'did not exist, had never existed and *might not subsequently have come into existence*'".[491]

370. The Panel also recalled that the Appellate Body had "not ruled out the inclusion of future measures within a panel's terms of reference".[492] Specifically, the Panel noted that in *U.S. – Softwood Lumber IV (Article 21.5 – Canada)*, the Appellate Body stated that it was appropriate for the panel in *Australia – Salmon (21.5)* to have included within its terms of reference an import ban on salmon, adopted by the State of Tasmania, that *did not exist* at the time of that panel's establishment.[493] Further, the Panel noted that in *EC – Chicken Cuts*, the Appellate Body found that as "a general rule", measures should be in existence at the time of a panel's establishment to be included in a panel's terms of reference; however, the Panel also recalled the Appellate Body's statement that this "general rule" was subject to exception in "limited circumstances".[494]

### (d) *The Panel's Conclusion Concerning the Inclusion of Review 9 in Its Terms of Reference*

371. While the Panel acknowledged that circumstances could arise in which a post-establishment measure is introduced too late in the proceedings to safeguard the objectives of Article 6.2, it found that it did not face those circumstances in these proceedings.[495] Recalling the reasons explained above and the fact-specific nature of its inquiry, the Panel

[490] Panel Report, para. 7.116.
[491] Panel Report, para. 7.115-7.116 (emphasis added), *citing* Panel Report, *U.S. – Upland Cotton*, paras. 7.158, 7.160.
[492] Panel Report, para. 7.116 (footnote 142).
[493] Panel Report, para. 7.116 (footnote 142), *citing* Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, para. 74.
[494] Panel Report, para. 7.116 (footnote 142), *quoting* Appellate Body Report, *EC – Chicken Cuts*, para. 156.
[495] Panel Report, para. 7.116 ("In reaching the conclusion that in some circumstances, including in the present dispute, it is possible to challenge a measure that does not exist at the time of a panel request, we note that a measure needs to have come into existence in order for a panel to make a ruling on it. We do not speculate here regarding the point in time by which a challenge must be raised in relation to a measure not in existence at the time of a panel request, for a panel to include a ruling on it within its report").

concluded that the circumstances of the present dispute justified the inclusion of Review 9 in its terms of reference.[496]

### 2. Legal Argument

372. The United States appeals the Panel's decision to include within its terms of reference Review 9, a measure taken to comply that came into existence during the panel proceedings.

#### (a) *Article 6.2 of the DSU Permits the Inclusion in a Panel's Terms of Reference of Measures Adopted During Panel Proceedings*

373. In considering the United States' appeal, Japan begins with the text of Article 6.2 of the DSU, which provides, in relevant part, that a panel request must "identify the specific measures at issue". According to the Appellate Body, Article 6.2 should be considered in light of the "two essential purposes of the terms of reference": to define the scope of the dispute, and to serve the due process objective of giving notice.[497]

374. In light of the text of Article 6.2 and these dual purposes, the Appellate Body has stated that "as a general rule, the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel".[498] However, the Appellate Body has also held that there are "limited circumstances" in which departing from the "general rule" is consistent with Article 6.2 and the purposes that provision serves.[499]

375. The Appellate Body has thus far stated that there are "*at least*" two exceptions in which departure from the "general rule" is permissible;[500] as such, it has not excluded that, where justified, there may be *other* exceptional circumstances that would similarly warrant departure. The United States notes that "the situation in this dispute does not fall within" the two exceptions thus far identified by the Appellate Body.[501] However, that does not mean that, as a legal matter, the list of exceptions and circumstances thus far identified is exhaustive. In Japan's view, compliance proceedings under Article 21.5 of the DSU offer circumstances in which a further exception from the "general rule" is warranted.

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[496] Panel Report, para. 7.116.
[497] Appellate Body Report, *EC – Chicken Cuts*, para. 155. *See also* Appellate Body Report, *Brazil – Desiccated Coconut*, pg. 22.
[498] Appellate Body Report, *EC – Chicken Cuts*, para. 156.
[499] Appellate Body Report, *EC – Chicken Cuts*, para. 156.
[500] Appellate Body Report, *EC – Selected Customs Matters*, para. 184 (emphasis added).
[501] United States' Appellant's Submission, para. 51.

376. Indeed, in circumstances closely resembling those surrounding Review 9, the panel in *Australia – Salmon (21.5)*, in the context of Article 21.5 proceedings, found that a measure that comes into existence during panel proceedings can properly be included within a compliance panel's terms of reference under Article 6.2 of the DSU. As outlined in paragraph 382, the Panel found that the *particular characteristics of compliance proceedings* provided compelling reasons to include such a measure within its terms of reference.

377. The Appellate Body has cited approvingly to the very elements of the *Australia – Salmon (21.5)* panel's reasoning, relating to the context of Article 21.5 proceedings, that were relied upon by the Panel in this dispute.[502] As explained below, to grant the United States' appeal would require the Appellate Body effectively to reverse the decision of the panel in *Australia – Salmon (21.5)* on this issue.

378. Japan recalls that in *Australia – Salmon (21.5)*, 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.*

379. 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.[503]

380. 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".[504]

381. In finding that the ban was part of its terms of reference, the panel noted that Canada's panel request identified as the measures at issue "measures taken to comply" that

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[502] Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, para. 74. The Panel noted the Appellate Body's approval of the panel's finding in *Australia – Salmon (21.5)*. *See* Panel Report, para. 7.116 (footnote 142) ("In particular, in *US – Softwood Lumber IV (21.5 – Canada)* at para. 74, the Appellate Body stated that it was appropriate for the panel in *Australia – Salmon (21.5 – Canada)* to have included within its jurisdiction an import ban on salmon adopted by the State of Tasmania. We note that this import ban did not exist at the time of the request for the panel's establishment in *Australia – Salmon (21.5 – Canada)*").
[503] Panel Report, *Australia – Salmon (21.5)*, para. 7.10 (sub-paras. 21-23).
[504] Panel Report, *Australia – Salmon (21.5)*, para. 7.10 (sub-para. 24).

Australia "'has taken or does take'", which the panel found to be a reference to "future measures".[505] The panel found that "[t]he ban falls within the *category of measures specified in the Panel request*".[506] The panel concluded that Australia was, therefore, on notice that future measures belonging to an identified category of measures were at issue.

382. The panel in *Australia – Salmon (21.5)* also held that the *particular characteristics of compliance proceedings* provided compelling reasons to include the Tasmanian ban within its terms of reference. The panel observed that:

> … 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.[507]

383. The panel also said:

> 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.[508]

384. As explained below, the circumstances that led the panel in *Australia – Salmon (21.5)* to conclude that Article 6.2 of the DSU permitted inclusion of the Tasmanian ban within its

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[505] Panel Report, *Australia – Salmon (21.5)*, para. 7.10 (sub-para. 26) (emphasis in original).
[506] Panel Report, *Australia – Salmon (21.5)*, para. 7.10 (sub-para. 27) (emphasis added). *See also* United States' Supplemental Submission, para. 15 ("In other words, the panel found that the Tasmanian ban fell within a 'category of measures' to comply that were specified in the panel request, or was 'closely related' to those measures").
[507] Panel Report, *Australia – Salmon (21.5)*, para. 7.10 (sub-para. 28) (emphasis added).

terms of reference are replicated in this dispute, and confirm the Panel's decision to include Review 9 within its terms of reference.

### (b) *Japan's Panel Request Identifies a Category of Measure that Is Sufficiently Specific to Satisfy the Requirement of Article 6.2 of the DSU, and Broad Enough to Include Review 9*

#### (i) *Japan's Panel Request Is Sufficiently Specific*

385. To begin, the reference in Japan's panel request to "any subsequent closely connected measures" is sufficiently specific to satisfy Article 6.2.[509]

386. Section III:B of Japan's panel request specifies that the periodic reviews at issue in the compliance proceedings relate to one of three antidumping orders, namely "'Ball Bearings and Parts Thereof From Japan', 'Cylindrical Roller Bearings and Parts Thereof From Japan', and 'Spherical Plain Bearings and Parts Thereof From Japan'".[510] The request identifies the periodic reviews as: (i) five periodic reviews at issue in the original proceedings; (ii) "three *closely connected* periodic reviews that the United States argues 'superseded' the original reviews"; and, (iii) "any subsequent *closely connected* measures".[511]

387. Thus, in its panel request, Japan identified the three periodic reviews in the second category with the modifying term "closely connected", and used this same modifier to identify the third category of subsequent "closely connected" measures. The close connections derive, in part, from the fact that the periodic reviews related to one of three antidumping orders specified in the same paragraph of the panel request; namely, "'Ball Bearings and Parts Thereof From Japan', 'Cylindrical Roller Bearings and Parts Thereof From Japan', and 'Spherical Plain Bearings and Parts Thereof From Japan'".[512] Any "subsequent closely connected" periodic reviews under the third category mentioned in paragraph 386 above could relate solely to the *Ball Bearings* order, because the United States had revoked the other two orders, effective 1 January 2000.[513]

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[508] Panel Report, *Australia – Salmon (21.5)*, para. 7.10 (sub-para. 27).
[509] WT/DS322/27, para. 12.
[510] WT/DS322/27, para. 12.
[511] WT/DS322/27, para. 12 (emphasis added).
[512] WT/DS322/27, para. 12.
[513] United States' First Written Submission, para. 66, *citing Revocation of Antidumping Duty Orders on Certain Bearings from Hungary, Japan, Romania, Sweden, France, Germany, Italy, and the United Kingdom*, 65 Fed. Reg. 42667, 42668 (July 11, 2000) (Exhibit US-A19).

388. Review 9, issued under the *Ball Bearings* order, falls squarely within the category of "subsequent closely connected measures", and for that reason, is properly part of these Article 21.5 proceedings.

389. As *Australia – Salmon (21.5)* demonstrates, a category of measure can be sufficiently specific to satisfy the requirement in Article 6.2 to "identify the specific measures at issue". Accepting that a category of measure ("subsequent closely connected measures") can be sufficiently specific to satisfy Article 6.2 does not imply that measures falling within the category (*e.g.*, individual periodic reviews) are not themselves "separate and distinct";[514] it means only that the *category* is in itself sufficiently specific to satisfy Article 6.2.

390. Panels and the Appellate Body have previously considered a category of measure to be sufficiently specific to satisfy Article 6.2. In *EC – Bananas III (Ecuador)*, the United States' panel request identified the relevant EC measures as:

> a regime for the importation, sale and distribution of bananas established by Regulation 404/93 (O.J. L 47 of 25 February 1993, p. 1), and subsequent legislation, regulations and administrative measures, including those reflecting the provisions of the Framework Agreement on bananas, which implement, supplement and amend that regime.[515]

Later in its request, the United States referred to the EC measures with a shorthand reference to "[t]he regime and related measures".[516]

391. In response to an Article 6.2 challenge by the European Communities, the panel noted that the United States' request did not identify the "subsequent legislation, regulations and administrative measures" that it considered implement Regulation 404/93.[517] Nonetheless, the panel noted that the request "does identify the basic EC regulation", and stated that in its

[514] United States' Appellant's Submission, paras. 44, 52.
[515] WT/DS27/6.
[516] WT/DS27/6.
[517] Panel Report, *EC – Bananas III (U.S.)*, para. 7.27.

view, the "'banana regime' that the Complainants are contesting is adequately identified".[518] The Appellate Body agreed.[519]

392. Japan's request is strikingly similar. It begins by identifying eight specific periodic reviews, identifying three subsequent reviews as "closely connected" to five original reviews, and follows with a reference to other "subsequent closely connected measures".[520] As noted in paragraph 387 above, the subsequent periodic reviews could not be issued pursuant to just any anti-dumping order, but necessarily related to one order, the *Ball Bearing* order, which was specifically mentioned in the panel request.

393. The United States' request in *EC – Bananas III* similarly began by identifying a specific EC regulation, and followed with a reference to "subsequent legislation, regulations and administrative measures".[521] In both cases, the category of subsequent measures is sufficiently specific to satisfy Article 6.2.

394. As additional evidence in support of this conclusion, and consistent with the Appellate Body's views,[522] the Panel reviewed the United States' First Written Submission to determine whether it had understood the reference in Japan's panel request to "subsequent closely connected measures" to be sufficiently specific to identify the measures Japan intended to challenge.

395. The Panel recalled that, in its First Written Submission, with respect to the phrase "any subsequent closely connected measures" in the panel request, the United States said:

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[518] Panel Report, *EC – Bananas III (U.S.)*, para. 7.27. The panel subsequently examined several measures adopted subsequent to Regulation 404/93, which was published on 25 February 1993. *See Id.*, paras. 7.233-7.242 (examining Regulation 478/95 of 1 March 1995 on additional rules for the application of Council Regulation (EEC) No. 404/93), 7.243-7.264 ("hurricane licenses" issued between November 1994 and May 1996).
[519] Appellate Body Report, *EC – Bananas III*, para. 140.
[520] WT/DS322/27, para. 12.
[521] WT/DS27/6.
[522] Appellate Body Report, *U.S. – Carbon Steel*, para. 127 ("[I]n considering the sufficiency of a panel request, submissions and statements made during the course of the panel proceedings, in particular the first written submission of the complaining party, may be consulted in order to confirm the meaning of the words used in the panel request and as part of the assessment of whether the ability of the respondent to defend itself was prejudiced").

> 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.*[523]

396. On the basis of this statement, the Panel concluded that "the United States clearly anticipates … inclusion" of Review 9,[524] which was, indeed a "future administrative review[] related to" Reviews 4, 5 and 6.

397. In its Appellant's Submission, the United States argues that the statement from its First Written Submission quoted by the Panel was a lucky "guess", or "speculation [that] proved to be accurate".[525] However, as noted by the Panel:

> under the United States' retrospective anti-dumping duty assessment system, if requested, administrative reviews for a particular anti-dumping duty order occur at a specific time each year.[526]

398. Review 9 had not only been requested, but, indeed, *initiated* by the USDOC over nine months in advance of Japan's panel request.[527] Moreover, at the time of Japan's request, the USDOC's determination was scheduled – by specific notice from the USDOC to interested parties – to be issued in mid-August 2008, which was shortly thereafter extended to 4 September 2008.[528]

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[523] Panel Report, para. 7.105 (emphasis added), *quoting* United States' First Written Submission, para. 50. *See also* Panel Report, para. 7.103.
[524] Panel Report, para. 7.105. *See also Id.*, para. 7.103.
[525] United States' Appellant's Submission, para. 45 (footnote 56).
[526] Panel Report, para. 7.106. *See also Id.*, para. 7.102.
[527] Panel Report, para. 7.111. Review 9 was initiated on 29 June 2007. *See* Panel Report, para. 7.116 (footnote 141).
[528] U.S. law provides that the preliminary determination in a periodic review is due 245 days after the final day of the anniversary month (which in the order underlying Review 9 is 31 May), and that the final determination is due 120 days thereafter, for a total of 365 days. Both deadlines can be extended: by 120 days (from 245 to 365 days in total), for the preliminary determination; and, by 60 days (from 120 to 180 days in total), for the final determination. *See* 19 U.S.C. § 1675(a)(3)(A) (Section 751(a)(3)(A) of the Tariff Act of 1930, as amended). Therefore, the latest date on which the final determination in Review 9 could have been issued was 26 November 2008. In fact, the notice of initiation in Review 9 stated that the USDOC "plan[s] to issue the final results of these reviews not later than May 31, 2008". 72 Fed. Reg. 35690 (29 June 2007), at http://frwebgate1.access.gpo.gov/cgi-bin/PDFgate.cgi?WAISdocID=558555238467+2+2+0&WAISaction=retrieve. The USDOC subsequently published a notice of extension of the preliminary determination deadline, as authorized by statute, from 31 January 2008 to 15 April 2008 (75 days, rather than the full 120 day extension permitted by statute). 73 Fed. Reg. 2887 (16 January 2008), at http://frwebgate3.access.gpo.gov/cgi-bin/PDFgate.cgi?WAISdocID=55994210734+2+2+0&WAISaction=retrieve. In a second notice, the USDOC extended the deadline for the preliminary determination to 30 April 2008. 73 Fed. Reg. 21311 (21 April 2008), at http://frwebgate4.access.gpo.gov/cgi-bin/PDFgate.cgi?WAISdocID=558616458224+1+2+0&WAISaction=retrieve. The preliminary determination, dated 30 April 2008 but published on 7 May 2008, states that the USDOC "will issue the final results of these

399. In these circumstances, it is not credible to dismiss as a lucky "guess", or as mere "speculation",[529] the United States' express understanding that the phrase "any subsequent closely connected measures" from Japan's panel request referred specifically to a "future administrative review[] related to" Reviews 4, 5 and 6.[530]

400. Unlike the situation in *U.S. – Upland Cotton*, to which the United States attempts to draw an analogy,[531] the Panel correctly concluded that it was not, at the time of Japan's panel request, "entirely speculative" that Review 9 would come into existence.[532] The panel in *U.S. – Upland Cotton* found that a measure implemented under legislation that, at the time of Brazil's panel request, "did not exist, had never existed *and might not subsequently have come into existence*", was not within its terms of reference, such that Brazil's claim concerning the measure was "entirely speculative".[533] At the time of Brazil's panel request, the measure at issue in *U.S. – Upland Cotton* constituted legislation pending in Congressional conference that, depending on political developments, "might not subsequently have come into existence".[534]

401. There is a significant difference between a legislative measure whose adoption turns on unknown political forces, and an executive measure which, as explained in paragraph 398, was scheduled by specific U.S. government notices to interested parties to be issued no later than mid-August 2008.[535] The Panel was justified in concluding that the measure at issue in *U.S. – Upland Cotton* is unlike Review 9.

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administrative reviews … not later than 120 days after the date of publication of this notice", or in other words, on 4 September 2008. 73 Fed. Reg. 25662 (7 May 2008), at http://frwebgate6.access.gpo.gov/cgi-bin/PDFgate.cgi?WAISdocID=558813179259+0+2+0&WAISaction=retrieve. The final determination in Review 9 was indeed issued on 4 September 2008, and published on 11 September 2008. 73 Fed. Reg. 52823 (11 September 2008) (Exhibit JPN-67.A).

[529] United States' Appellant's Submission, para. 45 (footnote 56).

[530] Panel Report, para. 7.105 (emphasis added), *quoting* United States' First Written Submission, para. 50.

[531] United States' Appellant's Submission, paras. 47-49.

[532] *See* Panel Report, paras. 7.115-7.116, *quoting* Panel Report, *U.S. – Upland Cotton*, para. 7.158.

[533] Panel Report, *U.S. – Upland Cotton*, para. 7.158 (emphasis added). *See also* Panel Report, para. 7.115.

[534] Panel Report, *U.S. – Upland Cotton*, para. 7.158. *See* http://www.govtrack.us/congress/bill.xpd?bill=hj108-2 (Congressional conference was not completed, and thus differences between dueling versions of the legislation were not resolved, until after the issuance of Brazil's panel request).

[535] The United States also suggests that even had Japan known, at the time of its panel request, that Review 9 would come into existence during the panel proceedings, "Japan had no way of knowing whether the United States would apply zeroing" in Review 9. United States' Appellant's Submission, para. 50. To the extent relevant, Japan recalls that in a notice dated 27 December 2006, the USDOC declined to abandon the zeroing procedures in any situation other than in W-to-W comparisons in original investigations, expressly stating that it "declines to adopt … modifications" to the use of zeroing in other situations. Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation; Final Modification, 71 Fed. Reg. 77724 (Dep't of Comm., 27 December 2006) (Exhibit JPN-25). In these

402. Accordingly, considered on its own terms, in comparison with panel requests in previous disputes, in the context of the facts at hand at the time of Japan's panel request, and in light of the United States' express understanding of the terms of that request, Japan's panel request was sufficiently specific to satisfy the requirement, in Article 6.2, "to identify the specific measures at issue".

### (ii) *Japan's Panel Request Is "Broad Enough" to Include Review 9*

403. In disputes in which panels and the Appellate Body have considered whether to include measures coming into existence during the panel proceedings in the terms of reference, they have assessed whether the panel request was, in the Appellate Body's words, "broad enough" to include such a measure.[536] As such, panels and the Appellate Body have recognized that a panel request can identify measures or a category of measures with some *breadth*, while simultaneously adhering to the requirement, in Article 6.2 of the DSU, to "identify the *specific* measures at issue".[537]

404. In contrast with Japan's panel request, measures adopted subsequent to panel establishment have been excluded from a panel's terms of reference where the panel request was not "broad enough" to justify inclusion.

405. For example, the panel in *EC – Chicken Cuts* rejected the inclusion in its terms of reference of two measures adopted subsequent to establishment of the panel. The panel reasoned that Brazil's and Thailand's panel requests lacked "*generic* terms" or "*inclusive* language", and were instead "narrowly drafted" and "*not broad enough*" to properly include the subsequent measures in the panel's terms of reference.[538]

406. Similarly, the panel in *EC – Zeroing (EC) (21.5)* rejected the inclusion in its terms of reference of a "subsequent review" for which a determination was issued during the panel proceedings. The panel reasoned that the EC's panel request was not "*broad enough to*

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circumstances, it strains credulity to assert that, with respect to the use of the USDOC's zeroing procedures, "the final results of Review 9 were entirely unknown at the time of the panel request". United States' Appellant's Submission, para. 50.

[536] Appellate Body Report, *Chile – Price Band System*, para. 144. *See also* Panel Report, *U.S. – Customs Bond Directive*, paras. 7.20, 7.22; Panel Report, *U.S. – Shrimp (Thailand)*, paras. 7.46, 7.48; Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.24; Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.10 (sub-paras. 39, 43); Panel Report, *Dominican Republic – Cigarettes*, paras. 7.20-7.21; Panel Report, *Colombia – Ports of Entry*, paras. 7.52-7.54.

[537] Emphasis added.

*include any subsequent review* other than those specifically listed" by the European Communities in an Annex to its request.[539]

407. To conclude, the reference to "any subsequent closely connected measures" in Japan's panel request, directly following the identification of eight specific periodic reviews, was at once a sufficiently specific category of measure to satisfy Article 6.2, and "broad enough" to cover Review 9.

### (c) *The Ongoing and Continuous Nature of Compliance with the DSB's Recommendations and Rulings Is a Circumstance Warranting Inclusion of Review 9 in the Panel's Terms of Reference*

408. As observed by the Appellate Body, the determination whether a measure that comes into existence during the panel proceedings may properly be included within the terms of reference depends on the context, or the "*circumstances*".[540] In Japan's view, the circumstances of the present compliance proceedings warrant inclusion of Review 9 in the panel's terms of reference.

409. The circumstances of this dispute include the fact that it concerns review of the consistency with the covered agreements of measures taken to comply, pursuant to Article 21.5 of the DSU.

410. The Appellate Body has itself noted that the exigencies of the implementation process under Article 21 of the DSU create particular circumstances that warrant consideration in dispute settlement. Specifically, the Appellate Body has underscored the particular importance placed by Article 21 on "prompt compliance", and the need for "'prompt resolution'" of disputes arising under the "reporting and surveillance modalities" similarly set out in Article 21.[541]

411. Of even greater significance, however, is the *character* of the implementation or compliance process itself. As noted by the panel in *Australia – Salmon (21.5)*, "compliance

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[538] Panel Report, *EC – Chicken Cuts (Thailand)*, paras. 7.28, 7.32.
[539] Panel Report, *U.S. – Zeroing (EC) (21.5)*, para. 8.125 and footnote 690.
[540] Appellate Body Report, *EC – Chicken Cuts*, para. 156.
[541] *See, e.g.*, Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, paras. 70, 72; Appellate Body Report, *U.S. – Upland Cotton (21.5)*, para. 246. In *EC – Chicken Cuts*, the Appellate Body observed that the generic need to secure "a positive and effective resolution of a dispute" is not reason enough to include a measure that came into existence post-establishment within the terms of reference of a panel in *original* proceedings. Appellate Body Report, *EC – Chicken Cuts*, para. 161.

is often an ongoing or continuous process", as was borne out by the facts of that dispute.[542] Japan recalls that the withdrawal of the federal import ban on salmonids, asserted by Australia as achieving compliance, was subsequently undermined by the adoption of a Tasmanian ban, following establishment of the compliance panel.

412. A jurisdictional ruling excluding the Tasmanian ban from review under Article 21.5 of the DSU would have resulted in a distinctly incomplete resolution to proceedings aimed at resolving a "disagreement" about what had become, by the respondent's own actions, an evolving process of achieving and undermining compliance.

413. Similarly, an "ongoing or continuous process" of achieving and undermining compliance through a series of "measures taken to comply" arises in the dispute at hand. Before the Panel,[543] the United States asserted that periodic reviews subject to the recommendations and rulings of the DSB in the original proceedings were "withdrawn",[544] "superceded",[545] "eliminated",[546] "replaced"[547] and "removed"[548] by Reviews 4, 5, 6 and 9.

414. The United States also asserted that, with the adoption of the subsequent periodic reviews, it "has *taken measures to comply with [the DSB's] recommendations and rulings*".[549] The United States added that, with the subsequent reviews, "*compliance was accomplished*",[550] and that, by virtue of those subsequent reviews, it "*came into compliance* with the recommendations and rulings of the Dispute Settlement Body".[551]

415. For this and other reasons described in Section V.B above, the Panel found that *Ball Bearings* Reviews 4, 5, 6 and 9 were "measures taken to comply", within the meaning of

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[542] Panel Report, *Australia – Salmon (21.5)*, para. 7.10 (sub-para. 28). *See also Id.*, para. 7.10 (sub-para. 27).
[543] The United States made similar statements in a status report to the DSB. *See* WT/DS322/22/Add.2 ("With respect to the assessment reviews at issue in this dispute, in each case the results were superseded by subsequent reviews. Because of this, no further action is necessary for the United States to bring these challenged measures into compliance with the recommendations and rulings of the DSB").
[544] United States' Answers of 26 November 2008, paras. 7, 12; United States' Second Written Submission, para. 28; United States' First Written Submission, paras. 39, 52, 54, 58, 65, 66, 67.
[545] United States' First Written Submission, paras. 3, 44.
[546] United States' Second Written Submission, para. 8; United States' First Written Submission, paras. 44, 54.
[547] United States' Second Written Submission, para. 18; United States' First Written Submission, para. 44.
[548] United States' Answers of 26 November 2008, paras. 8, 10, 13, 16, 17; United States' Second Written Submission, paras. 18, 26.
[549] United States' First Written Submission, para. 51 (emphasis added). *See also* United States' Answers of 26 November 2008, paras. 10, 12.
[550] United States' Second Written Submission, para. 18 (emphasis added); United States' First Written Submission, paras. 52, 67.
[551] United States' Answers of 26 November 2008, para. 3 (emphasis added). *See also Id.*, paras. 10, 13, 14, 16, 17.

Article 21.5 of the DSU. While the United States held these reviews out as *achieving compliance*,[552] the Panel found that each of Reviews 4, 5, 6 and 9 contained the very same WTO-inconsistency that the United States alleged to have "withdrawn", "eliminated" and "removed" through adoption of those measures.[553] Reviews 4, 5, 6 and 9 therefore *undermined compliance* with the DSB's recommendations and rulings.

416. In this context, including Review 9 within the Panel's terms of reference was essential to reach a satisfactory settlement of the matter and to secure a positive solution to the dispute. Japan recalls that each of Reviews 4, 5, 6 and 9 is a "replacement" measure that "supersedes" the previous periodic review involving *Ball Bearings*. As more fully explained at paragraphs 140-141, each successive 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.[554]

417. For example, when Review 9 was adopted, it established a cash deposit rate that replaced the cash deposit rate established in Review 6.[555] The Panel found that the cash deposit rates set in both Reviews 6 and 9 were established in a WTO-inconsistent manner, with the use of the United States' zeroing procedures.[556]

418. However, when the "zeroed" cash deposit rate in Review 9 was published on 11 September 2008,[557] during the panel proceedings, the "zeroed" cash deposit rate in Review 6 ceased to exist.[558] By function of the United States' own anti-dumping law and procedures, and through no fault of Japan's, the compliance process became a "moving target".[559]

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[552] Panel Report, paras. 7.69-7.73.
[553] Panel Report, para. 7.166.
[554] Panel Report, paras. 7.65-7.67, 7.71-7.72, 7.74-7.75.
[555] Panel Report, para. 7.75 ("[W]e recall that Review 4 was superseded by Review 5 and Review 5 was superseded by Review 6, which itself was superseded most recently by Review 9. In other words, Review 3 was actually superseded, in turn, by Reviews 4, 5 and 6 (and, most recently, 9)"). *See also Id.*, paras. 7.65-7.67, 7.71-7.72, 7.74.
[556] Panel Report, para. 7.166.
[557] 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).
[558] Panel Report, paras. 7.65-7.67, 7.71-7.72, 7.74-7.75.
[559] Appellate Body Report, *Chile – Price Band System*, para. 144 ("[T]he demands of due process are such that a complaining party should not have to adjust its pleadings throughout dispute settlement proceedings in order to deal with a disputed measure as a 'moving target'").

419. A failure to include Review 9, which as the "latest link in the chain"[560] constitutes a "measure taken to comply", would have made the Panel's findings distinctly incomplete, because the "zeroed" cash deposit rate established in Review 6 had ceased to exist during the course of the proceedings.[561]

420. This point is not lost on the United States, which asserts on appeal that "the Panel did not make any findings with respect to cash deposit rates established in Reviews 4, 5, and 6".[562] Although this statement inaccurately reflects the Panel's findings regarding these reviews, which encompassed both the cash deposit rates and the assessment rates,[563] the United States' remarks highlight that, *if Review 9 were excluded from these proceedings*, these compliance proceedings would have failed to resolve a disagreement regarding the latest cash deposit rates imposed under the *Ball Bearings* order.

421. Accordingly, a ruling excluding Review 9 from the Panel's terms of reference would have resulted in a distinctly incomplete resolution to proceedings aimed at resolving a disagreement about what had become, by the United States' own actions, an evolving process of allegedly achieving and incontrovertibly undermining compliance. In the words of the panel in *Australia – Salmon (21.5)*, to exclude from the terms of reference a post-establishment measure taken to comply, where the panel request is broad enough to cover that measure and the process of achieving and undermining compliance is "ongoing and continuous", "would go against the objective of 'prompt compliance'" in Article 21.1 of the DSU.[564]

### (d) *Including Review 9 in the Panel's Terms of Reference Is Consistent with the Due Process Objectives of Article 6.2*

422. The Appellate Body and panels have noted that, to be consistent with Article 6.2 of the DSU, including a measure adopted during panel proceedings within the panel's terms of

[560] Panel Report, para. 7.114.
[561] Panel Report, para. 8.2.
[562] United States' Appellant's Submission, para. 105 (footnote 146).
[563] Panel Report, para. 7.166 ("[W]e find that the exporter-specific margins of dumping and importer-specific assessment rates in Reviews 4, 5, 6 and 9 were affected (in the sense of being inflated) by zeroing").
[564] Panel Report, *Australia – Salmon (21.5)*, para. 7.10 (sub-para. 27).

reference must not compromise the "due process objective of notifying the parties and third parties of the nature of a complainant's case".[565]

423. The United States asserts that were Article 6.2 interpreted to allow within a compliance panel's terms of reference measures adopted during the panel proceedings, parties would be required to respond "on short notice, without a meaningful opportunity to review the measures".[566] The United States also considers that compliance panels would be required "to react to changes that occurred after some or all of the written submissions and meetings with the parties had passed", "or possibly make findings without the full benefit of the views of the parties (or the views of the third parties)".[567] Finally, the United States argues that the Panel's approach is "asymmetrical", because responding Members have, in previous disputes, not consistently been allowed to rely on post-establishment measures to assert that an alleged consistency "no longer exist[s]".[568]

424. For reasons explained below, none of these arguments avails. Including Review 9 within the Panel's terms of reference did not undermine the due process objective of Article 6.2 of the DSU.

### (i) *Including Review 9 in the Panel's Terms of Reference Did Not Deprive the United States of a Meaningful Opportunity to Reply*

425. The United States was not, in these proceedings, deprived of "a meaningful opportunity to review the measure[]", or to prepare and present a defense to the claims pursued against that measure.[569] Japan considers these two arguments in turn.

426. Before doing so, however, Japan briefly recalls the Panel's conclusion that, from the beginning of the proceedings, the United States understood, on the basis of Japan's panel

[565] Appellate Body Report, *EC – Chicken Cuts*, para. 155; Panel Report, *Australia – Salmon (21.5)*, para. 7.10 (sub-paras. 27-28). With respect to the "due process" function served by Article 6.2 generally, *see, e.g.*, Appellate Body Report, *U.S. – Carbon Steel*, para. 126; Appellate Body Report, *Korea – Dairy*, paras. 126-127; Appellate Body Report, *EC – Computer Equipment*, para. 70; Appellate Body Report, *Thailand – H-Beams*, para. 95.
[566] United States' Appellant's Submission, para. 57.
[567] United States' Appellant's Submission, para. 57.
[568] United States' Appellant's Submission, para. 57.
[569] United States' Appellant's Submission, para. 57.

request, that Japan intended to challenge Review 9, and so stated in its First Written Submission.[570]

427. In Japan's view, this alone is sufficient to conclude that Japan's panel request was sufficient to put the United States on notice that Japan intended to challenge Review 9, which was then pending and which would come into existence during the panel proceedings. Nonetheless, Japan rebuts below the United States' suggestion, in its Appellant's Submission, that including Review 9 within the Panel's terms of reference deprived the United States of an opportunity to sufficiently review and understand Review 9, and to prepare and present its defense to Japan's claims concerning that measure.

(i)(a) *The United States Was Not Deprived of the Opportunity to Sufficiently "Review" and Understand Review 9*

428. First, the United States was not deprived of the opportunity to sufficiently "review" Review 9, or to understand the legal consequences flowing from that measure.

429. The sole element of Review 9 subject to Japan's claims was the USDOC's use of the zeroing procedures. In the Issues and Decision Memorandum accompanying its determination, the USDOC decided, despite requests from interested parties, to maintain its use of the zeroing procedures, stating that it "has continued to deny offsets to dumping based on export transactions that exceed normal value in these reviews".[571] Japan provided the USDOC computer program and program logs for Review 9 demonstrating the USDOC's use of the zeroing procedures in this review.[572] The evidence provided for Review 9 was identical in form to the evidence provided for the other "subsequent administrative reviews" at issue in the proceedings (Reviews 4, 5 and 6).[573]

430. As a result, the only element of the determination in Review 9 that the United States was required to "review" to understand the claims against it was the USDOC's explicit confirmation, in the Issues and Decision Memorandum and the program and program log for

[570] As discussed at paragraphs 394-399 above, the Panel recalled that, in its First Written Submission, the United States interpreted the phrase "any subsequent closely connected measures", in Japan's panel request, to be a reference to "*any future administrative reviews related to the eight identified in its panel request*". Panel Report, para. 7.105 (emphasis added), *quoting* United States' First Written Submission, para. 50. *See also* Panel Report, para. 7.103.
[571] Panel Report, para. 7.161. *See also* USDOC Issues and Decision Memorandum: Ball Bearings and Parts Thereof from Japan (undated), at Comment 1, p. 10. Exhibit JPN-67.B.
[572] Panel Report, para. 7.160.
[573] *See* Panel Report, paras. 7.160-7.161.

Review 9, that it had applied the zeroing procedures. This evidence was identical in form to evidence it had already reviewed concerning Reviews 4, 5 and 6.

(i)(b) *The United States Was Not Deprived of the Opportunity to Prepare and Present Its Defense*

431. Second, the United States was not deprived of the opportunity to prepare and present a defense to claims against Review 9.

432. As with the other subsequent periodic reviews at issue in the compliance proceedings (Reviews 4, 5 and 6), Japan argued that Review 9 is a "measure taken to comply" by virtue of its relationship to the original proceedings, and the role it plays in undermining compliance with the recommendations and rulings of the DSB. Japan's arguments in this regard were similar to the arguments it made in relation to Reviews 4, 5 and 6.[574]

433. With respect to substantive compliance with the *Anti-Dumping Agreement* and the GATT 1994, Japan argued, as with the other subsequent periodic reviews at issue in the proceedings, that the application of the zeroing procedures in Review 9 is inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, as well as the "fair comparison" obligation of Article 2.4.[575] The arguments regarding all subsequent reviews were identical.

434. Additionally, apart from its arguments with respect to Review 9 under Article 6.2 of the DSU, the United States' defense was virtually identical for all of the subsequent periodic reviews.

435. As with Reviews 4, 5 and 6, the United States argued that Review 9 is not a "measure taken to comply", because it allegedly had no connection to the DSB's recommendations and rulings, and did not constitute voluntary action to circumvent or undermine declared compliance with those recommendations and rulings.[576] With respect to Review 9, as with Reviews 4, 5 and 6, the Panel noted that the United States "does not deny that it applied

[574] *Compare* Japan's Supplemental Submission, paras. 3-8 (concerning Review 9), *with* Japan's First Written Submission, paras. 87-105 (concerning Reviews 4, 5 and 6).
[575] *Compare* Japan's Supplemental Submission, paras. 30-34 (concerning Review 9), *with* Japan's First Written Submission, paras. 149-153 (concerning Reviews 4, 5 and 6).
[576] Panel Report, paras. 7.35, 7.39, 7.113. *See also* United States' Response to Japan's Supplemental Submission, paras. 2-7.

zeroing in these administrative reviews".[577] Nonetheless, for all of the subsequent periodic reviews, including Review 9, the United States argued that Japan had not sufficiently established that the use of the zeroing procedures impacted the importer-specific assessment rates for the individual importers implicated by those reviews.[578]

436. There is only one respect in which the United States' defense varied as between Reviews 4, 5 and 6, on the one hand, and Review 9, on the other – the United States' assertion that Review 9 was not properly within the Panel's terms of reference, based on its view that Japan's panel request had not identified Review 9 with sufficient specificity to satisfy Article 6.2 of the DSU.

437. Throughout the compliance panel proceedings, the United States exploited ample opportunities to address this aspect of Review 9.

438. As noted by the Panel,[579] as well as the United States itself in its Appellant's Submission,[580] the United States first raised the issue of Japan's intent to include "future administrative reviews related to the eight identified in its panel request" in a preliminary objection accompanying its First Written Submission.[581] The United States addressed the same issue in its Second Written Submission,[582] and in its Opening Statement for the Panel meeting.[583] In its Supplemental Submission,[584] the United States applied to Review 9 the arguments it had earlier raised concerning Japan's intent to include "future administrative reviews related to the eight identified in its panel request".[585]

439. Accordingly, the United States was not, in these proceedings, deprived of "a meaningful opportunity" to consider, prepare and present a defense to the claim pursued by Japan against Review 9.[586] Moreover, the Panel was not called upon to "make findings without the full benefit of the views of the parties";[587] both parties addressed arguments

[577] Panel Report, para. 7.159.
[578] Panel Report, para. 7.162.
[579] Panel Report, paras. 7.103, 7.105.
[580] United States' Appellant's Submission, para. 42 (footnote 47).
[581] United States' First Written Submission, para. 50.
[582] United States' Second Written Submission, paras. 29-34.
[583] United States' Opening Statement, paras. 13-14.
[584] United States' Response to Supplemental Submission of Japan, paras. 8-16.
[585] Panel Report, paras. 7.103, 7.105. *See also* United States' Appellant's Submission, para. 42 (footnote 47).
[586] United States' Appellant's Submission, para. 57.
[587] United States' Appellant's Submission, para. 57.

concerning the phrase "any subsequent closely connected measures", from Japan's panel request,[588] and, more specifically, Review 9, in multiple submissions to the Panel.

### (ii) *Including Review 9 in the Panel's Terms of Reference Did Not Deprive the Panel of Third Party Views or Deprive Potential Third Parties of Rights*

440. The United States also argues that by accepting jurisdiction over a measure that comes into existence after establishment, the Panel risks making findings on that measure "without the full benefit of the views of … third parties".[589]

441. That risk was not realized in these proceedings. As noted by the Panel[590] and the United States itself,[591] the United States first raised the issue of Japan's intent to include "future administrative reviews related to the eight identified in its panel request" in its First Written Submission.[592] The third parties received that submission, *as well as Japan's and the United States' Supplemental Submissions on Review 9*, in advance of the third party session of the Panel meeting. As a result, the European Communities,[593] the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu,[594] and Mexico,[595] specifically addressed the question whether Review 9 properly falls within the Panel's terms of reference, in the circumstances at hand.[596] (Each of these third parties agreed that Review 9 was properly within the Panel's terms of reference.)

442. In a related argument, the United States asserts that the Panel's decision to include in its terms of reference a measure that came into existence during the panel proceedings deprives "potential" third parties of the ability to determine whether they have a "substantial interest" in the matter that would justify reserving their third party rights.[597]

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[588] WT/DS322/27, para. 12.
[589] United States' Appellant's Submission, para. 57.
[590] Panel Report, paras. 7.103, 7.105.
[591] United States' Appellant's Submission, para. 42 (footnote 47).
[592] United States' First Written Submission, para. 50.
[593] European Communities Oral Statement, paras. 47-48; European Communities' Third Party Submission, para. 27.
[594] Oral Statement of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, paras. 7, 12-15.
[595] Mexico's Oral Statement, para. 12.
[596] An additional third party, Norway, expressly declined to offer its views. *See* Norway's Third Party Submission, para. 7.
[597] United States' Appellant's Submission, para. 55 (footnote 79).

443. However, this argument assumes that the phrase "any subsequent closely connected measures", from Japan's panel request,[598] did not give notice of Japan's intent to challenge future periodic reviews related to Reviews 4, 5 and 6. As noted by the Panel, the United States interpreted the phrase "any subsequent closely connected measures", from Japan's panel request, to mean "future administrative review[] related to" Reviews 4, 5 and 6.[599] There is no reason to assume that potential third parties did not arrive at a similar interpretation, particularly given that three other subsequent reviews – Reviews 4, 5 and 6 – were identified as "closely connected periodic reviews".[600]

### (iii) *Including Review 9 in the Panel's Terms of Reference Does Not Create "Asymmetry" to the Disadvantage of Responding Members*

444. The United States suggests that the Panel's approach to its terms of reference, when combined with the approach taken by other panels to the examination of post-establishment measures asserted by a responding Member to remove an alleged WTO-inconsistency, would create an "asymmetry".[601] Specifically, the United States asserts that while the Panel decided to exercise jurisdiction over a post-establishment measure asserted by a *complaining* Member, previous panels have refused "to examine" a post-establishment measure submitted by a *responding* Member as evidence that an alleged WTO-inconsistency no longer exists.[602]

445. The United States' argument is without foundation. To begin, any "asymmetry" suggested by the United States does not arise from the Panel's actions. As explained at paragraph 413 above, the United States frequently asserted to the Panel that, with the adoption of the subsequent periodic reviews, it "has taken measures to comply with [the DSB's] recommendations and rulings",[603] such that it "*came into compliance* with the recommendations and rulings of the Dispute Settlement Body".[604] The subsequent periodic reviews include, of course, Review 9. The Panel examined and addressed the United States' assertion that subsequent periodic reviews, including Review 9, which came into existence

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[598] WT/DS322/27, para. 12.
[599] Panel Report, para. 7.105 (emphasis added), *quoting* United States' First Written Submission, para. 50.
[600] WT/DS322/27, para. 12.
[601] United States' Appellant's Submission, para. 57.
[602] United States' Appellant's Submission, para. 57.
[603] United States' First Written Submission, para. 51. *See also* United States' Answers of 26 November 2008, paras. 10, 12.
[604] United States' Answers of 26 November 2008, para. 3 (emphasis added). *See also Id.*, paras. 10, 13, 14, 16, 17.

during the panel proceedings, brought it into compliance with the DSB's recommendations and rulings.[605] No "asymmetry" arises.

446. Additionally, no such "asymmetry" exists, because previous panels have indeed examined post-establishment measures offered by a responding Member as evidence that an alleged WTO-inconsistency no longer exists.

447. This is most clearly illustrated by the panel report in *India – Autos*, cited by the United States to support its "asymmetry" argument.[606] As demonstrated below, the panel in *India – Autos* did examine and take account of India's assertion that a measure challenged by the United States had been withdrawn following establishment. The "asymmetry" alleged by the United States, should the Appellate Body uphold the Panel's approach to Review 9, does not exist.

448. Japan has already noted[607] that in *India – Autos*, through a general measure known as Public Notice No. 60, India subjected the importation of auto-parts to the fulfillment of certain WTO-inconsistent conditions, including an indigenization requirement and a trade balancing obligation. During the panel proceedings, India withdrew Public Notice No. 60, such that *new* entries of auto-parts were no longer subject to the WTO-inconsistent conditions. India argued that there was, therefore, no duty to bring the measures challenged by the United States into conformity, because *new* entries were not subject to restrictions.[608]

449. The panel in *India – Autos* did not decline "to examine a measure that came into existence after the panel was established in order to [support India's] claim that the alleged inconsistency would in any event no longer exist", as the United States would have the Appellate Body believe.[609] Rather, the panel considered that it was required by Articles 11 and 19 of the DSU "to address the impact of events having taken place in the course of the proceedings".[610] Upon consideration of the post-establishment developments raised by India, and for reasons discussed in detail at paragraphs 197-204, the panel *rejected India's*

[605] Panel Report, paras. 7.69-7.75.
[606] United States' Appellant's Submission, para. 57 (footnote 81).
[607] *See* above, paras. 197-205.
[608] Panel Report, *India – Autos*, paras. 8.4 and 8.5.
[609] United States' Appellant's Submission, para. 57.
[610] Panel Report, *India – Autos*, para. 8.28.

*argument* that the withdrawal of Public Notice No. 60 meant that the WTO-inconsistency "no longer exist[ed]",[611] in the United States' words.

450. As suggested in *India – Autos*,[612] a panel that fails to consider the impact on alleged WTO-inconsistencies of subsequent events calling into question the continued existence of a challenged measure risks committing legal error. Specifically, the Appellate Body has found that while a panel retains the discretion to make *findings* with respect to a measure that ceases to exist during the proceedings,[613] it constitutes error to *recommend*, pursuant to Article 19.1 of the DSU, that a measure found no longer to exist and/or no longer to generate continuing legal effects be brought into conformity with the covered agreements.[614]

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[611] United States' Appellant's Submission, para. 57.

[612] Panel Report, *India – Autos*, para. 8.25 and footnote 461, *citing* Appellate Body Report, *U.S. – Certain EC Products*, para. 81.

[613] Appellate Body Report, *EC – Bananas III (U.S.) (21.5)*, paras. 269 ("[A] panel is not precluded from making findings with respect to measures that expire during the course of the proceedings"), 270 ("[O]nce a panel has been established and the terms of reference for the panel have been set, the panel has the competence to make findings with respect to the measures covered by its terms of reference. We thus consider it to be within the discretion of the panel to decide how it takes into account subsequent modifications or a repeal of the measure at issue"). *See also* Appellate Body Report, *U.S. – Upland Cotton*, para. 272 (footnote 214) (listing GATT and WTO decisions in which panels have "made findings with respect to measures withdrawn after the establishment of the panel"). This is precisely what happened in *Indonesia – Autos*, the second dispute cited by the United States in support of its "asymmetry" argument. United States' Appellant's Submission, para. 57 (footnote 81). In *Indonesia – Autos*, Indonesia informed the panel that during the panel proceedings, it had terminated part of the "National Car programme" at issue in the dispute – the 1996 programme – and requested that the panel refrain from making findings, at least with respect to the 1996 programme. Panel Report, *Indonesia – Autos*, para. 4.65. *See also Id.*, paras. 4.61-4.63, 4.66-4.71. The complaining Members, including the United States, disagreed that as a factual matter, the post-establishment measures taken by Indonesia had resulted in termination of benefits under the National Car programme, including benefits related to future sales or existing inventory. Panel Report, *Indonesia – Autos*, paras. 4.86 and 4.102. *See also generally Id.*, paras. 4.73-4.110. While not formally deciding whether Indonesia's post-establishment measures had indeed terminated the National Car programme and all benefits therefrom, the panel exercised its discretion to make findings concerning the National Car programme. Panel Report, *Indonesia – Autos*, para. 14.9.

[614] Appellate Body Report, *EC – Bananas III (U.S.) (21.5)*, paras. 271, 479; Appellate Body Report, *U.S. – Upland Cotton*, para. 272; Appellate Body Report, *U.S. – Certain EC Products*, paras. 80-81. *See also, e.g.*, Panel Report, *Chile – Price Band System*, para. 7.112 ("[W]hen a panel concludes that a [no-longer-existing] measure was inconsistent with a covered agreement, [a] … recommendation cannot and should not be made. However, in our view, Article 19.1 DSU would not prevent us from making findings regarding the consistency of an expired … measure, if we were to consider that the making of such a finding is necessary 'to secure a positive solution' to the dispute"); Panel Report, *Turkey – Rice*, paras. 7.179 ("The Panel does not believe that, given the circumstances of this dispute, it should refrain from making any legal finding with regard to the domestic purchase requirement, a measure that has been properly brought before it, merely because the measure expired after the establishment of the Panel"), 7.271 ("[T]here is generally no need for a panel to recommend that the DSB request the responding party to bring into conformity with its WTO obligations a measure which the panel has found no longer exists and which that party has declared does not have the intention to reintroduce"), 5.29 (With respect to an expired measure, "the Panel decided that it would be inappropriate to abstain from making findings with respect to such measure", but "considered … that there is no need to recommend to the DSB that it make any request to Turkey with respect to [that measure], in view of the fact that it has expired and that Turkey has declared its intention not to reintroduce the measure at issue").

451. That panels have exercised their discretion to make findings on measures that cease to exist following establishment does not mean that they have failed, in the United States' words,[615] "to examine" or take account of the responding Members' assertions that removal of a measure also removes the alleged WTO-inconsistency. Indeed, the Appellate Body's conclusion that panels may not make *recommendations* with respect to measures that cease to exist and/or generate continuing legal effects, by virtue of post-establishment events or otherwise, demonstrates that panels *must* undertake the examination called for by the United States in its Appellant's Submission.

452. Accordingly, the Panel's decision to include Review 9 within its terms of reference does not lead to the "asymmetry" alleged by the United States.

### (iv) ***Conclusion on Due Process***

453. The United States has raised a "parade of horribles" to illustrate the ways in which a decision to include in the terms of reference a measure that comes into existence during panel proceedings could compromise the rights of parties and third parties, and the ability of a panel to properly execute its mandate.[616]

454. As Japan has demonstrated, however, the "parade" did not materialize in these proceedings. The Panel benefited from the views of the parties and the third parties, all of whom were provided, and indeed acted upon, opportunities to address jurisdiction over Review 9 in multiple written submissions, and in oral statements.

455. Further, in acknowledging that circumstances could arise in which it is too late in the proceedings to introduce a post-establishment measure, the Panel recognized the potential for the rights of parties and third parties, and the integrity of a panel's work, to be compromised. However, for reasons explained by Japan above, the Panel properly concluded that it did not face those circumstances in these proceedings.[617]

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[615] United States' Appellant's Submission, para. 57.
[616] United States' Appellant's Submission, paras. 56-57.
[617] Panel Report, para. 7.116 ("In reaching the conclusion that in some circumstances, including in the present dispute, it is possible to challenge a measure that does not exist at the time of a panel request, we note that a measure needs to have come into existence in order for a panel to make a ruling on it. We do not speculate here regarding the point in time by which a challenge must be raised in relation to a measure not in existence at the time of a panel request, for a panel to include a ruling on it within its report").

(e) ***Conclusion with Respect to Review 9 and the Panel's Terms of Reference***

456. For all of these reasons, the Panel properly found that Review 9 was within its terms of reference. Accordingly, Japan requests that the Appellate Body deny the United States' appeal, and uphold the Panel's finding in this regard.

## D. The Panel Properly Found that the United States Has Acted Inconsistently with Its WTO Obligations by Applying Zeroing in Reviews 4, 5, 6 and 9

### 1. Summary of the Panel's Findings that Reviews 4, 5, 6 and 9 Are WTO-Inconsistent

457. Having found that Reviews 4, 5, 6 and 9 are "measures taken to comply",[618] the only remaining issue before the Panel was whether those "measures taken to comply" were consistent with the covered agreements – namely, with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.

458. As the Panel noted, Japan claimed that Reviews 4, 5, 6 and 9 are inconsistent with these provisions "because the United States applied zeroing when calculating margins of dumping to determine cash deposit rates and importer-specific assessment rates".[619] The United States did "not deny that it applied zeroing in these periodic reviews".[620]

459. The Panel found that Japan had established a *prima facie* case that "the exporter-specific margins of dumping and importer-specific assessment rates determined pursuant to Reviews 4, 5, 6 and 9 were affected by USDOC's application of zeroing", and the United States had failed to rebut that *prima facie* case.[621] The Panel relied on evidence that the "standard zeroing line" was applied by USDOC in the computer code for Reviews 4, 5, 6 and 9, as well as USDOC Issues and Decisions Memoranda for these Reviews indicating the use of zeroing.[622] It also relied on evidence demonstrating that the exporter-specific margins of dumping and importer-specific assessment rates were "inflated" by zeroing, and would have been significantly lower or zero in Reviews 4, 5, 6 and 9, absent the use of zeroing.[623]

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[618] Panel Report, paras. 7.82, 7.114, 7.156.
[619] Panel Report, para. 7.157.
[620] Panel Report, para. 7.159.
[621] Panel Report, para. 7.166.
[622] Panel Report, paras. 7.160-7.161.
[623] Panel Report, paras. 7.162-7.164, 7.166.

## 2. Legal Argument

### (a) *The United States Raises Threshold Issues Challenging the Panel's Entitlement to Rule upon Reviews 4, 5, 6 and 9 under Article 21.5 of the DSU*

460. The United States contends that Reviews 4, 5, 6 and 9 "*cannot serve as the basis for a finding of WTO-inconsistency in this dispute*".[624] It offers three arguments in support of this position: (1) the entries covered by Reviews 4, 5, 6 and 9 occurred before the end of the RPT;[625] (2) Reviews 4, 5 and 6 were completed before the end of the RPT;[626] and, (3) Reviews 4, 5 and 6 had no ongoing effects after the end of the RPT because duty collection had been enjoined pursuant to domestic litigation.[627]

461. Strikingly, the United States does not allege that any of these four reviews is consistent with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* or Article VI:2 of the GATT 1994. Instead, it appears to concede that the Panel properly found that the United States used zeroing in these reviews, contrary to the *Anti-Dumping Agreement* and the GATT 1994. Rather than contest the WTO-inconsistency of the four reviews as a general matter, the United States raises a *threshold issue that the Panel was not entitled to rule upon that inconsistency in Article 21.5 proceedings*.

462. The nature and formulation of the U.S. arguments lend support to this view. The United States' arguments are all explicitly directed towards whether the Panel had a valid "*basis*"[628] – *i.e.*, authority – to rule upon the "consistency" of Reviews 4, 5, 6 and 9. None of the arguments is directed to substantive issues under Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.

463. Significantly, two of the three U.S. arguments raised on appeal were specifically addressed by the Panel in its findings that the subsequent reviews are "*measures taken to comply*" under Article 21.5. In particular, the Panel examined the second and third arguments mentioned in paragraph 460 above, namely, the timing of the reviews and their

[624] United States' Appellant's Submission, para. 105. *See also Id.*, paras. 21, 24, 86, 89.
[625] United States' Appellant's Submission, paras. 60, 86, 89.
[626] United States' Appellant's Submission, paras. 24, 105.
[627] United States' Appellant's Submission, paras. 24, 62, 105.
[628] United States' Appellant's Submission, paras. 21, 24, 86, 89 and 105.

ongoing, post-RPT legal effects.[629] Thus, these two arguments were properly examined, and rejected, as threshold *jurisdictional* arguments under Article 21.5 of the DSU.

464. The remaining argument raised on appeal, based on the dates of entry, is closely related. Unbundling the U.S. arguments, the theory seems to run as follows. DSB recommendations and rulings regarding periodic reviews impose implementation obligations solely in connection with entries that occur after the end of the RPT. As a result, under this theory, subsequent periodic reviews, covering earlier entries, are not "taken to comply" with the DSB's recommendations and rulings, and cannot show a failure to comply with them. Thus, this argument also raises a threshold issue under Article 21.5; namely, whether periodic reviews covering entries occurring before the end of the RPT can be "taken to comply" with the DSB's recommendations and rulings.

465. Under Article 21.5 of the DSU, a compliance panel is entitled, and indeed required, to rule upon the "consistency" of "measures taken to comply". If a measure is one "taken to comply", and if that measure forms part of the panel's terms of reference, *the panel has a necessary and sufficient "basis"*[630] *to rule upon the consistency of the measure.* When these two threshold issues have been established, there are *no other threshold issues*, under Article 21.5, that must be addressed before examining the "consistency" of a "measure taken to comply" with the covered agreements. At that point, the relevant issues are solely those pertaining to the substantive consistency of the measures with the specific provisions of the covered agreements at issue.

466. In Section V.B above, we have explained why the Panel correctly found that Reviews 4, 5, 6 and 9 are "measures taken to comply". Each of these Reviews also formed part of the Panel's terms of reference.[631] As a result, the Panel had a valid legal "basis" to rule upon the "consistency" of the Reviews under Article 21.5, without any further examination of threshold issues.

467. As Japan explains below, the three threshold issues raised by the United States do not call into question the Panel's authority to rule upon the "consistency" of the four subsequent

[629] *See* Panel Report, paras. 7.74-7.75, 7.79.
[630] United States' Appellant's Submission, paras. 21, 24, 86, 89 and 105.
[631] *See* WT/DS322/27, para. 12, Annex I. The Panel's finding that Review 9 formed part of its terms of reference is subject to appeal and is addressed in Section V.C of this Appellee's Submission.

reviews, once it is established that they are "measures taken to comply". We address the three arguments in turn.

### (i) *The Timing of a Periodic Review Does Not Preclude a Compliance Panel from Ruling upon Its "Consistency" with the Covered Agreements, under Article 21.5 of the DSU*

468. The United States argues that the fact that Reviews 4, 5 and 6 were "concluded long before the end of the RPT" means these reviews "*cannot provide a basis for finding that the United States was acting inconsistently*" with its WTO obligations.[632]

469. In *U.S. – Zeroing (EC) (21.5)*, the Appellate Body held that "the *timing* of a measure cannot be determinative of whether it bears a sufficiently close nexus with a Member's implementation of the recommendations and rulings of the DSB so as to fall within the scope of an Article 21.5 proceeding".[633] Further, in that appeal, the Appellate Body ruled that "measures taken to comply" may be taken *before* the DSB's recommendation and rulings are adopted.[634] If compliance measures may be taken before the DSB's recommendations and rulings, it follows *a fortiori* that they may be taken before the end of the RPT. In fact, virtually all "measures taken to comply" are adopted before the end of the RPT, because the RPT is a period granted for the adoption of such measures, and, under Article 21.3 of the DSU, compliance must be secured by measures taken before the end of the RPT.

470. In this case, the Panel examined the fact that Reviews 4 and 5 were taken before the DSB's recommendations and rulings. As explained in Section V.B.3(d) above, the Panel rightly concluded that "the fact that Reviews 4 and 5 pre-dated adoption of the DSB's recommendations and rulings is not sufficient to break the very strong substantive links between those measures and the original dispute".[635] The Panel was, therefore, entitled to rule upon the consistency of these Reviews, even though they pre-dated the DSB's recommendations and rulings and, hence, the end of the RPT.

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[632] United States' Appellant's Submission, para. 105 (emphasis added). *See also Id.*, para. 24 (noting Reviews 4, 5 and 6 "were concluded long before the end of the RPT" and therefore "could [not] form the basis for finding the United States failed to comply with the DSB's recommendations and rulings in this dispute"). The U.S. argument with regard to the date of adoption does not apply to Review 9, since Review 9 was concluded after the end of the RPT.
[633] Appellate Body Report, *U.S. – Zeroing (EC) (21.5)*, para. 224.
[634] *See, e.g.,* Appellate Body Report, *U.S. – Zeroing (EC) (21.5)*, para. 224.
[635] Panel Report, para. 7.79.

471. Review 6 was adopted on 12 October 2007, just a few weeks before the RPT expired on 24 December 2007. With respect to the timing of this Review, the Panel recorded the United States' arguments as follows:

> The United States acknowledges that USDOC issued its final results in Review 6 after the adoption of the DSB's recommendations and rulings, but asserts that this determination (dated 12 October 2007) did not occur around the same time as US withdrawal of the administrative reviews subject to the DSB's recommendations and rulings, and did not closely correspond to the expiration of the RPT (on 24 December 2007).[636]

472. In this appeal, the United States now argues that the adoption of "measures taken to comply" must not just "*closely correspond* to the expiration of the RPT", but must fall *after* the end of the RPT;[637] if entries must be made after the end of the RPT to be "measures taken to comply", so, of course, must the periodic review covering those entries occur after the end of the RPT. As noted, this argument is contrary to the Appellate Body's findings that measures may be taken to comply much earlier than the end of the RPT, even before the DSB's recommendations and rulings are adopted.[638]

473. In fact, if measures taken to comply are not adopted before the end of the RPT, the implementing Member would fail to comply with its obligations under Article 21.3 of the DSU to bring its measures into conformity by the end of the RPT. In sum, the U.S. argument is without foundation.

#### (ii) ***Dates of Entry of Imports Have No Relevance for Assessing Whether a Panel Has a "Basis" to Examine the Consistency of "Measures Taken to Comply"***

474. The United States also argues that "because Reviews 4, 5, 6 and 9 do not cover entries occurring after the end of the RPT, the application of zeroing in those reviews … *cannot serve as a basis for a finding of inconsistency*".[639]

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[636] Panel Report, para. 7.38.
[637] *See, e.g.*, United States' Appellant's Submission, para. 103 (asserting that the Appellate Body's findings that the United States had failed to comply, in *U.S. – Zeroing (EC) (21.5)*, turned on the fact that the final results of certain of the periodic reviews at issue "were published after the conclusion of the RPT", and that certain of the assessment instructions at issue were "issued after the conclusion of the RPT").
[638] *See, e.g.,* Appellate Body Report, *U.S. – Zeroing (EC) (21.5)*, para. 224.
[639] United States' Appellant's Submission, para. 89 (emphasis added). *See also Id.*, paras. 60 (arguing the Panel erred in finding Reviews 4, 5, 6 and 9 WTO-inconsistent because "[a]ll of those reviews … covered entries made before the end of the RPT"), 86 (noting "Reviews 4, 5, and 6 … all involve entries made before the RPT

475. Japan disagrees. If a measure is one "taken to comply", a panel must rule upon its "consistency with the covered agreements", under Article 21.5 of the DSU, if it is part of the terms of reference. A panel's authority to rule upon the "consistency" of a "measure taken to comply" is not affected by the fact that goods covered by the measure entered before the end of the RPT. Consistent with this view, in *U.S. – Softwood Lumber IV (21.5)*, the Appellate Body also took into account the date of the determination of the First Assessment Review, and not the dates of the entries covered by the Review.[640]

476. Furthermore, as outlined in paragraph 464, this argument appears to be premised on the United States' view that the DSB's recommendations and rulings regarding periodic reviews impose implementation obligations solely in connection with entries that occur after the end of the RPT. Thus, subsequent periodic reviews, to the extent covering entries that occur before the end of the RPT, are not "taken to comply" with the DSB's recommendations and rulings, and cannot show a failure to comply with them.

477. In Section IV.D.2(a) above, Japan has addressed this argument in detail. Japan has explained that the Panel in this dispute, as well as both the panel and the Appellate Body in *U.S. – Zeroing (EC) (21.5)*, correctly concluded that the date of an entry is not determinative in deciding whether a WTO-inconsistent periodic review must be brought into conformity with WTO law.[641]

478. For the reasons stated in Section IV.D.2(a), there is no basis for the U.S. argument that the DSB's recommendations and rulings impose implementation obligations solely in relation to entries that occur after the end of the RPT.

#### (iii) ***Reviews 4, 5, 6 and 9 Have On-Going Legal Effects***

479. The United States makes the very curious remark that the "compliance Panel . . . never explained the significance of its finding of inconsistency [regarding Reviews 4, 5 and 6] or whether it was anything more than an advisory opinion or *obiter dicta*".[642] The United States continues, stating that a finding of inconsistency should only be made if the "measure

…. None of these reviews therefore provides a basis to find that the United States was acting inconsistently with the AD Agreement and the GATT 1994 at the time of Japan's Article 21.5 panel request"), 86 (footnote 116) (making the same argument with respect to Review 9, which "involves entries that all occurred prior to the expiry of the RPT").

[640] Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, para. 84.

[641] Panel Report, para. 7.147; Appellate Body Report, *U.S. – Zeroing (EC) (21.5)*, paras. 308-309.

[642] United States' Appellant's Submission, para. 102.

is in existence after the end of the RPT and is 'affecting' the operation of a covered agreement after the end of the RPT".[643] The United States also asserts that these three reviews "did not have any effects after the end of the RPT".[644]

480. The United States overlooks the Panel's express finding that Reviews 4, 5 and 6 have ongoing legal effects. Specifically, in examining whether these reviews were "measures taken to comply" for purposes of Article 21.5 of the DSU, the Panel held:

> importer-specific assessment rates determined in Reviews 4, 5 and 6 continued to have legal effect long after the adoption of the DSB's recommendations and rulings.[645]

481. In making this finding, the Panel referred to its earlier findings that:

> As with Review 4, this finding is confirmed by the fact that importer-specific assessment rates determined in Reviews 5 and 6 continued to have effects after both the adoption of the DSB's recommendations and rulings, and the expiry of the RPT.[646]

482. In support of these findings, the Panel made the following two factual findings, which have not been appealed by the United States:

> Japan has demonstrated that some of the import entries covered by the Review 4 importer-specific assessment rates had not been liquidated by the commencement of this proceeding …[647]

> Japan has demonstrated that some of the import entries covered by the Review 5 and 6 importer-specific assessment rates had not been liquidated by the commencement of this proceeding …[648]

483. With respect to Review 9, it was adopted after the end of the RPT and, hence, *began* to apply, and produce legal effects, after that date.

484. The United States is, therefore, wrong to assert that Reviews 4, 5 and 6 do "not have any effects after the end of the RPT".[649] The assessment rates from these Reviews continue

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[643] United States' Appellant's Submission, para. 102.
[644] United States' Appellant's Submission, para. 90.
[645] Panel Report, para. 7.79.
[646] Panel Report, para. 7.75. *See also Id.*, para. 7.74.
[647] Panel Report, para. 7.74 (footnote 101).
[648] Panel Report, para. 7.75 (footnote 102).
[649] United States' Appellant's Submission, para. 90.

to have effects after the end of the RPT and will serve as the legal basis for duty collection measures to be taken, after that time, with respect to entries covered by these Reviews.

485. Finally, the Panel's findings regarding these Reviews are not *obiter*, but are recorded in paragraph 8.1(b) of its "Conclusions and Recommendations". The United States itself recognized the legal significance of a finding of non-compliance in *U.S. – Zeroing (EC) (21.5)*. The Appellate Body records the United States' argument as follows:

> The United States notes that recommendations and rulings by the DSB do not create an obligation to comply with the covered agreements, as that obligation already exists in the covered agreements themselves; rather, it is the right to a remedy against a breach of the covered agreements (such as compensation or suspension of concessions or other obligations) that arises only after a Member fails to comply with the DSB's recommendations and rulings within the reasonable period of time.[650]

The Appellate Body continued:

> According to Article 22.1 of the DSU, compensation and suspension of concessions are temporary measures available in the event that the DSB's recommendations and rulings are not implemented within the reasonable period of time.[651]

486. Accordingly, the United States' adoption of WTO-inconsistent "measures taken to comply" gives rise to rights under Article 22.1 of the DSU to compensation or suspension of concessions. As the United States' own arguments in *U.S. – Zeroing (EC) (21.5)* recognize, there is nothing in any way novel about this outcome, as the same principles apply to all disputes, under all covered agreements, including the *Anti-Dumping Agreement*.

487. The United States seeks to evade the disciplines in Article 22.1 of the DSU because the post-RPT effects of Reviews 4, 5 and 6 linger because of court injunctions. It contends that "any liquidation occurring after the RPT would have occurred at that time (rather than earlier) solely as a result of judicial review proceedings".[652]

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[650] Appellate Body Report, *U.S. – Zeroing (EC) (21.5)*, para. 298.
[651] Appellate Body Report, *U.S. – Zeroing (EC) (21.5)*, para. 298.
[652] United States' Appellant's Submission, para. 105 (emphasis added). *See also Id.*, paras. 24 ("[A]s a result of judicial review, assessment of duties calculated in [Reviews 4, 5 and 6] was enjoined prior to the expiry of the RPT and remained enjoined throughout this compliance dispute. Accordingly, these reviews did not result in any post-RPT effects which could form the basis for finding the United States failed to comply with the DSB's

488. This argument is a reprise – with a twist – of the United States' argument that *original* measures need not be brought into conformity with WTO law if duties have not been collected at the end of the RPT due to domestic court injunctions. The twist is that it now applies to "measures taken to comply".

489. On this argument, the post-RPT legal effects of "measures taken to comply" – like those of original measures – are to be *ignored* in assessing compliance, if the effects linger because of court injunctions. Japan has explained, in paragraphs 277-292, that court injunctions issued in U.S. court proceedings are acts of U.S. courts, issued pursuant to powers conferred by U.S. law, on the basis of legal standards that form part of U.S. law. In WTO law, court injunctions are attributable to, and the responsibility of, the United States; they cannot "exonerate" a Member from its obligations to comply with WTO law; they are simply a fact that must be taken into account in assessing the measure.[653]

490. As Japan has noted, Articles 3.7, 19.1, 21.1 and 21.3 of the DSU do not exonerate an implementing Member from its obligation to bring an original measure into compliance with WTO law in circumstances where the post-RPT legal effects of the measure stem from court injunctions that are the responsibility of the Member.

491. Equally, neither Article 21.5, nor any other provision, exonerates an implementing Member from its obligation to ensure that "measures taken to comply" are "consistent" with WTO law, in circumstances where the post-RPT legal effects of the measure linger due to court injunctions that are the responsibility of the Member. Instead, in these circumstances, Article 21.5 requires a compliance panel to rule upon the "consistency" of a "measure taken to comply", if requested to do so, taking into account the fact that the measure will have post-RPT legal effects. As the Panel also noted, the "factual circumstances" and "reasons why the [implementing Member] finds itself in continuing violation are not pertinent to our findings".[654]

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recommendations and rulings in this dispute"), 62 ("[T]he zeroing in Reviews 4, 5, and 6 did not result in any actions or effects that were inconsistent with the covered agreements after the conclusion of the RPT").
[653] Appellate Body Report, *U.S. – Shrimp*, para. 173 (emphasis added), *citing* Appellate Body Report, *U.S. – Gasoline*, p. 28; Jennings and Watts (eds.), *Oppenheim's International Law*, 9th ed., Vol. I (Longman's 1992), p. 545; and I. Brownlie, *Principles of Public International Law*, 4th ed. (Clarendon Press, 1990), p. 450.
[654] Panel Report, para. 7.153 and footnote 167.

(b) ***Conclusion with Respect to Reviews 4, 5, 6 and 9***

492. The Panel correctly found that Reviews 4, 5, 6 and 9 are "measures taken to comply". As a result, the Panel had a valid legal "basis" to rule upon the "consistency" of the reviews under Article 21.5, without any further examination of threshold issues. None of the United States' three arguments to the contrary are availing.

## VI. THE PANEL PROPERLY FOUND THE UNITED STATES TO BE IN VIOLATION OF ARTICLES II:1(A) AND II:1(B) OF THE GATT 1994

### A. Introduction and Summary of U.S. Arguments

493. The Panel found that certain USDOC liquidation instructions and USCBP liquidation notices (collectively referred to as the "duty collection measures") concerning entries covered by Reviews 1, 2, 7 and 8 are "measures taken to comply", under Article 21.5 of the DSU. These duty collection measures were all issued after the end of the RPT. Pursuant to Article 21.5 of the DSU, the Panel ruled upon the "consistency" of these measures with the covered agreements, finding, as alleged by Japan, that they are inconsistent with Articles II:1(a) and II:1(b) of the GATT 1994.[655]

494. The United States appeals the Panel's findings.[656] The United States does not allege that the duty collection measures are *consistent* with Article II:1 of the GATT 1994. Rather, the United States argues that the Panel's findings are "entirely derivative" of its findings that the United States had failed to implement the DSB's recommendations and rulings by bringing Reviews 1, 2, 7 and 8 into conformity with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.[657] Additionally, the United States argues that the duty collection measures "*cannot serve as a basis for a failure to comply*" or "support a corollary finding" that the United States acted inconsistently with Articles II:1(a) and II:1(b).[658]

495. As explained in the Sections below, the United States' arguments lack merit. The Panel had a proper "basis" to examine the WTO consistency of the duty collection measures, because those measures are "taken to comply" under Article 21.5 of the DSU. Because the United States' appeal against the Panel's "basis" for its finding implicitly constitutes a

[655] Panel Report, para. 7.208.
[656] United States' Appellant's Submission, paras. 106-108.
[657] United States' Appellant's Submission, para. 107.

challenge to the Panel's finding that the duty collection measures constitute "measures taken to comply", Japan demonstrates in Section VI.B below that the Panel's finding was correct in this regard.

496. Having established that the duty collection measures are "taken to comply", the Panel reviewed the evidence offered by Japan, which it found demonstrated that the measures violated Articles II:1(a) and II:1(b) because they involved the collection of duties on bearings from Japan in excess of the bound rates set forth in the U.S. Schedule of Concessions, and were not covered by the safe harbour in Article II:2(b) because they are not anti-dumping duties applied consistently with WTO law.[659]

497. Accordingly, and for the reasons explained below, Japan requests that the Appellate Body deny the United States' appeal, and uphold the Panel's findings against the duty collection measures at issue, under Articles II:1(a) and (b) of the GATT 1994.

## B. The Panel Properly Found the Duty Collection Measures to Be Measures Taken to Comply

498. As noted at paragraph 494, the United States does not formally challenge the Panel's findings that the duty collection measures are "measures taken to comply".[660] Nonetheless, in Section V of its Appellant's Submission, the United States raises several arguments that implicitly question the Panel's findings in this regard, and that, as such, question the Panel's jurisdiction over the duty collection measures.

499. As explained at paragraph 311, a panel, and the Appellate Body, must verify its jurisdiction before proceeding to assess a matter on the merits.[661] To assure the Appellate Body that it enjoys the authority to deny the United States' appeal concerning the duty collection measures, and to uphold the Panel's findings on the merits, Japan explains below why the duty collection measures are "measures taken to comply".

500. Japan refers the Appellate Body to Section V.B.1 above, which sets out the legal standard for determining whether measures are properly considered as "taken to comply". Under that standard, the duty collection measures concerning entries covered by Reviews 1, 2,

[658] United States' Appellant's Submission, para. 108 (emphasis added).
[659] Panel Report, para. 7.208.
[660] Panel Report, para. 7.200.

7 and 8 bear a "particularly close relationship"[662] to the recommendations and rulings, and Reviews 1, 2, 7 and 8, which are subject to the DSB's recommendations and rulings. In short, after the end of the RPT, the duty collection measures *enforced* the WTO-inconsistent assessment rates in these Reviews. Thus, they are "measures taken to comply".

501. The Panel agreed, finding as follows:

> In our view, the relevant liquidation measures are sufficiently closely connected to the original dispute, such that they should be treated as "measures taken to comply" with the recommendations and rulings resulting from that dispute. This is because the relevant liquidation measures are the means by which the United States collects the final anti-dumping duties assessed in the administrative reviews at issue in the original proceeding. Any WTO-inconsistency in those administrative reviews regarding the calculation of the margin of dumping established in the original dispute is necessarily carried over into the subsequent liquidation measures. For these reasons, (and in the absence of any claims by the United States to the contrary) we find that the liquidation measures challenged by Japan are "measures taken to comply" within the meaning of Article 21.5 of the DSU.[663]

502. To elaborate further, the background of the duty collection measures (which the Panel referred to as "liquidation measures") is that they are "the means by which the United States collects the final anti-dumping duties assessed in"[664] Reviews 1, 2, 7 and 8, which were each subject to the DSB's recommendations and rulings. As reviewed in Section IV.B.3, USDOC issues liquidation instructions based on the importer-specific assessment rates determined in periodic reviews, and USCBP issues liquidation notices and collects duties based on USDOC's liquidation instructions. The duty collection measures at issue, therefore, enforced duty collection based on the WTO-inconsistent assessment rates determined in Reviews 1, 2, 7 and 8.

503. In terms of their *nature or subject matter*, these duty collection measures are taken pursuant to, and enforce, the assessment rates in periodic reviews that were found to be WTO-inconsistent in the original proceedings, namely Reviews 1, 2, 7 and 8. Thus, they

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[661] Appellate Body Report, *Mexico – Corn Syrup (21.5)*, para. 36 (footnotes omitted). *See also* Appellate Body Report, *U.S. – 1916 Act*, para. 54.
[662] Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, para. 77.
[663] Panel Report, para. 7.200.
[664] Panel Report, para. 7.200.

relate to the *same* products and the *same* companies as those Reviews. Moreover, they apply the *same* WTO-inconsistent importer-specific assessment rates determined in those Reviews (or an amendment thereto[665]). Duty collection based on these WTO-inconsistent rates is precisely what Japan challenges in this dispute.

504. Moreover, with respect to *effects*, these duty collection measures have "the effect of undermining compliance", and of "circumvent[ing]" the DSB's recommendations and rulings with respect to Reviews 1, 2, 7 and 8.[666] Specifically, the duty collection measures secure duty collection at importer-specific assessment rates determined in Reviews 1, 2, 7 and 8 that the DSB found to be WTO-inconsistent. Through the duty collection measures, the United States collects definitive anti-dumping duties in excess of properly calculated margins of dumping.

505. As for *timing*, the duty collection measures were all issued *after the end of the RPT*.[667] Thus, there is no argument that the timing of these measures in some way undermines a finding that they were "taken to comply".

506. In sum, the duty collection measures at issue enforce, after the expiry of the RPT, the importer-specific assessment rates determined in Reviews 1, 2, 7 and 8, which the DSB found to be WTO-inconsistent in the original proceedings. Thus, based on an examination of their factual and legal background, nature, effects, and timing, these duty collection measures bear a "particularly close relationship" to the DSB's recommendations and rulings with respect to Reviews 1, 2, 7 and 8. They are, therefore, "measures taken to comply" under Article 21.5 of the DSU. The Appellate Body should confirm this finding, and satisfy itself of its jurisdiction to examine the "consistency" of these duty collection measures with the covered agreements.

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[665] Panel Report, para. 7.139 (footnote 148).
[666] Appellate Body Report, *U.S. – Upland Cotton (21.5)*, para. 205. *See also* Appellate Body Report, *U.S. – Zeroing (EC) (21.5)*, para. 252 ("In our view, the use of zeroing to calculate assessment rates in administrative reviews issued after the end of the reasonable period of time is an indication that these reviews could undermine the compliance allegedly achieved by the United States") and para. 256 ("In our view, the United States misinterprets the findings of the Appellate Body in *U.S. – Softwood Lumber IV (Article 21.5 – Canada)* as requiring that the 'closely connected' measures actually undermine the compliance otherwise achieved by the implementing Member").
[667] *See* Annexes 1, 2, 7 and 8 submitted with Japan's Updated Answers of 10 December 2008.

## C. The Panel Properly Found that the Duty Collection Measures Are Inconsistent with Articles II:1(a) and (b) of the GATT 1994 by Effecting Collection of Duties in Excess of Bound Rates

### 1. Summary of the Panel's Findings that the Duty Collection Measures Are WTO-Inconsistent

507. Having found that the duty collection measures are "measures taken to comply", the Panel concluded, on the basis of evidence provided by Japan, that the USDOC liquidation instructions and USCBP liquidation notices at issue in these proceedings violate Articles II:1(a) and II:1(b) of the GATT 1994.[668]

508. The Panel emphasized that the duty collection measures challenged by Japan are "*new measures*",[669] adopted after the end of the RPT, that it had found constitute "measures taken to comply".[670] The Panel noted that the question before it was simply whether these "*new measures*", as "measures taken to comply", are inconsistent with Articles II:1(a) and II:1(b) because they enforced duty collection on bearings from Japan in excess of the bound rates set forth in the U.S. Schedule of Concessions.

509. The Panel noted that Article II:2(b) of the GATT 1994 allows Members to collect anti-dumping duties in excess of bound rates only if those duties are applied consistently with the requirements of Article VI, as implemented by the *Anti-Dumping Agreement*.[671] However, the Panel recalled that in the present case:

> the safe harbour provided for in Article II:2(b) does not apply to the liquidation actions at issue in this proceeding, since those actions were taken pursuant to administrative reviews, and importer-specific assessment rates determined therein, that had been found to be WTO-inconsistent in the original proceeding.[672]

510. The Panel recalled that Reviews 1, 2, 7 and 8 were found, in the original proceedings, to be inconsistent with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.[673] Because the duty collection measures at issue in the compliance proceedings were "based entirely" on those WTO-inconsistent Reviews, the Panel found that anti-dumping duties collected pursuant to those duty collection measures in excess of bound

[668] Panel Report, para. 7.208.
[669] Panel Report, para. 7.207 (footnote 219) (emphasis added).
[670] Panel Report, paras. 7.199-7.200.
[671] Panel Report, paras. 7.205, 7.207.
[672] Panel Report, para. 7.207.

rates could not benefit from the safe harbour of Article II:2(b) and were, therefore, inconsistent with Articles II:1(a) and II:1(b).[674]

511. The Panel noted the United States' argument that "the liability for anti-dumping duties challenged by Japan", and collected pursuant to the duty collection measures at issue, "was incurred prior to the expiry of the RPT" on entries that occurred before that date.[675] To the United States, as long as it applied WTO-consistent cash deposits to new entries occurring after the end of the RPT (which it still does not, as evidenced by the Panel's finding that Review 9 is WTO-inconsistent), it had taken sufficient implementation action.

512. As addressed in other parts of its report, the Panel reiterated that "the United States' implementation obligations apply to actions taken after the expiry of the RPT, even if those actions relate to import entries that occurred at an earlier date".[676] As noted above, the Panel found it significant that the duty collection measures challenged by Japan are "new measures", which constituted "measures taken to comply" and which the Panel considered to be "separate from the cash deposits applied at the time of entry".[677] The Panel concluded that "[t]he fact that the United States no longer collects those [earlier] cash deposit rates therefore has no bearing on Japan's Article II claims regarding" the duty collection measures.[678]

### 2. **Legal Argument**

513. The United States contends that the Panel erred in finding that the duty collection measures are inconsistent with Articles II:1(a) and II:1(b) of the GATT 1994.

514. Strikingly, the United States does not allege that the duty collection measures are *consistent* with Article II:1 of the GATT 1994. It appears to concede that the Panel properly found that the United States violated Articles II:1(a) and II:1(b) by enforcing duty collection on bearings from Japan in excess of the bound rates set forth in the U.S. Schedule of Concessions.

515. Instead, the United States offers three arguments in support of its appeal on this point: (1) Japan's Article II:1 claims against the duty collection measures "are entirely derivative of

[673] Panel Report, para. 7.207.
[674] Panel Report, para. 7.207.
[675] Panel Report, para. 7.207 (footnote 219).
[676] Panel Report, para. 7.207 (footnote 219).
[677] Panel Report, para. 7.207 (footnote 219).
[678] Panel Report, para. 7.207 (footnote 219).

Japan's claims under Articles 2.4 and 9.3 of the AD Agreement", and that it was therefore "entirely unnecessary to make any Article II findings";[679] (2) the entries covered by the duty collection measures occurred before the end of the RPT;[680] and, (3) the duty collection measures would have had no ongoing legal effects after the end of the RPT, but for the fact that duty collection had been enjoined pursuant to domestic litigation.[681] To the United States, arguments (2) and (3) demonstrate the absence of a "*basis*", or authority, for the Panel to rule upon the "consistency" of the duty collection measures in these Article 21.5 proceedings.

516. Japan addresses argument (1) in Section VI.C.2(a) below, and arguments (2) and (3) in Section VI.C.2(b).

### (a) *The Panel's Findings Concerning the Duty Collection Measures under Articles II:1(a) and (b) Are Not "Entirely Derivative" of Its Findings Concerning Reviews 1, 2, 7 and 8 Under the Anti-Dumping Agreement and Article VI:2 of the GATT 1994*

517. Like "*any* act or omission" attributable to a Member,[682] and as found by the Panel,[683] the United States' liquidation instructions and notices are "measures". The Panel cited to evidence of these duty collection measures in Exhibits JPN-40.A, and JPN-77 to JPN-87.[684] Japan's Article II:1 claims in connection with these measures are not "entirely derivative" of its claims under the *Anti-Dumping Agreement* regarding periodic reviews, as the United States asserts,[685] because those claims challenge *separate measures* with respect to a violation of *separate WTO obligations*.

518. While Reviews 1, 2, 7 and 8 were all adopted *before* the original panel proceedings began, the duty collection measures were all adopted *after* the end of the RPT.[686] The

[679] United States' Appellant's Submission, para. 107.
[680] United States' Appellant's Submission, paras. 60, 86, 89.
[681] United States' Appellant's Submission, paras. 24, 62, 105.
[682] Appellate Body Report, *U.S. – Zeroing (EC)*, para. 188.
[683] Panel Report, para. 7.207 (footnote 219) ("[T]he liquidation actions challenged by Japan are new measures ...").
[684] Panel Report, para. 7.208. In Exhibits JPN-77 to JPN-87, and JPN-40.A, Japan provided 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 provided annotations explaining the terms contained in the liquidation instructions and notices. In Exhibit JPN-90, Japan showed which liquidation instructions and notices relate to which original periodic reviews, and showed that the amount of duties collected in connection with importation exceeds the bound rates.
[685] United States' Appellant's Submission, para. 107.
[686] Annexes 1, 2, 7 and 8 submitted with Japan's Updated Answers of 10 December 2008.

USCBP liquidation notices are also adopted by a separate agency of the United States' Government than adopted the periodic reviews. These facts underscore that the measures involve *separate acts* of the United States.

519. The content of the measures also differs, because the duty collection measures are the acts by which the United States collects or levies duties, whereas the periodic reviews established *rates* at which duties would be subsequently collected or levied. In particular, the USCBP liquidation notices result from the USCBP's "computation"[687] of the total amount of duties due on a given entry. The USCBP makes this calculation by multiplying the assessment rate communicated by the USDOC and the entered value determined by USCBP.[688]

520. The fact that the duty collection measures and the periodic reviews are separate and distinct measures is also highlighted by the fact that mutually-exclusive legal remedies are available in U.S. law to challenge them. Duty collection measures issued by USCBP can be challenged only through a "protest" on limited grounds.[689] A "protest" cannot be used to challenge the USDOC's determination of the importer-specific assessment rates that underlie USCBP's measures. The USDOC's determination in a periodic review may only be subject to judicial review in separate proceedings commenced upon the issuance of USDOC's final determination, without awaiting USCBP's duty collection process.[690]

521. Japan's claims regarding the duty collection measures are not "entirely derivative"[691] of its claims regarding the periodic reviews, because they involve different measures, and different claims.

522. The United States cites no provision of 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, if a related periodic review is challenged under separate WTO provisions. The liquidation measures at issue nullify and impair Japan's benefits under

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[687] 19 C.F.R. § 159.1 (Exhibit JPN-115).
[688] *See supra* Section IV.B.3.
[689] *See* 19 U.S.C. § 1514(a), at http://www.law.cornell.edu/uscode/search/display.html?terms=1514&url=/uscode/html/uscode19/usc_sec_19_00001514----000-.html, and *supra* footnotes 254 and 255.
[690] *See* 19 U.S.C. § 1516a (Exhibit JPN-36).
[691] United States' Appellant's Submission, para. 107.

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.

523. Specifically, on importation, the entries at issue were subject to ordinary customs duties, as shown in Exhibit JPN-90.[692] In addition, subsequent to the end of the RPT, the United States collected additional import duties, on the same entries, through the duty collection measures. Exhibit JPN-90 identifies, by exporter, the additional duties collected through the duty collection measures. Exhibit JPN-90 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). Japan's claims regarding the periodic reviews do not address the cumulative amount of duties collected by the United States on the entries, as these Article II claims do.

524. In view of this evidence, the Panel properly found that the United States acted inconsistently with its obligations under Articles II:1(a) and (b) of the GATT 1994 by adopting the duty collection measures.[693]

525. Although Article II:2(b) of the GATT 1994 provides that a Member may normally levy anti-dumping duties in excess of rates bound by the Member in its Schedule of Concessions, it may do so only if those duties are "applied consistently with the provisions of Article VI" of the GATT 1994, as implemented by the *Anti-Dumping Agreement*.

526. The United States' duty collection measures do not meet this condition. As recalled by the Panel, duties collected under the duty collection measures at issue are "entirely based" on the importer-specific assessment rates calculated in Reviews 1, 2, 7 and 8.[694] Reviews 1, 2, 7 and 8 were found to be WTO-inconsistent in the original proceedings, and were not brought into conformity with the United States' WTO obligations by the end of the RPT.[695] Thus, anti-dumping duties collected pursuant to the duty collection measures were not "applied consistently with the provisions of Article VI" of the GATT 1994, as implemented by the *Anti-Dumping Agreement*.

[692] An earlier version of this exhibit was included at Exhibit JPN-45.
[693] Panel Report, para. 7.208.
[694] Panel Report, para. 7.207.
[695] Panel Report, paras. 7.154, 7.207.

527. The impact of the duty collection measures, and the relevance of Japan's Article II:1 claims, is considerably more than academic, and belies the United States' assertion that findings under Article II:1 were "entirely unnecessary".[696] Had each importer-specific assessment rate in Reviews 1, 2, 7 and 8 been "applied consistently" with the ceiling in the exporter's margin on the maximum amount of anti-dumping duties, as required by Article VI:2,[697] *no* anti-dumping duties would have been collected for any entries covered by reviews 1, 2, 7 and 8, because that ceiling is *zero*.[698]

### (b) ***Threshold Issues Raised by the United States Concerning the Panel's Authority to Rule Upon the Duty Collection Measures Under Article 21.5 of the DSU***

528. The United States argues that the duty collection measures "*cannot serve as a basis for a failure to comply*" or "support a corollary finding" that the United States acted inconsistently with Articles II:1(a) and (b).[699] As noted above, it offers two arguments in support of this conclusion: (1) that the entries covered by the duty collection measures occurred before the end of the RPT;[700] and, (2) that the duty collection measures would have had no ongoing legal effects after the end of the RPT, but for the fact that duty collection had been enjoined by U.S. courts.[701]

529. Rather than contest the WTO-inconsistency of the duty collection measures, the United States raises a *threshold issue that the Panel was not entitled to rule upon that inconsistency in Article 21.5 proceedings*.

530. The nature and formulation of the U.S. arguments lend support to this view. The United States' arguments are explicitly directed towards whether the Panel had a valid "basis"[702] – *i.e.*, authority – to rule upon the "consistency" of the duty collection measures. Neither of the arguments is directed to substantive issues under Articles II:1 or II:2 of the GATT 1994.

531. Significantly, the second of the two U.S. arguments mentioned in paragraph 528, relating to the ongoing, post-RPT legal effects of the duty collection measures, was

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[696] United States' Appellant's Submission, para. 107.
[697] *See* Appellate Body Report, *U.S. – Stainless Steel (Mexico)*, para. 102.
[698] Japan's Updated Answers of 10 December 2008, para. 6.
[699] United States' Appellant's Submission, para. 108 (emphasis added).
[700] United States' Appellant's Submission, paras. 60, 86, 89.
[701] United States' Appellant's Submission, paras. 24, 62, 105.

specifically addressed by the Panel in its findings that other measures at issue in these proceedings – subsequent periodic Reviews 4, 5, 6 and 9 – are "*measures taken to comply*" under Article 21.5.[703] Thus, this argument is essentially a threshold *jurisdictional* argument under Article 21.5 of the DSU.

532. The remaining argument, based on the dates of entry, is closely related to jurisdiction. As discussed above,[704] in the context of the United States' arguments regarding Reviews 4, 5, 6 and 9, the U.S. theory appears to be that DSB recommendations and rulings regarding periodic reviews impose implementation obligations solely in connection with entries that occur after the end of the RPT. As a result, under this theory, duty collection measures associated with subsequent periodic reviews, covering entries that occur before the end of the RPT, are not "taken to comply" with the DSB's recommendations and rulings, and cannot show a failure to comply with them. Thus, this argument raises a threshold issue under Article 21.5; namely, whether duty collection measures covering entries occurring before the end of the RPT can be "measures taken to comply" with the DSB's recommendations and rulings.

533. As explained below, the two threshold issues raised by the United States do not call into question the Panel's authority to rule upon the "consistency" of the duty collection measures, once it is established that they are "measures taken to comply". Under Article 21.5 of the DSU, a compliance panel is entitled, and indeed required, to rule upon the "consistency" of "measures taken to comply". If a measure is one "taken to comply", and if that measure forms part of the panel's terms of reference, *the panel has a necessary and sufficient "basis"*[705] *to rule upon the consistency of the measure*. Besides these two issues, there are *no other threshold issues* that must be addressed before examining the "consistency" of a "measure taken to comply" with the covered agreements. At that point, the relevant issues are solely those pertaining to the substantive consistency of the measures with the specific provisions of the covered agreements at issue.

534. In Section VI.B above, Japan explained why the Panel correctly found that the duty collection measures are "measures taken to comply". Each of these measures also formed

[702] United States' Appellant's Submission, para. 108.
[703] *See* Panel Report, paras. 7.74-7.75, 7.79.
[704] *See supra* Section V.D.2(a)(ii).
[705] United States' Appellant's Submission, para. 108.

part of the Panel's terms of reference.[706] As a result, the Panel had a valid legal "basis",[707] under Article 21.5, to rule upon the "consistency" of the duty collection measures, without any further examination of threshold issues.

535. As explained below, the two threshold issues that the United States raises on appeal fail to show that the Panel made any errors in deciding that it could rule upon the "consistency" of the four subsequent reviews. Japan addresses the two arguments in turn.

### (i) *Dates of Entry of Imports Have No Relevance for Assessing Whether a Panel Has a "Basis" to Examine the Consistency of "Measures Taken to Comply"*

536. The United States observes that the duty collection measures at issue concern entries of goods for which "the liability for antidumping duties … was incurred prior to the expiration of the RPT".[708] To the United States, therefore, the Panel's findings under Article II:1 were in error, because:

> compliance with DSB recommendations and rulings with respect to the duties a Member imposes on particular merchandise should be evaluated by examining the Member's treatment of the merchandise on the date that the merchandise enters its territory, not on the date when the ministerial act of collection of duties occurs.[709]

As a result, the United States concludes that the duty collection measures "cannot serve as a basis for a failure to comply".[710]

537. Japan disagrees. The United States relies on this same "date of entry" argument to argue that it was not required to bring the original periodic reviews (Reviews 1, 2, 3, 7 and 8) into conformity with its WTO obligations. In Section IV.D.2(a) above, Japan explained that the Panel in this dispute, and the panel and the Appellate Body in *U.S. – Zeroing (EC) (21.5)*, correctly rejected this argument.

538. The United States makes essentially the same argument to assert that, under Article 21.5, the Panel had no authority to rule upon the "consistency" of Reviews 4, 5, 6 and 9 in

[706] *See* WT/DS322/27, para. 12, Annex I.
[707] United States' Appellant's Submission, para. 108.
[708] United States' Appellant's Submission, para. 108.
[709] United States' Appellant's Submission, para. 108.
[710] United States' Appellant's Submission, para. 108.

these compliance proceedings. In Section V.D.2(a)(ii) above, Japan rebutted these arguments, which are essentially jurisdictional in character.

539. For the same reasons, the United States' "date of entry" argument does not show that the Panel erred in ruling upon the "consistency" of the duty collection measures under Article 21.5 of the DSU. In short, a panel's authority to rule upon the "consistency with the covered agreements" of a "measure taken to comply", under Article 21.5, is not affected by the fact that goods covered by the measure entered before the end of the RPT.

### (ii) *The Duty Collection Measures Have Legal Effects after the End of the RPT*

540. The United States notes that, even if the date of entry is not determinative of the United States' obligations, duty collection *pre-dating* the end of the RPT does not trigger those obligations. Although the duty collection measures at issue in these proceedings *post-dated* the end of the RPT, the United States suggests that they *would have preceded that date*, and *would not have had on-going legal effects after that date*, had it not been for "a delay due to domestic judicial review".[711]

541. The Panel found that the duty collection measures at issue were taken by the United States *after the end of the RPT*.[712] Thus, the *entirety* of the legal effects of these separate measures was produced after the end of the RPT. After the end of the RPT, these new measures were required to be fully consistent with the United States' WTO obligations.

542. Nonetheless, the United States seeks to evade a finding of inconsistency in these compliance proceedings because the duty collection measures were taken after the end of the RPT due to U.S. court injunctions. To recall, the United States contends that "any liquidation that occurred after the RPT resulted from a delay due to domestic judicial review".[713]

543. This argument is a slightly-modified reprise of the United States' argument that *original* measures need not be brought into conformity with WTO law if duties have not been collected at the end of the RPT due to domestic court injunctions. In Section IV.D.2(b) above, we explained that the Panel correctly rejected this argument with respect to the United

[711] United States' Appellant's Submission, para. 108.
[712] Panel Report, paras. 7.192, 7.207 (footnote 219). *See also* Annexes 1, 2, 7 and 8 submitted with Japan's Updated Answers of 10 December 2008.
[713] United States' Appellant's Submission, para. 108.

States' obligations to bring Reviews 1, 2, 3, 7 and 8 into conformity with its WTO obligations by the end of the RPT.

544. The United States also makes essentially the same "ongoing legal effects" argument to assert that, under Article 21.5, the Panel had no authority to rule upon the "consistency" of Reviews 4, 5, 6 and 9 in these compliance proceedings, because the legal effects of these compliance measures lingers after the end of the RPT due to court injunctions. In paragraphs Section V.D.2(a)(iii) above, we rebutted these arguments.

545. For the same reasons, the United States' argument that the duty collection measures would have been taken earlier, but for U.S. court injunctions, does not show that the Panel erred in ruling upon the "consistency" of the duty collection measures under Article 21.5 of the DSU.

546. As explained in the passages referenced above, court injunctions issued in U.S. court proceedings are acts of the U.S. courts, issued pursuant to powers conferred by U.S. law, on the basis of legal standards that form part of U.S. law. Court injunctions cannot "exonerate" an implementing Member from its obligation to ensure that "measures taken to comply" are "consistent" with WTO law, in circumstances where the measures are adopted after the end of the RPT due to court injunctions that are the responsibility of the implementing Member. The court injunctions are facts that must be taken fully into account in objectively assessing the measures at issue.

547. The consequences of the U.S. argument are well illustrated when viewed in the overall context of the United States' appeal. In earlier parts of its appeal, the United States asks the Appellate Body to ignore – to wish away – the ongoing effects of measures taken *before* the end of the RPT (*e.g.*, the original and certain of the subsequent periodic reviews) if those effects linger *after* the end of the RPT.

548. In this part of its appeal, the United States carries the argument one step further. Japan recalls that the duty collection measures at issue in these compliance proceedings were all taken *after* the end of the RPT. Yet, the United States asks the Appellate Body to *pretend* that they were taken *before* that date, since were it not for "a delay due to domestic judicial review", duty collection would have occurred before the end of the RPT.[714] The sole purpose

[714] United States' Appellant's Submission, para. 108.

of this fiction is for the United States to evade its obligations. It seems that there is never a point in time when the United States considers itself bound by its WTO obligations.

549. Panels and the Appellate Body cannot *pretend* that the legal status of domestic measures, as a matter of domestic law, differs from the reality in domestic law. These issues of municipal law are treated as questions of fact in WTO law, and the facts cannot be distorted to the benefit of one party or the other.[715]

550. Each Member assumes the consequences of its domestic laws, regulations, and measures *vis-à-vis* other Members. That is the essence of a multilateral rules-based system. Thus, if domestic laws and regulations result in the adoption of measures that are WTO-inconsistent, the Member is responsible. Similarly, if domestic laws and regulations result in injunctions that affect the status of measures, the Member remains responsible for the measure. It cannot plead domestic laws relating to court injunctions as an excuse for failing to live up to its WTO obligations. As the panel said in *Brazil – Retreaded Tyres*, court injunctions do not "exonerate" a Member from its WTO obligations.[716] A Member cannot, therefore, ask panels and the Appellate Body to do anything other than rule upon domestic law, and domestic measures, as they stand in the reality of domestic law, as a matter of fact.

551. Accordingly, that the duty collection measures were "delayed" beyond the end of the RPT because of a fact – domestic court injunctions – does not alter the conclusion that Article 21.5 requires a compliance panel to rule upon the "consistency" of a "measure taken to comply", taking into account the additional fact that the measure will have post-RPT legal effects.

### (c) *Conclusion with Respect to the Duty Collection Measures*

552. The Panel correctly found that the duty collection measures are "measures taken to comply". As a result, the Panel's mandate was to rule upon the "consistency" of the duty collection measures under Article 21.5. None of the United States' arguments to the contrary changes this conclusion. Japan requests that the Appellate Body deny the United States' appeal, and uphold the Panel's findings that the duty collection measures are inconsistent with Articles II:1(a) and II:1(b) of the GATT 1994.

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[715] *See supra* footnote 379.
[716] Panel Report, *Brazil – Retreaded Tyres*, para. 7.305.

## VII. CONCLUSION

553. For the foregoing reasons, Japan requests that the Appellate Body deny the United States' appeal, and uphold the Panel's findings that:

- the United States has failed to comply with the DSB's recommendations and rulings regarding the importer-specific assessment rates determined in Reviews 1, 2, 3, 7 and 8 that apply to entries covered by those Reviews that were, or will be, liquidated after the expiry of the RPT, and accordingly is in continued violation of its obligations under Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994;

- Review 9 was properly within the Panel's terms of reference;

- the United States has acted inconsistently with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 by applying zeroing in the context of Reviews 4, 5, 6 and 9; and,

- the United States is in violation of Articles II:1(a) and II:1(b) of the GATT 1994 with respect to the duty collection measures at issue.