UNITED STATES – MEASURES RELATED TO ZEROING AND SUNSET REVIEWS

RECOURSE TO ARTICLE 21.5 OF THE DSU BY JAPAN

WT/DS322

SECOND WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

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Table of Reports

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Australia – Leather (Article 21.5) (Panel)	Panel Report, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather – Recourse to Article 21.5 of the DSU by the United States*, WT/DS126/RW and Corr.1, adopted 11 February 2000
Australia – Salmon (Article 21.5) (Panel)	Panel Report, *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada*, WT/DS18/RW, adopted 20 March 2000
EC – Bananas III (Article 21.5) (US) (Panel)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States*, WT/DS27/RW/USA, circulated 19 May 2008
US – Corrosion-Resistant Steel Sunset Review (AB)	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004
US – FSC (Article 21.5) (AB)	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, adopted 29 January 2002
US – FSC (Article 21.5 II) (Panel)	Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Second Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/RW2, adopted 14 March 2006, as modified by the Appellate Body Report, WT/DS108/AB/RW2
US – Gambling (Article 21.5) (Panel)	Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/RW, adopted 22 May 2007

US – Gasoline (AB)	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996
US – Shrimp (Article 21.5) (AB)	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 by Malaysia*, WT/DS58/AB/RW, adopted 21 November 2001
US – Softwood Lumber Dumping (AB)	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004
US – Softwood Lumber IV (Article 21.5) (AB)	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS257/AB/RW, adopted 20 December 2005
US – Upland Cotton (AB)	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005
US – Upland Cotton (Article 21.5) (AB)	Appellate Body Report, *United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267/AB/RW, adopted 20 June 2008
US – Zeroing (Japan) (AB)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted 23 January 2007

CONFIDENTIAL INFORMATION

Exhibit US-A26 (BCI) contains proprietary business confidential information ("BCI"). Pursuant to Article 18.2 of the DSU and paragraph 3 of the Panel's Working Procedures, the United States has designated such information as BCI by enclosing it in double square brackets and marking it with a notation "Contains Business Confidential Information" at the top of each page containing the information. The United States requests that the participants in this proceeding respect the confidentiality of the BCI contained in these exhibits and ensure that it is not publicly disclosed.

I. INTRODUCTION

1. In this dispute under Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Japan challenges the U.S. implementation of the Dispute Settlement Body's ("DSB") recommendations and rulings in *US – Zeroing (Japan)*. As explained in the U.S. first written submission, and more fully below, the United States has eliminated all measures that were found to be WTO-inconsistent.

2. Article 21.5 of the DSU applies where there is a disagreement over the existence or consistency with a covered agreement of a measure taken to comply with the DSB's recommendations and rulings. Here, Japan has challenged the WTO consistency of three subsequent administrative reviews of *Ball Bearings from Japan*, but these measures fall outside the scope of this proceeding. Contrary to Japan's claim, the three reviews cannot in any objective way be considered measures taken to comply, and the United States has never maintained that they are. Japan also would like to include subsequent measures that were not identified in its panel request, but under Article 6.2 of the DSU, Japan was required to identify all measures at issue in this proceeding. This Panel should reject Japan's attempt to include future administrative reviews, and deny Japan's request to file a supplemental submission with respect to one such review.

3. Japan challenges the existence of measures taken to comply with the DSB's recommendations and rulings concerning five administrative reviews that were found inconsistent with the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") and the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"). The United States has fully implemented the DSB's recommendations and rulings with respect to these administrative reviews by withdrawing entirely the antidumping orders covering two of the administrative reviews and withdrawing the cash deposit rates established in the remaining three administrative reviews. As a result, none of the five administrative reviews are the basis for antidumping liability on entries occurring on or after the expiration of the reasonable period of time ("RPT") in this dispute.

4. Japan asserts that the United States must recalculate the final antidumping liability established in the five administrative reviews by revising the importer-specific assessment rates determined in these administrative reviews. Japan's theory of implementation must be rejected because it would create fundamental inequalities between retrospective and prospective antidumping systems, because it is not prospective in nature, because it would make a Member's implementation obligations dependent on domestic litigation, and because it is premised on misunderstandings of the AD Agreement.

5. As to the one challenged sunset review, the United States has shown that the majority of margins relied on by the U.S. Department of Commerce ("Commerce") in that determination are not WTO-inconsistent and demonstrate that dumping continued at above a *de minimis* level after the imposition of the order. The United States has not asked to re-litigate the finding from the

original proceeding with respect to sunset reviews, which only pertains to Commerce's reliance on margins calculated with the use of zeroing.

6. Japan lastly alleges that the United States has not eliminated the zeroing procedures that were found to be "as such" inconsistent with the AD Agreement and the GATT 1994. Japan attempts to show that the DSB's recommendations and rulings pertained to multiple measures, and that the United States has not removed all of them. However, the zeroing procedures were found by the original panel and the Appellate Body to be a *single* measure, as Japan itself maintained in the original proceeding, and it is this single measure that the United States has eliminated.

II. THE PANEL SHOULD GRANT THE U.S. REQUEST FOR PRELIMINARY RULINGS

A. The Three Subsequent Administrative Reviews of *Ball Bearings from Japan* Are Outside the Scope of This Proceeding

1. The United States Has Not Asserted That the Three Subsequent Administrative Reviews Are Measures Taken To Comply

7. Japan erroneously claims that the United States considers the three subsequent administrative reviews of *Ball Bearings from Japan* to be "measures taken to comply" with the recommendations and rulings of the DSB in the original dispute.[1] Much of Japan's argument focuses on U.S. statements that the cash deposit rates from the original administrative reviews were superceded by cash deposits rates from subsequent administrative reviews. In addition, Japan incorrectly asserts that the United States has "expressly declare[d]" that the three administrative reviews are measures taken to comply.[2] However, the United States, far from treating the three administrative reviews as measures taken to comply, has explicitly taken the exact opposite position.

8. In paragraph 44 of its first written submission, the United States explained that saying that the results of one administrative review were superceded by the results of another administrative review was not the same thing as saying that the subsequent review was a

[1] These three administrative reviews of *Ball Bearings and Parts Thereof from Japan* are identified as Review Nos. 4, 5, and 6 in Japan's first written submission. *See* Japan First Written Submission, paras. 52-53. More specifically, the reviews are: Review No. 4 – *Ball Bearings and Parts Thereof From Japan* (May 1, 2003 through April 30, 2004) (JTEKT, NSK, NPB and NTN); Review No. 5 – *Ball Bearings and Parts Thereof From Japan* (May 1, 2004 through April 30, 2005) (JTEK, NS, NPB, and NTN); Review No. 6 – *Ball Bearings and Parts Thereof From Japan* (May 1, 2005 through April 30, 2006) (Asahi Seiko, JTEKT, NSK, NPB and NTN).

[2] Japan Second Written Submission, para. 15.

"measure taken to comply" within the meaning of Article 21.5 of the DSU. As the United States noted, the measures subject to the DSB's recommendations and rulings were eliminated as an *incidental consequence* of the U.S. antidumping system when the cash deposit rate from one review was replaced by the cash deposit rate from the next review.[3] This fact does not somehow transform the subsequent reviews into "measures taken to comply."

2. The United States Does Not Make Arguments Focused on its Intent To Comply with the DSB's Recommendations and Rulings

9. Japan misrepresents the U.S. arguments concerning the three subsequent administrative reviews of *Ball Bearings from Japan*.[4] The United States has not asked this Panel to focus on the subjective intent of the United States in adopting the final results in the three administrative reviews. Rather, the United States has demonstrated that two of the three measures cannot objectively be considered measures taken to comply, because they were adopted long before the recommendations and rulings in the original proceeding. Moreover, in distinguishing the dispute settlement reports cited by Japan, the United States has discussed the very same factors examined by panels and the Appellate Body in those reports in determining whether a measure is a measure taken to comply. As the United States has shown, from an objective standpoint, the three subsequent administrative reviews are not measures taken to comply with the DSB's recommendations and rulings.

10. Concerning the two administrative reviews of *Ball Bearings from Japan* that were adopted prior to the DSB's recommendations and rulings,[5] the United States explained in its first written submission that measures taken by a Member prior to adoption of recommendations and rulings typically are not taken for the purpose of achieving compliance with recommendations and rulings and would not be within the scope of an Article 21.5 proceeding.[6] The Appellate Body has affirmed this interpretation of the DSU, noting that, "[a]s a whole, Article 21 deals with events *subsequent* to the DSB's adoption of recommendations and rulings in a particular dispute."[7] Therefore, the determinations from Review Nos. 4 and 5, made long before the DSB's

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[3] U.S. First Written Submission, paras. 52-69; *see also* Part III, *infra*.

[4] Japan Second Written Submission, paras. 19-27.

[5] These two reviews are Commerce's final determinations in the 2003-04 and 2004-05 administrative reviews of *Ball Bearings* (Review Nos. 4 and 5). The DSB adopted the Appellate Body report in this dispute on January 23, 2007. Commerce, however, made and published the final results of the 2003-04 administrative review in 2005, well before the adoption of the Appellate Body report. Likewise, Commerce made and published the final results of the 2004-05 administrative review in 2006, months before the adoption of the report.

[6] U.S. First Written Submission, paras. 33-34.

[7] *US – Softwood Lumber IV (Article 21.5) (AB)*, para. 70 (emphasis in original).

recommendations and rulings, cannot be considered measures taken to comply. Moreover, even were the intent of the United States determinative, it would not make sense to speak of the intent to comply, as there would not have been any recommendations and rulings with which the United States could have intended to comply when it issued the determinations in Review Nos. 4 and 5.

11. Japan alleges that the United States argues here, as it did in *US – Softwood Lumber IV (Article 21.5)*, that an administrative review *initiated* prior to the DSB's recommendations and rulings cannot be a measure taken to comply.[8] The United States, however, makes no such argument in this proceeding. The United States instead focuses on the date that the final results in the reviews were issued.[9] In this case, the final results in Review Nos. 4 and 5 were made and published prior to the DSB's recommendations and rulings. The date of initiation is irrelevant to the U.S. argument, a fact that Japan overlooks.

12. The report in *US – Softwood Lumber IV (Article 21.5),* cited by Japan, actually supports the U.S. position. In that dispute, Canada claimed that the U.S. first administrative review of the countervailing duty order on softwood lumber was a measure taken to comply. The United States argued that the review was initiated eight months before the DSB's recommendations and rulings were adopted and that it therefore could not be considered a measure taken to comply. In finding that the first administrative review was a measure taken to comply, the Appellate Body considered it important that "the *results* of the First Assessment Review were published 10 months *after* adoption of the recommendations and rulings of the DSB."[10] Unlike in *Softwood Lumber IV*, the *final results* of Review Nos. 4 and 5 were published *before* the DSB's recommendations and rulings.

13. As to all three of the subsequent administrative reviews in *Ball Bearings from Japan*, the U.S. first written submission examined factors that the Appellate Body considered in *US – Softwood Lumber IV (Article 21.5)*, and demonstrated why the present dispute is different and why those three reviews are not measures taken to comply.[11] It is surprising that Japan thinks

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[8] Japan Second Written Submission, paras. 20-21.

[9] U.S. First Written Submission, para. 34.

[10] *US – Softwood Lumber IV (Article 21.5)(AB)*, para. 84 (emphasis added).

[11] U.S. First Written Submission, paras. 38-39. The United States also distinguished the facts and reasoning in other disputes involving alleged measures taken to comply. *See* U.S. First Written Submission, paras. 40-47. As the United States has noted, although in these disputes panels and the Appellate Body explained how they were applying the particular requirements of Article 21.5 to the dispute at issue, they did not (indeed could not) establish a comprehensive standard to replace the agreed text of Article 21.5. *See* U.S. First Written Submission, para. 35.

that the United States has asked the Panel to focus solely on "the subjective intent of the implementing Member."[12]

14. Japan's exclusive focus on effects is disingenuous. The effect of the alleged measure taken to comply was just one factor that the Appellate Body examined in *US – Softwood Lumber IV (Article 21.5)*. As the United States pointed out, timing was another important element, although in this dispute, the timing of the subsequent administrative reviews demonstrates why they cannot be considered measures taken to comply.[13]

15. Japan is also mistaken to dismiss a Member's intentions altogether. The Appellate Body has considered that although a Member's intentions are not dispositive, they may nonetheless be relevant in determining whether a measure is a measure taken to comply.[14] In *US – Softwood Lumber IV (Article 21.5)*, for example, the Appellate Body gave weight to the fact that the United States acknowledged that a component of the countervailing duty determination in the first assessment review was adopted "in view of" the DSB's recommendations and rulings.[15] Along with other factors, including timing, this acknowledgment led the Appellate Body to conclude that the alleged measure taken to comply fell within the scope of the Article 21.5 proceeding. Here, unlike the first assessment review in *US – Softwood Lumber IV (Article 21.5),* the final results of three subsequent reviews were not made "in view of" the DSB's recommendations and rulings. This fact, when considered alongside the timing of the three reviews, demonstrates that they are not measures taken to comply.[16]

16. Lastly, the United States has not asked this Panel to take an approach that would interpret Articles 3.7, 19.1, and 21.5 of the DSU in an unharmonious fashion.[17] The United States offers the only plausible interpretation of the DSU provisions on compliance. A Member must withdraw the measures found to be WTO-inconsistent, or otherwise bring them into conformity with the covered agreements. Where a measure is not a measure taken to comply, there is no basis under DSU Article 21.5 for reviewing the measure's consistency with the covered agreements. Japan, however, would have this Panel examine any measure that has some relation, however tenuous, to the DSB's recommendations and rulings, but the DSU does not establish such a far-reaching rule. Where, as here, measures were adopted prior to the DSB's

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[12] Japan Second Written Submission, para. 23.

[13] For a more detailed discussion, *see* U.S. First Written Submission, para. 39; *see also* Part II.A.4, *infra*.

[14] *US – Softwood Lumber IV (Article 21.5)(AB)*, paras. 73, 84.

[15] *US – Softwood Lumber IV (Article 21.5)(AB)*, para. 84.

[16] U.S. First Written Submission, para. 39.

[17] Japan Second Written Submission, para. 25.

recommendations and rulings, those measures typically are not measures taken to comply within the meaning of Article 21.5. And even when looking at factors examined by past panels and the Appellate Body, the three subsequent administrative reviews of *Ball Bearings from Japan* cannot objectively be considered measures taken to comply.

3. Japan, and not the United States, Makes Contradictory Claims in This Dispute

17. Japan would like this Panel to treat U.S. arguments concerning the three subsequent administrative reviews of *Ball Bearings from Japan* as inconsistent. However, Japan's own arguments, and not those of the United States, are plagued by a "fundamental inconsistency."[18] Japan asserts that the three reviews are measures taken to comply, but at the same time argues that the United States has *omitted* to take the necessary action to implement the DSB's recommendations and rulings with respect to the three administrative reviews of *Ball Bearings* (Review Nos. 1, 2, and 3).[19] Japan's positions are mutually exclusive. Article 21.5 proceedings concern disagreements over the "existence *or* consistency" of measures taken to comply.[20] If Japan is making a claim under Article 21.5 that measures taken to comply do not exist, then that claim is inconsistent with a claim that such measures exist but are inconsistent with the covered agreements. Either the United States has taken measures to comply, or it has not. Japan cannot ignore the subsequent reviews as part of its existence claim, and at the same time focus on those same reviews as part of its consistency claim.

18. The United States has responded to each of Japan's contradictory arguments. 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.[21] This compliance was accomplished as an incidental consequence of the U.S. antidumping duty system, where the cash deposit rate from one review is replaced by that from a subsequent review.

19. As to Japan's *consistency* claim, Japan falls back on the argument that the United States has allegedly treated the three reviews as measures taken to comply for purposes of Japan's existence claim, even though the United States has said that these reviews are not measures taken to comply in response to Japan's consistency claim.[22] As the United States explained above, it

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[18] Japan Second Written Submission, para. 28.

[19] Japan First Written Submission, paras. 51-52.

[20] Emphasis added.

[21] U.S. First Written Submission, paras. 52-69.

[22] Japan Second Written Submission, para. 31.

has not argued, nor does it argue now, that the three subsequent reviews are measures taken to comply within the meaning of Article 21.5.[23] Moreover, contrary to Japan's assertion, the United States has not asked this Panel to focus on the U.S. intent behind the final results of the three subsequent reviews of *Ball Bearings from Japan*, and does not advocate an "*intent*-based approach."[24] Rather, the United States has shown that from an objective standpoint, the three subsequent reviews are not measures taken to comply.[25]

20. There is nothing contradictory about the U.S. argument, and the United States has not asked that the Panel adopt "divergent legal standards" when considering Japan's claims.[26] The United States has merely asked the Panel to adhere to the terms of Article 21.5 and find that the three subsequent reviews are not measures taken to comply within the meaning of that provision.

4. Japan Fails To Demonstrate That the Three Subsequent Reviews Are Measures Taken To Comply due to the Allegedly Close Relationship Between Those Reviews and the DSB's Recommendations and Rulings

21. Japan, after devoting considerable attention in its first written submission to inapposite dispute settlement reports, now tells the Panel that "reliance on this line of cases is not necessary in these proceedings" and that there is no reason to examine the existence of substantive connections between the three subsequent reviews and the DSB's recommendations and rulings.[27] Japan's argument starts from the flawed proposition that the United States has expressly declared the three subsequent reviews to be measures taken to comply. Once again, the United States refers to its previous arguments demonstrating why Japan is wrong in making such an assertion.[28] The three subsequent reviews are not declared measures taken to comply; rather the measures found to be WTO-inconsistent were removed as an incidental result of the U.S. antidumping system.

22. Japan, although dismissing the need to look at substantive connections, proceeds to an examination of the alleged "obvious and important" connections between the DSB's

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[23] *See* Part II.A.1, *supra*; *see also* U.S. First Written Submission, para. 44.

[24] Japan Second Written Submission, para. 31.

[25] *See* Part II.A.2, *supra; see also* U.S. First Written Submission, paras. 33-34; 38-44.

[26] Japan Second Written Submission, para. 31.

[27] Japan Second Written Submission, paras. 36-37.

[28] *See* Part II.A.1, *supra*.

recommendations and rulings and the three subsequent reviews of *Ball Bearings from Japan*.[29] However, as the United States has explained, there is no connection between Review Nos. 4 and 5 and the DSB's recommendations and rulings.[30] The final results of these two reviews were issued long before the recommendations and rulings came into existence.

23. Japan's attempt to establish close connections as to the 2005-06 administrative review of *Ball Bearings* also fails.[31] Commerce issued the final results in this review after the adoption of the DSB's recommendations and rulings. However, this determination did not occur around the same time as U.S. withdrawal of the administrative reviews subject to the DSB's recommendations and rulings,[32] and did not closely correspond to the expiration of the RPT. By contrast, in *US – Softwood Lumber IV (Article 21.5)*, the determination in the Section 129 proceeding (the declared measure taken to comply) and the first administrative review (the undeclared measure to comply) both occurred after the adoption of the DSB's recommendations and rulings. Moreover, the Section 129 determination and the determination in the first administrative review, which was issued a few days after the Section 129 determination, both closely corresponded to the expiration of the RPT.[33] In addition, unlike the alleged measure taken to comply in *US – Softwood Lumber IV (Article 21.5)*, the 2005-06 administrative review did not incorporate elements from a Section 129 determination "in view of" the DSB's recommendations and rulings,

24. Japan, citing *US – Softwood Lumber IV (Article 21.5)*, emphasizes the similarity between a specific component (i.e., zeroing) that was found to be WTO-inconsistent in the original proceeding, and a specific component of the three reviews that is challenged here.[34] However, even if the United States used zeroing in all three subsequent *Ball Bearings* reviews, the subject matter of the measures subject to the DSB's recommendations and rulings and the measure at issue was but one factor examined by the Appellate Body in *US – Softwood Lumber IV (Article 21.5)*[35] For example, the Appellate Body also accorded great importance to the timing of the declared and the undeclared measures taken to comply and their relationship to the DSB's

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[29] Japan Second Written Submission, para. 40.

[30] U.S. First Written Submission, paras. 33-34; *see also* Part II.A.2, *supra.*

[31] U.S. First Written Submission, paras. 38-39; *see also* Part II.A.2, *supra*.

[32] The cash deposit rate for the most recent review of *Ball Bearings* that was subject to the DSB's recommendations and rulings was replaced by the cash deposit from the 2003-04 review in 2005, around two years before the results of the 2005-06 review were announced.

[33] *US – Softwood Lumber IV (Article 21.5) (AB)*, para. 84.

[34] Japan Second Written Submission, paras. 42-44.

[35] *US – Softwood Lumber IV (Article 21.5) (AB)*, paras. 83-85.

recommendations and rulings. Here, as explained above, timing counsels against a finding that the three administrative reviews are measures taken to comply.

25. In attempting to rebut U.S. arguments on *Australia – Salmon (Article 21.5)* and *Australia – Leather (Article 21.5)*, Japan notes that the critical issue in an Article 21.5 proceeding is whether the implementing Member has complied with the recommendations and rulings of the DSB.[36] The United States does not disagree. However, Japan is wrong to suggest that the United States considers the question to be whether a Member has complied with its own declared compliance measure. An Article 21.5 proceeding examines, to the extent provided in its terms of reference, whether the Member concerned has adopted a measure taken to comply, and if so, whether that measure is consistent with the covered agreements. This inquiry enables a compliance panel to determine whether the Member has in fact complied with the DSB's recommendations and rulings. The panels in *Salmon* and *Leather* were merely looking at whether an undeclared measure could fall within the scope of an Article 21.5 proceeding, and one factor they examined was whether the undeclared measure could circumvent alleged compliance.[37] The panels in those disputes did not consider the nonsensical issue of compliance with a Member's declared measures taken to comply, and the United States does not request that the Panel adopt such an approach here.

26. Japan worries about the alleged lack of a remedy were the Panel to find that the three subsequent reviews of *Ball Bearings from Japan* fall outside the scope of this proceeding.[38] However, the jurisdiction of an Article 21.5 panel, and the scope of the overall dispute settlement system, is established by the covered agreements, as agreed to by all Members. If Japan or other Members wish to change the rules governing compliance proceedings, they must negotiate a change to the covered agreements. Japan cannot unilaterally seek to re-write the meaning of the WTO's dispute settlement provisions just because Japan thinks it is a more appropriate way of approaching an issue. And in any event, Japan has obtained relief here in the form of the removal of the specific cash deposit rates that were imposed by the United States and that Japan challenged.

27. Japan continues to assert the relevancy of *US – Upland Cotton (Article 21.5)* to its argument that the three subsequent administrative reviews are measures taken to comply.[39] However, what Japan fails to comprehend is that in *Upland Cotton*, the Appellate Body was considering the issue of the *existence* of measures taken to comply with the DSB's

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[36] Japan Second Written Submission, paras. 47-48.

[37] U.S. First Written Submission, paras. 40-42.

[38] Japan Second Written Submission, paras. 51-52.

[39] Japan Second Written Submission, paras. 53-56.

recommendations and rulings on serious prejudice. The Appellate Body found that to the extent that U.S. agricultural support payments were being made according to the same conditions and criteria as the payments subject to the DSB's recommendations and rulings, those payments were subject to the obligation under Article 7.8 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") to withdraw the subsidy or remove its adverse effects.[40] The Appellate Body then examined whether the adverse effects of the payments were removed, and determined that they were not, meaning the United States had not taken a measure to comply, and that it was acting inconsistently with the SCM Agreement.

28. Japan also dismisses an important difference between this dispute and the one in *Upland Cotton* – the *Upland Cotton* dispute involved an interpretation of the SCM Agreement, and not the AD Agreement. The issue of withdrawing an annually-recurring subsidy in the sense of Article 7.8 of the SCM Agreement, addressed by the Appellate Body in *Upland Cotton*, is not pertinent to a dispute concerning compliance with the AD Agreement, which has no provision analogous to Article 7.8.[41] And contrary to Japan's claim, the "withdrawal" of an antidumping measure under Article 3.7 of the DSU to comply with provisions of the AD Agreement is not the same thing as "withdrawal" of a subsidy under Article 7.8 of the SCM Agreement. Notwithstanding Japan's attempt to make two different things seem to be the same, *US – Upland Cotton (Article 21.5)* is not relevant here.

B. Future Administrative Reviews are Outside the Scope of This Proceeding

1. Japan Cannot Include Subsequent Administrative Reviews in This Proceeding

29. As confirmed by its recent request to file a supplemental submission, Japan would like to include in this proceeding any subsequent administrative reviews that it claims are "closely connected" to the DSB's recommendations and rulings.[42] However, as the United States explained in its first written submission,[43] under Article 6.2 of the DSU, a panel request must identify the *specific* measures at issue, and under Article 7.1, the Panel's terms of reference are limited to those specific measures. Here, each determination that sets a margin of dumping for a defined period of time is separate and distinct, and under Article 6.2, Japan had to identify each such measure in its panel request. Allowing Japan to challenge such subsequent administrative

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[40] *US – Upland Cotton (Article 21.5) (AB)*, paras. 248-49.

[41] In this regard, the United States notes that, pursuant to Annex 2 of the DSU, Article 7.8 of the SCM Agreements constitutes a special or additional rule or procedure within the meaning of Article 1.2 of the DSU.

[42] Japan Second Written Submission, paras. 59-65.

[43] U.S. First Written Submission, para. 50.

reviews would force the United States to defend against an ever-expanding target during the course of these proceedings.

30. The future measures are outside the scope of this proceeding for another reason. Under the DSU, subsequent reviews cannot be subject to dispute settlement because they were not in existence at the time of the Panel's establishment. As prior panels have recognized, a measure that did not yet exist at the time of panel establishment cannot be within a panel's terms of reference.[44]

31. Japan believes that its interpretation of the DSU would promote the prompt settlement of disputes.[45] However, Japan's preference cannot override the specificity requirement of Article 6.2. Japan cannot rewrite the DSU just because it feels that its own ideas of efficiency would be superior to the rules actually negotiated by Members.

32. Japan cites *Australia – Salmon (Article 21.5)* to support its argument that subsequent administrative reviews may be challenged in this proceeding. That dispute is inapposite to the facts before this Panel. In *Australia – Salmon (Article 21.5)*, Canada challenged an import ban on salmonids that was adopted by the Tasmanian government after the panel request. Australia objected that the Tasmanian ban was outside the scope of the proceeding because it was not identified in the request for establishment. The panel considered that Canada had identified in its panel request the Australian government's new salmon import policy, AQPM 1999/51 and more generally, any measures that Australia took, or would take, to implement that policy. The panel determined that the Tasmanian ban was similar to an implementing measure related to the policy adopted by Australia and identified in the panel request, and therefore found that the subsequent ban fell within the scope of the Article 21.5 proceeding.[46]

33. Unlike in *Australia – Salmon (Article 21.5)*, Japan is not challenging future measures that are related to a regulatory standard that was adopted to comply with the recommendations and rulings of the DSB. Rather, Japan is trying to challenge subsequent administrative reviews, which occur upon request of interested parties on a schedule that is established without regard to dispute settlement proceedings and pursuant to rights and obligations established in the AD Agreement. Any subsequent reviews of *Ball Bearings* therefore have a timetable independent of the present dispute, and independent of other prior reviews.

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[44] *US – Upland Cotton (Panel)*, paras. 7.158-7.160.

[45] Japan Second Written Submission, para. 61.

[46] *Australia – Salmon (Article 21.5) (Panel)*, para. 7.10(25)-(26).

34. Japan further cites *EC – Bananas III (Article 21.5) (US)* to argue that a compliance panel may consider a measure adopted years after the end of the RPT.[47] That point, however, is irrelevant here. In the *EC – Bananas III (Article 21.5)* proceeding, the measure at issue, the EC's bananas regime in effect after January 1, 2006, was identified in the panel request.[48] The question before that panel did not pertain to a failure to specify the measure, as required by DSU Article 6.2, but instead concerned whether an unreasonable amount of time had elapsed between the adoption of the DSB's recommendations and rulings and the U.S. challenge.[49] That panel's findings are therefore inapposite to this dispute.

2. The Panel Should Reject Japan's Request To File a Supplemental Submission

35. Japan considered that the U.S. objection to subsequent measures was "not ripe unless and until Japan seeks to include a future administrative review within the scope of these proceedings."[50] On September 15, 2008, Japan asked the Panel for permission to file a supplemental submission concerning an alleged additional measure taken to comply by the United States – the final results of the 2006-07 administrative review of *Ball Bearings from Japan*.[51] Whatever concerns Japan may have had about ripeness are now irrelevant given Japan's request.

36. The United States objects to Japan's request to file a supplemental submission. Japan never identified the 2006-07 administrative review in its request for establishment, as required by Article 6.2 of the DSU. For the reasons stated above, including that it is now well established that a measure that did not yet exist at the time of panel establishment (for example because it was not adopted until subsequent to the establishment of a panel) cannot be within that panel's terms of reference, Japan cannot now seek to include this subsequent measure. The 2006-07 review is outside the scope of this Article 21.5 proceeding, and Japan does not have the right to file a submission on a measure which is not properly before the Panel in the first place.[52]

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[47] Japan Second Written Submission, para. 61.

[48] *EC – Bananas III (Article 21.5) (US) (Panel)*, Annex A, p. A-2.

[49] *EC – Bananas III (Article 21.5) (US) (Panel)*, paras. 7.471-7.495.

[50] Japan Second Written Submission, para. 64.

[51] *Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews and Rescission of Reviews in Part*, 73 Fed. Reg. 52,823 (September 11, 2008).

[52] The United States also notes that in an email message dated September 16, 2008, the European Communities ("EC") asked the Panel to "extend the invitation to comment on Japan's submission to the EC and eventually to all third parties." The United States would like to express its disagreement with the EC's assertion that

III. THE UNITED STATES HAS COMPLIED FULLY WITH THE DSB'S RECOMMENDATIONS AND RULINGS WITH RESPECT TO THE FIVE ADMINISTRATIVE REVIEWS

37. In this dispute, the Appellate Body found five administrative reviews inconsistent with the AD Agreement and the GATT 1994.[53] As the United States explained in its first written submission, the United States has fully implemented the DSB's recommendations and rulings with respect to these administrative reviews by withdrawing entirely the antidumping orders covering two of the administrative reviews and withdrawing the cash deposit rates established in the remaining three administrative reviews.[54] As a result, none of the five administrative reviews are the basis for antidumping liability on entries occurring on or after the date of implementation. In this manner the United States has *prospectively* implemented the DSB's recommendations and rulings in this dispute as of the end of the RPT.[55]

A. Japan Has Failed To Establish that this Dispute Requires the Recalculation of Final Liability Determined in the Five Administrative Reviews

38. In response to the U.S. first written submission, Japan raises one principal argument with respect to the five original administrative reviews. Japan asserts that, to properly implement the DSB's recommendations and rulings, the United States must undo action taken with respect to imports that entered the United States prior to the date of implementation. Specifically, Japan argues that the United States must recalculate the final antidumping liability established in the five administrative reviews by revising the importer-specific assessment rates determined in these administrative reviews. Japan's theory of implementation must be rejected because it would create fundamental inequalities between retrospective and prospective antidumping systems, because it is not prospective in nature, because it would make a Member's

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"the measure in question also concerns imports from the EC." The single *Federal Register* notice cited by Japan in its September 15 request covers several distinct administrative reviews of individual antidumping duty orders on ball bearings, including the order on ball bearings from Japan. The U.S. Department of Commerce frequently publishes the results of several reviews as part of a single notice. As set forth in Japan's September 15 request, Japan intends to challenge only the results of the administrative review of ball bearings from Japan, and not those reviews pertaining to ball bearings from France, Germany, Italy, and the United Kingdom. The EC is therefore incorrect to assert that "the measure in question also concerns imports from the EC" and that it has a "specific trade interest" in the review that Japan is seeking to challenge.

[53] The five administrative reviews are referred to by Japan as "Review Nos. 1, 2, 3, 7 and 8." *See, e.g.,* U.S. First Written Submission, paras. 66-67. Japan also refers to them as "the five original periodic reviews." *See, e.g.,* Japan Second Written Submission, para. 103.

[54] *See* U.S. First Written Submission, Part V.A.

[55] *See* Japan Second Written Submission, para. 128 (stating that a WTO-inconsistent measure may remain unchanged during the RPT but a WTO member must bring that measure into conformity by the end of the RPT).

implementation obligations dependent on domestic litigation, and because it is premised on misunderstandings of the AD Agreement.

1. Japan's Argument Impermissibly Creates Inequalities Between Retrospective and Prospective Antidumping Systems

39. The United States explained in its first written submission that it would create substantial inequalities between the implementation obligations for retrospective and prospective antidumping systems if implementation obligations in antidumping disputes extended to unliquidated imports which entered the United States prior to the date of implementation (i.e., "prior unliquidated entries").[56] This is because there is no analogous concept of unliquidated entries in a prospective system. All duties are assessed at the time of importation. As a result, WTO antidumping disputes involving a prospective system can never result in an obligation to revise the WTO-inconsistent measure for imports which entered prior to the date of implementation. That is, the only obligation in a prospective system is to revise the measure as applied to imports entering after the date of implementation.

40. In contrast, under Japan's theory of implementation, there would be *two* implementation obligations under a retrospective system. The Member would modify the measure as it applies to imports occurring after the date of implementation. In addition, the Member would recalculate final liability as to any prior unliquidated entries.

41. There is no basis to conclude that the covered agreements require such radically different implementation obligations for prospective and retrospective systems. Instead, achieving equality in implementation obligations is the correct interpretive approach unless those agreements expressly provides otherwise. In the underlying dispute, the Appellate Body stated that "[t]he Anti-Dumping Agreement is neutral as between different systems for levy and collection of anti-dumping duties," and the AD Agreement does not favor one system or place one system at a disadvantage.[57]

42. In response to the U.S. position, Japan argues that extending implementation obligations to prior unliquidated entries creates no inequality in WTO antidumping disputes between prospective and retrospective systems. Japan asserts that no inequality exists because, contrary to the U.S. position, definitive duties may be revised after importation in a prospective system pursuant to a review under Article 9.3.2 of the AD Agreement (i.e., a refund proceeding).

43. As explained above, the additional obligation that Japan argues applies to the five administrative reviews in this dispute is to recalculate the final liability applicable to prior

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[56] *See, e.g.,* U.S. First Written Submission, paras. 68-69.

[57] *U.S. – Zeroing (Japan) (AB)*, para. 163.

unliquidated entries. The crux of Japan's argument is that this obligation would exist in a prospective system if a refund proceeding was challenged at the WTO and the proceeding remained legally operational after the RPT. That is, according to Japan, a Member operating a prospective system could implement its WTO obligations by, *inter alia*, revising the amount of duties assessed on prior imports in a refund proceeding.[58]

44. Japan's argument is unsubstantiated. Japan provides no evidence that Members operating prospective systems allow WTO obligations to be implemented in refund proceedings, and even if so, that does not mean that the Member would be properly interpreting the covered agreements. Furthermore, as the United States explained in its first written submission,[59] the operation of the prospective system of at least one Member demonstrates that Japan's argument is incorrect. The EC, which operates a prospective antidumping system, maintains a regulation that prescribes how the recommendations and rulings of the DSB in antidumping disputes shall be implemented into EC law.[60] Under this regulation, any measure taken to comply cannot serve as a basis for reimbursement of antidumping duties collected prior to the date of implementation.[61] Thus, a Member operating a prospective system has correctly understood that it is not required to implement its WTO obligations as to prior entries through a refund proceeding.

45. Japan also argues that limiting implementation obligations to imports entering after the date of implementation would create advantages for retrospective systems because it would allow the United States to maintain assessment rates indefinitely without an obligation to change these rates no matter how impermissibly inflated they were.[62] Japan is incorrect. Once a measure is found to be WTO-inconsistent, the same obligation exists under a retrospective or prospective

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[58] Only Article 9.3.1 of the AD Agreement, which is applicable solely to retrospective systems, contains the concept of "final liability." Thus, it is unclear how the obligation to implement with regard to "final liability" in a retrospective antidumping system could exist in a prospective system. Based on Japan's Second Written Submission (para. 172), Japan appears to consider modifying final liability to be the same as the obligation to revise definitive duties through a refund proceeding.

[59] U.S. First Written Submission, paras. 55-57.

[60] *See* U.S. First Written Submission, para. 56 & n. 103 *citing to* Council Regulation No. 1515/2001, *on the measures that may be taken by the Community following a report adopted by the WTO Dispute Settlement Body concerning anti-dumping and anti-subsidy matters*, 2001 O.J. (L201) 10 (July 23, 2001) ("EC WTO Regulation").

[61] *See,* EC WTO Regulation. at Article 3 (stating "[a]ny measures adopted pursuant to this Regulation shall take effect from the date of their entry into force and shall not serve as a basis for the reimbursement of the duties collected prior to that date, unless otherwise provided for"); *see also* U.S. First Written Submission, para. 56 (providing an example of a regulation in which the European Communities implemented the recommendations and rulings of the DSB and explicitly prohibited this implementation from providing a basis for the reimbursement of duties).

[62] Japan Second Written Submission, para. 178.

system – the obligation to cease applying that measure to imports occurring after the date of implementation. This includes refraining from assessing duties on post-implementation entries based on the WTO-inconsistent measure. With respect to the five administrative reviews, the United States has withdrawn the measures and completed subsequent administrative reviews before the end of the implementation period and, therefore, no antidumping duties will be assessed on imports entering the United States after the end of the RPT on the basis of the five determinations found to be WTO-inconsistent.

46. This is the bargain that was struck between Members – prospective implementation obligations in both retrospective and prospective systems. Therefore, the fact that U.S. implementation obligations with regard to the five administrative reviews do not include the recalculation of final liability for prior unliquidated entries is equivalent to the fact that Members operating prospective antidumping systems are not obligated to disgorge duties assessed on prior imports.

2. Japan's Argument Impermissibly Would Require the United States To Undo the Final Liability Established in the Five Administrative Reviews

47. In each of the five administrative reviews, the United States determined final liability for the entries in dispute. This final liability was established through importer-specific assessment rates that were calculated in each of the administrative reviews. It is this final liability that Japan argues Commerce should revise as part of its implementation obligations. Revising this final liability as Japan requests would not constitute prospective implementation of the DSB's recommendations and rulings because it would require Commerce to undo past acts as to prior unliquidated entries. That is, it would require Commerce to re-open each of the administrative reviews and recalculate the final liability for each importer.

48. In this regard, the wording of Japan's argument is instructive. Japan is not arguing that Commerce must calculate, for the first time, assessment rates for the entries from the five administrative reviews. Rather Japan is arguing that "the United States is required to *recalculate* the importer-specific assessment rate determined in the review to bring it into conformity with WTO law."[63] This use of the term "recalculate" demonstrates that Japan is asking Commerce to undo past acts – the calculation of final liability in the five administrative reviews.

49. Japan argues that undoing this past act is permissible because:

> Japan challenges solely those WTO-inconsistent periodic reviews with respect to which liquidation of entries had *not* occurred by the end of the RPT and,

[63] Japan First Written Submission, para. 135.

> consequently, the final amount of anti-dumping duties had not yet been definitively finalized or collected.[64]

50. Japan references the fact that these entries remain unliquidated under U.S. law. But that point does not resolve the concerns raised by Japan's request. In particular, Japan's argument is premised on a misunderstanding of liquidation. Liquidation is the ministerial act whereby U.S. Customs determines what is owed on an entry. For entries subject to an antidumping order, Customs would collect the antidumping duties – as previously determined by Commerce – and also collect regular customs duties. Contrary to Japan's misunderstanding, liquidation has nothing to do with the determination of final liability for antidumping duties; Commerce makes that final determination at the conclusion of an administrative review. Consequently, Japan's focus on liquidation is irrelevant to the issues in this proceeding.

3. Japan's Argument Impermissibly Makes the Implementation Obligations of Members Dependent on Domestic Litigation in the United States

51. As explained above, the United States calculated the final liability for the entries in the five administrative reviews but did not liquidate these entries (i.e., collect the duties for these entries). Liquidation did not occur because these entries were subject to domestic litigation in the United States that included court injunctions suspending liquidation during the pendency of the litigation. Japan's theory of U.S. implementation obligations is dependent on the existence of these injunctions because, without them, the United States would have liquidated all of the entries from the five administrative reviews long before the end of the implementation period in this dispute. The fact that Japan's theory of implementation is dependent on these injunctions demonstrates that Japan is attempting to rely on domestic U.S. litigation to alter its WTO rights, but the obligations at issue under the covered agreements do not change depending on the existence of domestic litigation.

52. In the U.S. retrospective antidumping system, liquidation occurs either automatically or, if an administrative review is requested, following that review. The deadline for liquidation following an administrative review, however, is not indefinite. It must occur within six months of Commerce's determination of final liability in an administrative review, unless such liquidation is enjoined by domestic litigation.[65]

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[64] Japan First Written Submission, para. 144.

[65] Under 19 USC § 1504(d), U.S. Customs and Border Protection has six months to liquidate antidumping duties following publication of the final results of an administrative review, unless enjoined by a court. If liquidation does not occur within six months, then the entry is deemed liquidated at the cash deposit rate.

53. WTO dispute settlement proceedings involve various steps that invariably take longer than six months (e.g., consultations, submission of written argument, panel meetings, possible appeals to the Appellate Body, and establishment and completion of the RPT). For each of the original administrative reviews, the challenged final determinations were made years before the end of the dispute settlement proceeding.[66]

54. Because WTO disputes will invariably last longer than six months, liquidation will always occur before the conclusion of a WTO dispute – *absent a domestic injunction*. That is, a WTO antidumping dispute will never involve prior unliquidated entries unless a domestic injunction prevents liquidation. For the five original administrative reviews, liquidation did not occur within the requisite six months for exactly this reason – because the United States was enjoined from liquidating these entries as a result of domestic litigation. Japan concedes the importance of domestic litigation to its theory of implementation.[67]

55. The necessity of these injunctions demonstrates that Japan's attempt to expand implementation obligations to reach these prior unliquidated entries is not grounded in the rights and obligations found in the WTO Agreements. Rather, Japan's attempt is entirely dependent on the existence of injunctions issued in the domestic litigation for the five administrative reviews.

56. The rights and obligations of WTO Members arise from the covered agreements. Other factors, not provided for by the terms of those agreements, cannot be allowed to add to or diminish the rights and obligations of Members contained in the WTO Agreements. This Panel should not permit the rights of private enterprises under injunctions issued by U.S. courts under U.S. law to define the rights of Japan and the implementation obligations of the United States with respect to the five administrative reviews.

4. Japan's Argument Misapprehends Articles 18.3 and 9.3 of the AD Agreement

57. In explaining that "prospective" and "retrospective" relief can only be determined by reference to the date of importation, the United States identified several provisions of the AD Agreement that support its argument, including Articles 8.6, 10.1, 10.6 and 10.8, as well as Article VI:2 of the GATT 1994 and its interpretative note. In response, Japan principally relies on Articles 18.3 and 9.3 of the AD Agreement to argue that implementation obligations must

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[66] For example, the most recent of the five original administrative reviews was completed in September 2004. *See Antifriction Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom: Final Results of Antidumping Administrative Reviews*, *Rescission of Administrative Review in Part, and Determination to Revoke Order in Part*, 69 Fed. Reg. 55574 (Sept. 15, 2004). This was a full 39 months before the end of the RPT, on December 24, 2007.

[67] Japan Second Written Submission, para. 173.

extend to prior unliquidated entries.[68] Because Japan's argument misapprehends these articles of the AD Agreement, it must be rejected.

58. With respect to Article 18.3 of the AD Agreement, Japan notes that this provision provides that the AD Agreement applies to any administrative review based on an application made on or after January 2, 1995.[69] Because the five challenged administrative reviews were initiated pursuant to applications made after January 2, 1995, Japan reasons that there is no manner in which the DSB's recommendations and rulings in the instant dispute, or a requirement to revise importer-specific assessment instructions in the five reviews at issue, can be viewed as imposing an obligation on the United States retroactively.[70]

59. Article 18.3 of the AD Agreement cannot mean what Japan asserts it means. As an initial matter, Article 18.3 of the AD Agreement simply provides a transition rule with respect to the new provisions of the AD Agreement. Article 18.3 of the AD Agreement does not address the implementation obligations of Members pursuant to the dispute settlement provisions, nor is it listed as a special or additional dispute settlement rule listed in Appendix 2 of the DSU. Accordingly, Article 18.3 of the AD Agreement is not relevant to this dispute.

60. Japan's argument also assumes what it wants to prove. Japan claims that a dispute based on a post-WTO entry-into-force application concerning pre-WTO entry-into-force entries could lead to a revision of those pre-entry-into-force entries.[71] However, to reach that result assumes that there is an obligation to revise prior entries, but the validity of that assumption is precisely the question at issue.

61. Furthermore, through Article 18.3 of the AD Agreement, Japan attempts to introduce an implausible definition of "retroactivity" into WTO antidumping disputes. According to Japan, as

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[68] Japan also argues that these provisions do not support limiting implementation to imports occurring after the date of importation, because, contrary to the U.S. argument, these provisions fail to establish that the legal regime at the time of importation must remain definitively fixed on importation. *See* Japan Second Written Submission, para. 124. In support of its argument, Japan argues that Article 9.3 of the AD Agreement permits the legal regime established at importation to be altered. *See* Japan Second Written Submission, para. 129. Japan misunderstands the U.S. position, which never was premised on the inability of Members to revise antidumping liability after the date of entry. The U.S. position is that the provisions of the AD Agreement to which the United States has cited demonstrate that where the drafters recognized a need to identify the point at which a requirement would apply to imports, in each case, they based that identification on the date of importation. To that end, it is entirely consistent with these provisions to use the date of importation as the relevant date for implementation purposes. *See generally,* U.S. First Written Submission, paras. 59-64.

[69] Japan Second Written Submission, paras. 138-141.

[70] Japan Second Written Submission, paras. 138-141.

[71] Japan Second Written Submission, para. 139.

long as a WTO dispute involves an administrative review that was based on an application received on or after January 2, 1995, then the dispute could result in an obligation to revise that administrative review *in any manner* irrespective of how long ago the WTO member took action pursuant to that administrative review and how final that action was. The mere fact that Article 18.3 of the AD Agreement makes the agreement applicable to administrative reviews initiated pursuant to applications which have been made on or after January 2, 1995 cannot support application of such an implausible definition of "retroactive" to the AD Agreement.[72]

62. With respect to Article 9.3 of the AD Agreement, Japan notes that this article contains disciplines that apply to importer-specific assessment instructions. According to Japan, an administrative review by definition determines an importer-specific assessment rate for entries occurring before initiation of the review, before a WTO dispute challenging the administrative review, and long before the end of a RPT in such a WTO dispute. Japan concludes that the U.S. argument that implementation applies only to imports occurring after the date of implementation means that WTO-inconsistent assessment rates need never be brought into conformity, rendering Article 9.3 of the AD Agreement a nullity.[73]

63. As explained above, U.S. implementation obligations under Article 9.3 of the AD Agreement are the same as those for a Member operating a prospective system. Under either system, if the results of a review pursuant to Article 9.3 are challenged and found to be WTO-inconsistent, implementation does not require the Member to undo the results of the review as to the period examined and (presumably) refund additional duties. Instead, the nature of the obligation is prospective. If, in the prospective system, the results of the review had also reset the duty rate going forward (something which often occurs in prospective systems through Article 11.2 reviews rather than Article 9.3.2 reviews), the Member would need to recalculate the duty rate applied to future imports. Similarly, if the results of the challenged review pursuant to a retrospective system provided the continuing basis for the cash deposit rate going forward, the Member would need to recalculate that cash deposit rate to be applied to future imports. However, the fact that under either system prior imports need not be impacted by the implementation is not a limitation on Article 9.3, but rather a function of the prospective nature

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[72] Japan also cites to *Parkdale International*, a judicial opinion from the U.S. Court of Appeals for the Federal Circuit, arguing that this decision contradicts the U.S. position that it is the date of entry that is decisive for purposes of implementing the DSB's recommendations and rulings. *See* Japan Second Written Submission, para. 143. Japan has failed to explain why a judicial opinion from the United States is relevant to determining implementation obligations under the AD Agreement and DSU. In fact, this opinion has no relevance. In *Parkdale International,* the U.S. Court of Appeals analyzed whether Commerce had acted "impermissibly retroactively" – a term of art under U.S. administrative law – in applying a new policy to goods that had entered the United States prior to the policy's enactment. This inquiry bears no relation whatsoever to the question before this panel – whether the United States was obligated to extend implementation of the DSB's recommendations and rulings to imports occurring prior to the date of implementation.

[73] Japan Second Written Submission, paras. 112-117.

of WTO dispute settlement implementation and the balance of rights and obligations agreed to for prospective and retrospective systems in the AD Agreement.

64. Similar to Japan's argument under Article 18.3 of the AD Agreement, Japan's argument under Article 9.3 of the AD Agreement fails to distinguish between obligations that exist under the AD Agreement and implementation obligations under the DSU. 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. However, the existence of this obligation does not establish that the United States must retroactively recalculate the final antidumping liability determined in the five administrative reviews. Instead, for the reasons discussed above and in the U.S. first written submission, the implementation obligations for these five administrative reviews do not extend to imports occurring prior to the date of implementation.[74]

65. Japan attempts to bolster its Article 9.3 argument by citing to *U.S. – Upland Cotton (Article 21.5) (AB)* and arguing that the United States interpretation of the DSU compromises the effectiveness of the AD Agreement and conflicts with the objectives of the DSU.[75] However, as described above, it is Japan's interpretation that would result in significant damage to the dispute settlement system by creating inequality between WTO dispute resolution in prospective and retrospective antidumping systems and by making implementation obligations entirely dependent upon domestic U.S. litigation.

B. Japan's Argument Improperly Relies on the Articles on Responsibility of States for Internationally Wrongful Acts

66. Japan argues that the International Law Commission's ("ILC") Articles on Responsibility of States for Internationally Wrongful Acts ("ILC Articles") confirm Japan's arguments with respect to the five original administrative reviews.[76] Specifically, Japan argues that multiple analyses under the ILC Articles illustrate that a failure to recalculate the final liability for prior unliquidated entries occurring after the end of the RPT constitutes a new or continued wrongful acts that should have been brought into conformity with the WTO Agreement.[77]

67. Japan's reliance on the ILC Articles is misplaced. The ILC Articles are not incorporated either expressly or implicitly into the covered agreements, and do not constitute an element of

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[74] *See, e.g.,* U.S. First Written Submission, paras. 54-64.

[75] Japan Second Written Submission, para. 119.

[76] Japan Second Written Submission, para. 148.

[77] Japan Second Written Submission, para. 169.

WTO law. In addition, when interpreting the provisions at issue in this proceeding, there is no reason for this Panel to invoke the ILC Articles for interpretive guidance or support. As an initial matter, it is not at all clear what provisions of the DSU or the other covered agreements Japan is seeking to clarify by reference to the ILC Articles. In any event, even were Japan using the ILC Articles for interpretive support, there is no provision in the Vienna Convention on the Law of Treaties justifying reference to the ILC Articles.[78]

68. Articles 31 and 32 of the Vienna Convention provide:

Article 31
General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

   (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
   (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

[78] Article 3.2 of the DSU directs panels and the Appellate Body to "clarify the existing provisions of [the WTO] agreements in accordance with customary rules of interpretation of public international law." As the Appellate Body has noted, Articles 31 and 32 of the Vienna Convention reflect "public international law" for purposes of interpreting the WTO Agreements under the DSU. *See US – Gasoline (AB)*, p. 17.

Article 32
Supplementary means of interpretation

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
> (b) leads to a result which is manifestly absurd or unreasonable.

69. Under Articles 31 and Article 32 of the Vienna Convention, there is no basis for this Panel to resort to the ILC Articles. The ILC Articles are neither an agreement nor an instrument relating to the conclusion of the covered agreements, nor are they a subsequent agreement regarding the interpretation or application of the covered agreements. Further, the ILC Articles do not constitute a subsequent practice in the application of the covered agreements. Even were the application of Article 31 to lead to an ambiguous or obscure interpretation, or to a manifestly absurd or unreasonable result, the ILC Articles cannot in any way be considered preparatory work that would provide interpretive guidance.

70. Lastly, the ILC Articles are not "relevant rules of international law" for purposes of this dispute. Without entering into the question of whether the specific articles that Japan cites reflect or would alter customary international law, the ILC Articles themselves make plain that they are not intended to apply in the situation presented by this proceeding. Article 55 provides that the ILC Articles "do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law."[79] Here, the specific WTO provisions on dispute settlement and compliance trump the general rules as set forth in the ILC Articles. This Panel should reject Japan's attempt to use the ILC Articles in this dispute.[80]

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[79] We also note that Japan is incorrect to assert that these articles were adopted by the U.N. General Assembly at its 85th plenary meeting on December 12, 2001. *See* Japan Second Written Submission, n. 137. Instead, at that meeting, the General Assembly merely took note of these articles. *See* U.N. General Assembly Resolution 56/83 (Dec. 12, 2001) ("The General Assembly . . . [t]akes note of the articles on responsibility of States for intentionally wrongful acts . . . and commends them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action.")

[80] Even assuming this Panel could rely on the ILC Articles, the very general principles contained in these articles relied on by Japan provide this Panel with no meaningful assistance in answering the questions raised in this dispute. For example, Japan discusses how failing to undo the assessment instructions for prior unliquidated entries after the end of the RPT could be analyzed as one of the following breaches of international obligations described in the ILC Articles: a) a breach without a continuing character (i.e., ILC Article 14(1)); b) a breach with a continuing character (i.e., ILC Article 14(2)); and a breach through a series of actions (i.e., ILC Article 15(1)). Each of these

C. Japan Has Failed To Establish a Violation of Articles 17.14, 21.1, and 21.3 of the DSU

71. Japan argues that the United States has failed unconditionally to accept the Appellate Body's findings with respect to the five original administrative reviews in this dispute in violation of Article 17.14 of the DSU.[81] Japan asserts that the U.S. omission to take compliance measures to bring the importer-specific assessment rates from the five original administrative reviews into compliance indicates that the United States has not unconditionally accepted the Appellate Body's findings.[82]

72. Nothing Japan argues can change the fact that the United States unconditionally accepted the recommendations and rulings of the DSB in this dispute. On February 20, 2007, the United States notified the DSB of its intention to implement those recommendations and rulings.[83] As discussed in this submission, and in the U.S. first written submission, the United States implemented all of the DSB's recommendations and rulings in this dispute. Japan is merely trying to cast its disagreement with the United States concerning compliance into "conditional acceptance" by the United States.

73. Japan also argues that the alleged U.S. failure to promptly comply with the recommendations and rulings of the DSB concerning the five original administrative reviews is inconsistent with Articles 21.1 and 21.3 of the DSU. In its first written submission, the United States explained that these provisions do not impose a substantive compliance obligation on WTO Members. In response, Japan cites to three dispute settlement reports in which it argues that panels recognized "prompt compliance" in Article 21.1 as a fundamental requirement of the DSU.[84] Japan also asks the Panel to create an obligation of prompt compliance when reading Article 21.3.[85]

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analyses begs the question – did the United States comply with its international obligations under the WTO Agreements when it limited implementation to entries occurring after the date of implementation? Japan's lengthy discussion of the ILC Articles brings this Panel no closer to answering that crucial question.

[81] Japan Second Written Submission, para. 183.

[82] Japan Second Written Submission, para. 183.

[83] Minutes of the DSB Meeting of 20 February 2007, WT/DSB/M/226 (indicating that the United States informed the DSB of its intention to implement the recommendations and rulings in this dispute on February 20, 2007).

[84] Japan Second Written Submission, para. 184.

[85] Japan Second Written Submission, para. 184.

74. The United States maintains that these DSU provisions do not impose a substantive obligation on Members.[86] Article 21.1 simply states that prompt compliance is essential to dispute settlement, and Article 21.3, rather than imposing an obligation on an implementing Member, creates a right to a reasonable period of time for implementation. The panel reports to which Japan cites do not support Japan's claims. These panels simply affirmed the importance of prompt compliance in WTO disputes. They did not recognize any measures as being inconsistent with either Article 21.1 or 21.3 of the DSU.[87]

D. Japan Has Failed To Establish a Violation of Article II of the GATT 1994

75. The United States reiterates its general objection to Japan's Article II claims. As indicated in the U.S. first written submission,[88] these Article II claims are entirely derivative, and the Panel is not required to address them to resolve the matter before it.[89] Japan also failed to request findings from the Panel under these Article II claims.[90] For these reasons, the Panel should refrain from ruling on Japan's claims under Article II of the GATT 1994.

76. Even were the Panel to address Japan's claims under Article II of the GATT 1994, the United States notes that the liability for antidumping duties that Japan claims resulted in collection of duties above the bound rate was incurred prior to the expiration of the RPT, when the subject merchandise entered the United States and a cash deposit was paid. In addition, when the RPT expired, the United States was no longer collecting cash deposits pursuant to the administrative reviews that were subject to the DSB's recommendations and rulings. Japan has no basis to claim that the United States, after the RPT, collected duties in excess of the bound rates, and in a manner inconsistent with Article VI of the AD Agreement.

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[86] In *US – FSC (Article 21.5) (AB)*, the Appellate Body affirmed that not every provision of the covered agreements imposes a substantive obligation on Members. *See US – FSC (Article 21.5) (AB)*, para. 85.

[87] Japan's reliance on *U.S. – FSC (Article 21.5 II)* is particularly misplaced given that, in an exercise of judicial economy, that compliance panel explicitly refused to consider whether Article 21.1 of the DSU embodied implicit obligations on Members. *See U.S. – FSC (Article 21.5 II) (Panel),* para. 7.64 & n. 84.

[88] U.S. First Written Submission, para. 170, n. 116.

[89] *US – Upland Cotton (AB)*, paras. 731-32 (determining that a panel properly exercised judicial economy when it refrained from ruling on claims that were unnecessary to resolving the matter in dispute).

[90] Japan First Written Submission, para. 159.

E. Japan Has Failed To Establish a Continuing Violation of Articles 2.4 and 9.3 of the AD Agreement and Article VI:2 of the GATT 1994

77. Japan asserts that the United States is in continuing violation of Articles 2.4 and 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 because it failed to revise the importer-specific assessment rates in the five original administrative reviews.[91] Other than simply making this assertion, Japan provides no further explanation.

78. The United States brought the five original administrative reviews into conformity with the AD Agreement and the GATT 1994 by withdrawing each of these measures.[92] That is, these administrative reviews no longer serve as a basis for cash deposits in the United States. As such, these administrative reviews cannot serve as a basis to claim a continued violation of the covered agreements.

IV. THIS PANEL SHOULD NOT REACH THE MERITS OF JAPAN'S CLAIMS CONCERNING THE THREE SUBSEQUENT ADMINISTRATIVE REVIEWS OF *BALL BEARINGS FROM JAPAN*

79. Japan claims that three administrative reviews which the United States conducted subsequent to the five original administrative reviews also violated Articles 2.4 and 9.3 of the AD Agreement and Article VI:2 of GATT 1994 due to the application of zeroing procedures.[93] As the United States has explained here and in its first written submission, these reviews are not measures taken to comply and are not properly within the scope of this proceeding.[94] Therefore, this Panel should not reach the issue of the WTO consistency of these alleged measures.

V. THE UNITED STATES HAS COMPLIED FULLY WITH THE DSB'S RECOMMENDATIONS AND RULINGS WITH RESPECT TO THE SUNSET REVIEW OF *ANTI-FRICTION BEARINGS*

80. In its second written submission, "Japan claims that the United States has failed to implement the DSB's recommendations and rulings regarding the sunset review of 4 November 1999 concerning *Anti-Friction Bearings ("AFBs")*."[95] Japan asserts that "there have been no

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[91] Japan Second Written Submission, para. 185.

[92] *See generally* U.S. First Written Submission, paras. 65-67.

[93] Japan Second Written Submission, para. 187.

[94] *See* Part II.A, *supra;* U.S. First Written Submission, paras. 30-49.

[95] Japan Second Written Submission, para. 188.

changes in the facts underlying the measure"[96] and that the United States is essentially re-litigating the original dispute over sunset reviews. Japan's arguments are groundless and undermine the effectiveness of dispute settlement.

81. In the underlying dispute, Japan challenged a specific aspect of the November 1999 sunset review, namely the reliance upon margins calculated with zeroing in the likelihood of dumping determination.[97] With respect to that sunset review, the Appellate Body made a specific finding that the United States acted inconsistently with Articles 2 and 11 of the AD Agreement in that particular review, "*when it relied on margins of dumping calculated in previous proceedings through the use of zeroing.*"[98] Accordingly, both Japan's challenge and the Appellate Body's finding of WTO inconsistency were limited to the extent the United States relied on margins from previous proceedings calculated *with zeroing*. Japan did not challenge the U.S. reliance upon margins that were determined *without zeroing* or the margins that predated the AD Agreement and the WTO. As such, Japan's assertion that the United States should have presented the arguments defending its reliance upon non-zeroed margins and pre-WTO margins in the original proceeding is unfounded.[99] The United States had no obligation to defend these aspects of November 1999 sunset review because Japan did not challenge them at that time.

82. As the United States demonstrated in its first written submission, the original likelihood of dumping determination in the November 1999 sunset review did not rest exclusively upon margins that the Appellate Body found inconsistent with Article 11.3 of the AD Agreement. As the Appellate Body explained in *US – Corrosion Resistant Steel Sunset Review*, "Article 11.3 neither explicitly requires authorities in a sunset review to calculate fresh dumping margins, nor prohibits them from relying on dumping margins calculated in the past."[100] In this dispute, the United States is not precluded from relying upon the previously calculated dumping margins that

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[96] Japan Second Written Submission, para. 191.

[97] Request for Establishment of Panel by Japan, WT/DS322/8, February 7, 2005, para. 1(c) ("Thus, the sunset reviews by the US authorities are inconsistent with: (i) Articles 11.1 and 11.3 of the Anti-Dumping Agreement, *insofar as the likelihood determinations in the sunset review are based upon dumping margins using zeroing procedure* . . . (ii) Article I of the Anti-Dumping Agreement and Articles VI:1 and VI:2 of the GATT 1994 *to the extent that* as the sunset reviews and the resulting continued imposition and collection of antidumping duties are inconsistent with the Anti-Dumping Agreement.") (emphasis added).

[98] *US – Zeroing (Japan) (AB)*, para. 190(e) (emphasis added).

[99] Japan Second Written Submission, para. 192.

[100] Indeed, as the Appellate Body explained in *US – Corrosion-Resistant Steel Sunset Review*, "Article 11.3 does not expressly prescribe any specific methodology for investigating authorities to use in making a likelihood determination in a sunset review." *US – Corrosion-Resistant Steel Sunset Review (AB),* para. 123. The Appellate Body further explained, "[n]or does Article 11.3 identify any particular factors that authorities must take into account in making such a determination." *US – Corrosion-Resistant Steel Sunset Review (AB),* para. 123.

were not challenged by Japan. Japan's contentions notwithstanding, it is entirely unreasonable to interpret the Appellate Body's findings in this dispute as prohibiting the United States from relying upon margins calculated without zeroing.

83. Japan's reliance on the panel report in *US – Gambling (Article 21.5)* is misplaced. In *US – Gambling (Article 21.5)*, the compliance panel declined to entertain a direct challenge to the Appellate Body's findings: "[a] reassessment in a compliance proceeding of *an issue that had already been ruled upon* in an original proceeding in an adopted report, even with better arguments by the respondent but without a change relevant to the underlying facts in the intervening period, would run counter to the prompt settlement of disputes."[101] The Panel also stated that "the parties only owe the obligation with respect to the *report*, which by its own terms is limited to the measures in dispute and the claims, defences and *issues ruled upon therein.*"[102] In this dispute, the United States is not seeking a new finding on that part of the sunset review determination that was already litigated and on which there were recommendations and rulings (i.e., the reliance on margins of dumping calculated in previous proceedings through the use of zeroing). Rather, the United States is asking this Panel to examine issues which were never addressed by the original panel or the Appellate Body (i.e., the reliance upon margins that were determined *without zeroing* or the margins that predated the AD Agreement and the WTO).

84. Japan also erroneously relies on the Appellate Body report in *US – Shrimp (Article 21.5)*. In that dispute, the Appellate Body stated that "Appellate Body reports that are adopted by the DSB are, as Article 17.14 provides, '. . . . unconditionally accepted by the parties to the dispute', and, therefore, must be treated by the parties to a particular dispute as a final resolution of that dispute."[103] In this dispute, the Appellate Body expressed no views as to whether the original likelihood of dumping determination can exist on alternative grounds, such as dumping margins calculated *without zeroing* and dumping margins that predate the AD Agreement and WTO.

85. Commerce in the sunset review of *AFB* was required to make a determination of the likelihood of dumping on an order-wide basis, and did so by examining the results from administrative reviews concluded during the sunset review period. Its finding of likelihood of dumping was supported by higher than *de minimis* margins that were calculated without zeroing. In the fifth administrative review, which covered part of the relevant sunset review period, for example, Commerce reviewed twenty-one respondents, eleven of which failed to cooperate.[104]

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[101] *US – Gambling (Article 21.5) (Panel)*, para. 6.53 (emphasis added).

[102] *US – Gambling (Article 21.5) (Panel)*, para. 6.52 (emphasis added).

[103] *US – Shrimp (Article 21.5) (AB)*, para. 97.

[104] *See Anti-Friction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, Germany, Italy, Japan, Singapore, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews*, 61 Fed. Reg. 66,472, 66,472-74 (Dec.

For ten of the eleven non-cooperating respondents,[105] Commerce applied the dumping margin of 106.61 percent that was based upon a petition rate.[106] In turn, as demonstrated by Exhibit US-A26 (BCI), this rate was based upon actual pricing data and calculated *without* zeroing. Because these respondents were not subsequently reviewed during the relevant period of the sunset review, their non-zeroed dumping margins of 106.61 percent represent their most recent dumping experience that is directly relevant to the likelihood of dumping determination for this antidumping duty order. This high margin of dumping for Japanese respondents during the relevant sunset period vitiates any suggestion by Japan that the antidumping duty order should have been terminated. Inexplicably, Japan does not address these non-zeroed dumping margins in any of its submissions.

86. Finally, in its second written submission, Japan asserts a new argument that a Member cannot rely upon pre-WTO margins in making a sunset determination. Japan cites no authority that supports its argument. To the contrary, there is nothing which prohibits such reliance. Accordingly, the Panel should reject Japan's argument as baseless.

VI. THE UNITED STATES HAS COMPLIED WITH THE DSB'S RECOMMENDATIONS AND RULINGS WITH RESPECT TO THE ZEROING PROCEDURES

87. Japan misapprehends the DSB's recommendations and rulings concerning the "zeroing procedures."[107] As the United States explained in its first written submission,[108] those recommendations and rulings applied to the *single measure* known as the "zeroing procedures," regardless of the comparison methodology used or the type of antidumping proceeding.[109] The United States has removed that single measure by discontinuing zeroing in W-to-W comparisons in original investigations. Japan, however, has de-constructed that single measure, and

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17, 1996).

[105] One of the non-cooperating respondents received a reduced best information available margin of 45.83 percent.

[106] *See Anti-Friction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, Germany, Italy, Japan, Singapore, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews*, 61 Fed. Reg. 66,472, 66,472-74 (Dec. 17, 1996).

[107] Japan Second Written Submission, paras. 66-81.

[108] U.S. First Written Submission, para. 78.

[109] *US – Zeroing (Japan) (Panel)*, para. 7.58; *US – Zeroing (Japan) (AB)*, paras. 88, 190(a).

essentially treats each use of zeroing as a separate measure that the United States was required to withdraw.[110]

88. The panel in the original proceeding was explicit that the zeroing procedures were a single measure that applied in all contexts and when using all comparison methodologies. As the panel noted, "in this case the evidence before us is sufficient to conclude that a rule or norm exists providing for the application of zeroing *whenever* USDOC calculates margins of dumping or duty assessment rates."[111] Moreover, "it is clear as a factual matter that USDOC *always* applies zeroing."[112] The panel further observed that "the consistent use of zeroing in specific cases reflects a rule or norm of general and prospective application, which provides that non-dumped export sales are not allowed to offset margins found on dumped export sales and which is applied *regardless* of the basis upon which export price and normal value are compared and *regardless* of the type of proceeding in which margins are calculated."[113] In the end, the panel concluded that "we consider that what Japan terms 'zeroing procedures' is *a measure* which can be challenged as such."[114] The Appellate Body upheld the panel's conclusion: "the Panel had sufficient evidence before it to conclude that the 'zeroing procedures' under different comparison methodologies, and in different stages of anti-dumping proceedings, do not correspond to separate rules or norms, but simply reflect different manifestations of *a single rule or norm*."[115]

89. It is clear that the original panel, and the Appellate Body, considered the zeroing procedures to be a single measure that was *always* applied in *any* comparison methodologies and in *any* antidumping proceeding – "whenever" Commerce calculates margins of dumping or assessment rates. Logically, if the United States stops using zeroing in any one of these different contexts, then the single measure is eliminated or withdrawn. Therefore, when Commerce announced on December 27, 2006 that it would no longer apply the zeroing procedures in W-to-

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[110] To Japan, the zeroing procedures consist of at least four different measures: zeroing procedures in W-to-W comparisons in original investigations, zeroing procedures in T-to-T comparisons in original investigations, zeroing procedures in any comparison methodology in administrative reviews, and zeroing procedures in any comparison methodology in new shipper reviews. *See, e.g.,* Japan Second Written Submission, para. 82.

[111] *US – Zeroing (Japan) (Panel)*, para. 7.50 (emphasis added).

[112] *US – Zeroing (Japan) (Panel)*, para. 7.51 (emphasis added).

[113] *US – Zeroing (Japan) (Panel),* para. 7.53 (emphasis added).

[114] *US – Zeroing (Japan) (Panel)*, para. 7.58 (emphasis added).

[115] *US – Zeroing (Japan) (AB)*, para. 88 (emphasis added).

W comparisons in original investigations,[116] it eliminated the single measure that Japan had challenged and that was found to be "as such" inconsistent.

90. Japan now contradicts the very same position that it took in the original proceeding, and with which the panel and the Appellate Body agreed (and which Japan presumably accepted unconditionally). Japan considered the zeroing procedures to be "a *single measure* that applies to W-to-W comparisons, T-to-T comparisons and W-to-T comparisons, used in any type of anti-dumping proceeding."[117] Moreover, "[t]his single rule mandates that in calculating dumping margins under *any* method of comparison and in *any* type of anti-dumping proceeding, the USDOC systematically disregards negative intermediate comparison results determined on a model- or transaction-specific basis."[118] Japan also told the Appellate Body, "the Panel properly weighed the evidence and appreciated its meaning overall, finding that it was of sufficient quantum and character to support a finding that the zeroing procedures constitute a rule or norm that applies 'whenever' USDOC determines margins of dumping and that can be challenged as such, across all types of U.S. anti-dumping proceedings employing all types of comparison methods."[119] Thus, according to Japan's own view, the zeroing procedures were a single measure applied in all contexts. Once the use of zeroing was eliminated in any one of these contexts, then the measure that Japan explicitly challenged ceased to exist.

VII. CONCLUSION

91. For the reasons set forth above, along with those set forth in the U.S. first written submission, the United States requests that the Panel reject Japan's claims.

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[116] *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77722 (Dec. 27, 2006) (Exhibit JPN-35).

[117] Japan's Opening Statement at the Third Meeting of the Panel, June 12, 2006, para. 4 (emphasis in original); *US – Zeroing (Japan)(Panel)*, para. 6.19.

[118] Japan's Opening Statement at the Third Meeting of the Panel, June 12, 2006, para. 3 (emphasis in original).

[119] Japan Appellee Submission, Nov. 6, 2006, para. 62.