

ANNEX C

EXECUTIVE SUMMARIES OF THE SECOND WRITTEN SUBMISSIONS OF THE PARTIES

Contents		Page
Annex C-1	Executive Summary of the Second Written Submission of Japan	C-2
Annex C-2	Executive Summary of the Second Written Submission of the United States	C-10

ANNEX C-1

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF JAPAN

(3 September 2008)

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

1. The United States requests the Panel to rule that: the three subsequent reviews (nos. 4, 5 and 6¹) are not "measures taken to comply" under Article 21.5 of the DSU²; and that the Panel cannot examine any "subsequent closely connected" measures.³ Japan requests that the Panel reject the United States' request, and find that the three subsequent reviews are measures taken to comply subject to Article 21.5 of the DSU. Japan notes that the United States bears the burden of proving that the three subsequent periodic reviews are excluded from the scope of these Article 21.5 proceedings.⁴

A. THE PANEL HAS JURISDICTION OVER THE THREE SUBSEQUENT REVIEWS CHALLENGED IN THESE PROCEEDINGS

2. The United States argues that the original *Ball Bearing* periodic reviews (nos. 1, 2, and 3), and the cash deposit rates they establish, were "withdrawn"⁵, "superseded"⁶, "eliminated"⁷ and "replaced"⁸ by the three subsequent reviews. Specifically, it contends that "has withdrawn" the original reviews "within the meaning of DSU Article 3.7"⁹ by "put[ting] in place new cash deposits for the companies examined" in the three subsequent reviews.¹⁰ In the United States' view, therefore, the subsequent reviews are replacement measures that secure the withdrawal of the original measures found to be WTO-inconsistent. The United States expressly declares that the three subsequent reviews are *measures taken to comply* with the DSB's recommendations and rulings regarding the three original *Ball Bearing* reviews.

¹ In this submission, Japan uses the same numbering of the eight original and subsequent periodic reviews set forth in paragraph 53 of its First Written Submission.

² United States' First Written Submission, para. 28.

³ United States' First Written Submission, para. 50.

⁴ Panel Report, *EC – Bananas III (21.5 – US)*, para. 7.79.

⁵ United States' First Written Submission, paras. 39, 52, 54, 58, 65, 66 and 67.

⁶ United States' First Written Submission, paras. 3 and 44.

⁷ United States' First Written Submission, paras. 44 and 54.

⁸ United States' First Written Submission, para. 44.

⁹ United States' First Written Submission, para. 52.

¹⁰ United States' First Written Submission, para. 67. *See also* para. 44 ("*[t]he original reviews were superseded by subsequent reviews because the cash deposit rate from one review was replaced by the cash deposit rate from the next review.*"), para. 65 ("*in each of the five challenged administrative reviews that were the subject of the DSB's recommendations and rulings in the original dispute, the United States has withdrawn the cash deposit rate resulting from the challenged review and calculated new cash deposit rates pursuant to separate and distinct administrative reviews.*"), and para. 67 ("*In these subsequent determinations, Commerce . . . put in place new cash deposits for the companies examined*" and, as a consequence, "*the former cash deposit rate is terminated . . . Thus, the United States has complied with the recommendations and rulings of the DSB by withdrawing the challenged measures.*") (emphasis added).

3. Nonetheless, the United States argues that reviews issued before adoption of the DSB's recommendations and rulings are not "measures taken to comply" because, in view of the timing of the measures, it did not *intend* to comply with the DSB's recommendations and rulings when it adopted the three subsequent reviews. However, panels and the Appellate Body have consistently rejected an interpretation of Article 21.5 that focuses on the intent of the implementing Member.¹¹ Despite a recognized lack of intent to comply, the Appellate Body held that a periodic review was a "measure taken to comply" where it enjoyed "multiple and specific links" to the dispute.¹²

4. Under Article 3.7 and 19.1 of the DSU, a measure may, by its effects, achieve compliance, even if that was not the measure's purpose, and even if the measure was taken *before* the adoption of the DSB's recommendations and rulings. Articles 3.7, 19.1 and 21.5 must be interpreted harmoniously.¹³ Thus, under Article 21.5, an implementing Member must be able to rely on a measure that, in effect, "secure[s] withdrawal", and/or "bring[s]" an original measure into conformity, to rebut a claim that no "measure taken to comply" is in "existence". Neither the implementing Member's intent nor its adoption of the measure prior to the DSB's recommendations and rulings preclude it from asserting such a defence. A compliance panel must equally be able to examine the "consistency" with the covered agreements of any measure that allegedly "secure[s] withdrawal" of an original measure and/or "bring[s]" it into conformity with its obligations.

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

6. The United States' arguments regarding the status of the three subsequent reviews are tainted by a fundamental inconsistency. Japan claims that the United States has not adopted appropriate compliance measures that bring the five original measures into conformity with WTO law. In reply to Japan's non-"existence" claims, the United States contends that "measures taken to comply" do exist within the meaning of Article 21.5, namely, the three subsequent reviews. In arguing that these reviews secure compliance, the United States relies heavily on the *effects* of the reviews, excluding the USDOC's *intent* in adopting them. Simultaneously, in reply to Japan's claim concerning the "consistency" of the three subsequent reviews with the covered agreements, the United States contends that these measures are *not* "measures taken to comply" within the meaning of Article 21.5. Its argument that these measures are *not* "taken to comply" relies heavily on the USDOC's *intent* in taking them, excluding the *effects* of the three subsequent reviews. On the US view, Article 21.5 would permit an examination of the "existence" of any measure whose effect is to secure compliance; however, the "consistency" of such a measure could be reviewed solely if the measure was adopted for the purpose of complying.

7. Japan rejects this asymmetrical interpretation because it would seriously undermine the utility of Article 21.5. In Japan's view, Article 21.5 applies fully to any measure that the implementing Member declares secures the withdrawal of the original measures, within the meaning of Article 3.7 of the DSU.

8. The United States must, therefore, accept the consequences of its own declaration that the three subsequent reviews are "measures taken to comply" that "withdraw" the original *Ball Bearing*

¹¹ Panel Report, *US – Gambling (21.5)*, para. 6.24, quoting Appellate Body Report, *US – Softwood Lumber IV (21.5)*, para. 67.

¹² Appellate Body Report, *US – Softwood Lumber IV (21.5)*, para. 88.

¹³ Appellate Body Report, *Korea – Dairy*, paras. 80-81; Appellate Body Report, *Argentina – Footwear (EC)*, para. 81; *see also* Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 271; Appellate Body Report, *US – Gasoline*, p. 23; Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 12; and Appellate Body Report, *India – Patents*, para. 45.

periodic reviews.¹⁴ As a result, the Panel can examine these measures in assessing Japan's claims regarding *both* the "existence" *and* "consistency" of "measures taken to comply".

9. Because of the United States' declaration that the three subsequent reviews are "measures taken to comply", there is no reason for the Panel to enquire into the existence of the substantive connections that, absent such a declaration, can bring a measure within the scope of Article 21.5. Nonetheless, Japan comments on the United States' arguments regarding the connections between the three subsequent reviews and the three original *Ball Bearing* reviews subject to the DSB's recommendations and rulings. The US arguments are beset with contradictions. On the one hand, it asserts that two of the three subsequent reviews (nos. 4 and 5) "have no connection with the DSB's recommendations and rulings".¹⁵ Yet, on the other hand, as set forth in paragraph 2, it argues that these same reviews (and review no. 6) bring about compliance with the DSB's recommendations and rulings regarding reviews nos. 1, 2, and 3.¹⁶

10. It is absurd to suggest that such measures have "no connection with the DSB's recommendations and rulings".¹⁷ To the contrary, they have obvious and important connections to the recommendations and rulings that they allegedly implement.¹⁸ In light of these connections, the subsequent reviews are "measures taken to comply", irrespective of the United States' explicit recognition of that fact.

11. The United States also omits to mention certain of the specific substantive connections relied upon by Japan. In particular, it does not mention that a strong link exists between the reviews in terms of the "*specific component*" of the measures that was found to be WTO-inconsistent in the original proceedings, and that is challenged in these proceedings. That "specific component" is, of course, the zeroing methodology used to make the dumping determinations. Japan argues that *solely this specific component* is within the scope of these proceedings.¹⁹ Thus, contrary to the United States' suggestion, neither every periodic review nor every aspect of every review is subject to these compliance proceedings.

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

B. FUTURE CLOSELY CONNECTED MEASURES MAY FALL WITHIN THE SCOPE OF THESE PROCEEDINGS

13. The United States objects to Japan's reservation of the right to challenge future periodic reviews that are closely connected to the DSB's recommendations and rulings.²⁰ It argues that Japan fails to identify a specific measure, and seeks to include "future, indeterminate measures" to be adopted after the date of the Panel's establishment. Japan requests that the Panel reject the United States' request. *Australia – Salmon (21.5)*²¹ and *EC – Bananas III (21.5 – US)*²² support

¹⁴ United States' First Written Submission, paras. 51, 52, 54, 65 and 67.

¹⁵ United States' First Written Submission, para. 34.

¹⁶ United States' First Written Submission, para. 67.

¹⁷ United States' First Written Submission, para. 34.

¹⁸ For Japan's description of these connections, *see further* Japan's First Written Submission, paras. 90-93.

¹⁹ Appellate Body Report, *US – Softwood Lumber IV (21.5)*, para. 83. ("[A] specific component" of a subsequent review was a "measure taken to comply" in circumstances where the same "specific component" was found to be WTO-inconsistent in an original measure concerning the same anti-dumping order, affecting the same product, exported by the same companies, from the same country.)

²⁰ United States' First Written Submission, para. 50.

²¹ Panel Report, *Australia – Salmon (21.5)*, para. 7.10 (sub-para. 24). (the Panel held that its terms of reference included a Tasmanian import ban, "even though the ban was only introduced subsequent to this Panel's establishment and therefore not *expressis verbis* mentioned in Canada's Panel request.")

Japan's view. The Panel's terms of reference are sufficiently specific for the United States to identify exactly the measures concerned.²³ Finally, Japan considers that the United States' request is not ripe unless and until Japan seeks to include a future periodic review within the scope of these proceedings. There is, therefore, no reason for the Panel to exclude the possibility for Japan to challenge subsequent closely connected "measures taken to comply".

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

A. THE UNITED STATES HAS FAILED TO COMPLY FULLY WITH THE DSB'S RECOMMENDATIONS AND RULINGS WITH RESPECT TO THE ZEROING PROCEDURES

14. The United States argues that by announcing that it "would no longer apply the zeroing procedures in W-to-W comparisons in original investigations", it has "eliminated the single measure that Japan had challenged and that was found to be 'as such' inconsistent".²⁴ According to the United States, "[n]ow that zeroing is no longer used in W-to-W comparisons in antidumping investigations, the single measure that was subject to the DSB's recommendations and rulings has been withdrawn".²⁵

15. Thus, the United States believes that eliminating the use of zeroing in *one* narrow situation results in the elimination of the zeroing procedures in *all* the other situations in which they were found to be WTO-inconsistent. However, a small limitation to the scope of application of a general rule does not eliminate the rule itself. Equally, implementing one of the DSB's four recommendations and rulings regarding the zeroing procedures does not amount to implementation of all four of those recommendations and rulings.

16. The United States also offers no evidence whatsoever to demonstrate that it has, in fact, eliminated the "single rule or norm"²⁶ in the various "manifestations" and situations in which it was found to be WTO-inconsistent. To the contrary, the evidence shows that the United States expressly decided in the *Zeroing Notice*²⁷ to limit its change of zeroing policy to W-to-W comparisons in original investigations. That decision is confirmed by: (1) a string of dumping determinations made since the end of the RPT that apply the zeroing procedures²⁸; and (2) decisions of United States domestic courts since the end of the RPT.²⁹ The evidence, therefore, demonstrates that the

²² Panel Report, *EC – Bananas III (21.5 – US)*, para. 7.493. (The compliance panel agreed with the United States, as complainant, that a measure adopted many years after the end of the RPT could be a "measure taken to comply", even though not recognized as such by the implementing Member. This ruling supports the view of the panel in *Australia – Salmon (21.5)* that implementation is "an ongoing" process that can extend over many years.)

²³ WT/DS322/27, para. 12. The scope of Japan's panel request is circumscribed to include solely specific measures that are "closely connected" to the original measures and that are "measures taken to comply".

²⁴ United States' First Written Submission, para. 79.

²⁵ United States' First Written Submission, para. 80.

²⁶ Panel Report, *US – Zeroing (Japan)*, footnote 688.

²⁷ Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin during an Antidumping Investigation; Final Modification, 71 Fed. Reg. 77722, 77724 (Dep't of Comm., 27 December 2006) (Exhibit JPN-35).

²⁸ In Exhibit JPN-46, Japan presents a table summarizing evidence showing that, in the short time between 1 January 2008 and 11 August 2008, the United States has used the zeroing procedures in at least 13 anti-dumping proceedings other than W-to-W comparisons in original investigations. These include: 11 periodic reviews, one changes circumstances review, and one new shipper review.

²⁹ In several recent decisions, United States courts have confirmed that the United States has abandoned the use of zeroing only in W-to-W comparisons in original investigations. *Corus Staal BV v. United States*, 502 F.3d 1370, 1374 (Fed. Cir. 2007) (Exhibit JPN-61); *Corus Staal BV v. United States*, 493 F. Supp. 2d 1276,

United States' assertion that it has complied with the DSB's four recommendations and rulings regarding the zeroing procedures is incorrect.³⁰

B. THE UNITED STATES HAS FAILED TO COMPLY FULLY WITH THE DSB'S RECOMMENDATIONS AND RULINGS WITH RESPECT TO THE FIVE ORIGINAL PERIODIC REVIEWS

17. The United States does not dispute that it has taken no action to revise the importer-specific assessment rates established in the five original periodic reviews. However, it objects that revision of these importer-specific assessment rates would involve retrospective relief, and explains that, in its view, a prospective remedy is one that applies solely to *new entries that occur on or after the end of the RPT*.³¹ Thus, it believes that action is *never* required to bring importer-specific assessment rates into conformity with WTO obligations because these rates always apply to entries that occurred before the end of the RPT.

18. The United States' interpretation of the DSU "compromise[s] the effectiveness" of the disciplines in Article 9.3 of the *Anti-Dumping Agreement*, and is "difficult to reconcile with objectives of the DSU".³² The United States has not demonstrated how the text of the DSU or the *Anti-Dumping Agreement* requires the extreme interpretation that it proposes.

19. The United States argues that the domestic "legal regime" that applied at the time of importation determines "whether [an] import is liable" for anti-dumping duties, and a Member is not required to change that "legal regime" during implementation.³³ The United States' argument is wrong. As the United States recognizes³⁴, the domestic "legal regime" that applies at the time of importation is merely *provisional*, and notably *does not even include periodic reviews*, which are adopted *long after importation*. Further, the mere fact that Article VI of the GATT 1994 provides that potential liability for the payment of duties is triggered by importation does not mean that a Member is liberated from its obligations under Article 9.3 of the *Anti-Dumping Agreement* to ensure that the amount of duties definitively collected at a later date does not exceed the margin of dumping.

20. The United States argues that Articles 8.6, 10.1, and 10.6 of the *Anti-Dumping Agreement* demonstrate that "determining whether relief is 'prospective' or 'retroactive' can only be determined by reference to date of entry."³⁵ Japan disagrees. Articles 8.6, 10.1, and 10.6 set forth rules governing the earliest date of an importer's obligation to pay anti-dumping duties. The United States is not exonerated from its duty to bring the periodic reviews into conformity with Article 9.3 simply because, at the time of importation, it respected Articles 8.6, 10.1, and 10.6. The United States' argument regarding these three provisions is irrelevant.

21. Although the United States argues that the date on which an import enters the United States is decisive³⁶, that date is not pertinent under Article 18.3 of the *Anti-Dumping Agreement*, which sets forth when that *Agreement* applies to a review. Under that provision, if an application for a periodic

1288 (Ct. Int'l Trade 2007) (Exhibit JPN-62); and *NSK Ltd. v. United States*, 510 F. 3d 1375, 1380 (Fed. Cir. 2007) (Exhibit JPN-63).

³⁰ Even if the Panel were to find that the United States had eliminated the original zeroing procedures, the evidence shows that the original zeroing procedures have been replaced by new zeroing procedures that apply in all situations, except W-to-W comparisons in original proceedings.

³¹ United States' First Written Submission, paras. 53 and 54.

³² Appellate Body Report, *US – Upland Cotton* (21.5), para. 246, *citing* to Articles 3.3 and 21.1 of the DSU.

³³ United States' First Written Submission, para. 59.

³⁴ United States' First Written Submission, para. 61. See also the summary of the US arguments in panel report, *US – Customs Bond Directive*, para. 7.89.

³⁵ United States' First Written Submission, para. 62.

³⁶ United States' First Written Submission, paras. 59-62.

review had been made on 2 January 1995 in connection with entries that occurred in 1993 and 1994, the Member conducting the review would have been subject to the obligations in Article 9.3, even if the relevant entries occurred before the *Anti-Dumping Agreement* entered into force. The terms of Article 18.3, therefore, defeat the United States' assertion that the "legal regime" prevailing at the time of importation is decisive.

22. The United States' argument that the date of entry is decisive is also contradicted by United States domestic law, which treats the *date of liquidation* as the determining factor in deciding whether a *new methodology* can be applied to *past entries*.³⁷

23. In Japan's view, the decisive issue in determining whether the United States must modify a WTO-inconsistent periodic review is *whether the review continues to produce legal effects after the end of the RPT*. If an implementing Member continues to take action pursuant to a review after that date, the rates established in the review must be modified to ensure that future applications of the rates, after the RPT, are WTO-consistent.³⁸

24. Here, the five original periodic reviews do continue to be operational because the importer-specific assessment rates will be applied to determine the duties definitively due on entries that were unliquidated at the end of the RPT. The United States' liquidation actions, on the basis of these importer-specific assessment rates, will give rise to new violations, or continue existing violations, of the covered agreements through the collection of excessive duties after the end of the RPT, in particular under Article 9.3 of the *Anti-Dumping Agreement* and Article II:1(a) of the GATT 1994. As a result, the United States must bring the measure into conformity by modifying the importer-specific assessment rates to ensure that they are applied in a WTO-consistent fashion after the RPT expires.

25. Pursuant to Articles 13, 14 and 15 of the *ILC Articles*³⁹, a breach of international law results from an act of a State, which may or may not be continuing in nature, or from a series of actions. For an act to be wrongful, the State must be subject to the obligation breached when the breach occurs or during the time that the breach is occurring, as set forth in Article 13 of the *ILC Articles*. The *ILC Articles* are useful in showing that the United States is subject to a "prospective" remedy if it is required to revise the importer-specific assessment rates in the original reviews to ensure that any definitive anti-dumping duties collected, *after the end of the RPT*, on the basis of those rates do not exceed the properly determined margin of dumping.

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

27. Whether the USDOC's instructions and the USCBP notices issued after the end of the RPT are viewed (1) as completed acts when they occur, (2) as part of a continuing act, or (3) as part of a series of composite actions, they involve new or continued wrongful acts committed by the United States, *after the end of the RPT*, on the basis of periodic reviews that, *by that time*, should have been brought into conformity with WTO law. This interpretation is fully consistent with the view that

³⁷ See *Parkdale International v. United States*, 475 F.3d 1375 (Fed. Cir. 2007) (Exhibit JPN-64).

³⁸ See also European Communities' Third Party Submission, para. 46 and Hong Kong, China, Third Party Submission, para. 7.

³⁹ International Law Commission's ("ILC") *Articles on Responsibility of States for Internationally Wrongful Acts* ("ILC Articles").

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

28. Japan strongly disagrees that the United States' interpretation "creates inequality" in the implementation obligations that apply to retrospective and prospective duty collection systems.⁴⁰ The United States appears to believe that the definitive amount of anti-dumping duties due in a prospective system is fixed with certainty at the time of importation. This view is incorrect because it overlooks that, in a prospective system, the definitive amount of duties due may be revised *after* importation in a periodic review under Article 9.3.2. In such a review, as with the retrospective system, the authorities must examine whether the duties paid on importation exceed the margin of dumping determined for the product as a whole, for all entries covered by the review.⁴¹ Following an Article 9.3.2 review, a refund of some or all of the duties initially paid may be made. Thus, in a prospective system, the definitive amount of duties due is determined in a periodic review, if requested, and not on importation.

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

30. By omitting to bring the five periodic reviews found to be WTO-inconsistent into conformity with WTO law, the United States acts inconsistently with Articles 17.14, 21.1 and 21.3 of the DSU in the sense that these provisions aim at achieving a satisfactory and prompt settlement of the matter, and is in continued violation of Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994. With respect to Article II:1(a) of the GATT 1994, as shown in Exhibit JPN-40.A, after the end of the RPT, the United States adopted new measures – liquidations instructions and notices – that effect the collection of duties that exceed bound tariffs and that, therefore, give rise to new violations of that provision.

C. THREE SUBSEQUENT PERIODIC REVIEWS COMPLETED BY THE UNITED STATES ARE INCONSISTENT WITH THE ANTI-DUMPING AGREEMENT AND THE GATT 1994

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

⁴⁰ United States' First Written Submission, heading V.A.2 (preceding para. 68), and paras. 68 and 69.

⁴¹ Appellate Body Report, *US – Zeroing (Japan)*, para. 160; Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 121.

D. THE UNITED STATES HAS FAILED TO COMPLY WITH THE DSB'S RECOMMENDATIONS AND RULINGS REGARDING ONE SUNSET REVIEW

32. Japan claims that the United States has failed to implement the DSB's recommendations and rulings regarding the sunset review of 4 November 1999 concerning *Anti-Friction Bearings* ("AFB").⁴²

33. In reply, the United States admits that it has done nothing to implement the DSB's recommendations and rulings, but argues that "it was unnecessary to modify the final results of the challenged sunset review."⁴³ The basis for this startling position is an allegation that "an independent *WTO-consistent* basis for the likelihood of continuance of dumping determination exists".⁴⁴ The United States contends that the "majority" of the margins relied on by the USDOC in the 1999 *AFB* sunset review are not inconsistent with the *Anti-Dumping Agreement* because they either pre-date the *Anti-Dumping Agreement* or they did not involve zeroing. Thus, it suggests that there is "no basis" to consider that the sunset review "continues to be in violation of Article 11.3 of the AD Agreement".⁴⁵

34. This argument is groundless and, once more, seeks to undermine the effectiveness of dispute settlement. The Appellate Body found that the 1999 *AFB* sunset review is inconsistent with Article 11.3 of the *Anti-Dumping Agreement*,⁴⁶ and the DSB's recommendations and rulings required the United States to bring this WTO-inconsistent measure into conformity with its WTO obligations. As the panel in *US – Gambling (21.5)* held, Article 21.5 proceedings do not provide respondents with an opportunity to re-litigate the WTO-consistency of measures found to be inconsistent in the original proceedings.⁴⁷ The Panel cannot reverse the Appellate Body's conclusion that the 1999 *AFB* sunset review is inconsistent with Article 11.3, absent a change in the facts warranting a different conclusion.

⁴² See Japan's First Written Submission, paras. 155 to 158.

⁴³ United States' First Written Submission, para. 75.

⁴⁴ United States' First Written Submission, para. 75.

⁴⁵ United States' First Written Submission, para. 73.

⁴⁶ Appellate Body Report, *US – Zeroing (Japan)*, paras. 186 and 190(f).

⁴⁷ Panel Report, *US – Gambling (21.5)*, para. 6.53.

ANNEX C-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE UNITED STATES

(3 October 2008)

I. INTRODUCTION

1. Japan challenges the US implementation of the Dispute Settlement Body's ("DSB") recommendations and rulings in *US – Zeroing (Japan)*. As explained in the US first written submission, and more fully below, the United States has eliminated all measures that were found to be WTO-inconsistent. This Panel should also reject Japan's attempt to include measures that are outside the scope of this proceeding.

II. THE PANEL SHOULD GRANT THE US REQUEST FOR PRELIMINARY RULINGS

A. THE THREE SUBSEQUENT ADMINISTRATIVE REVIEWS OF *BALL BEARINGS FROM JAPAN* ARE OUTSIDE THE SCOPE OF THIS PROCEEDING

2. Japan erroneously claims that the United States considers the three subsequent administrative reviews of *Ball Bearings* to be "measures taken to comply" with the DSB's recommendations and rulings in the original dispute. Much of Japan's argument focuses on US statements that the cash deposit rates from the original administrative reviews were superceded by cash deposits rates from subsequent reviews. However, saying that the results of one administrative review were superceded by the results of another administrative review is not the same thing as saying that the subsequent review was a "measure taken to comply" within the meaning of DSU Article 21.5. The measures subject to the DSB's recommendations and rulings were eliminated as an *incidental consequence* of the US anti-dumping system when the cash deposit rate from one review was replaced by the cash deposit rate from the next review.

3. Japan misrepresents the US arguments concerning the three subsequent administrative reviews. 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, as the United States has shown, from an objective standpoint, the three subsequent administrative reviews are not measures taken to comply. Concerning the two administrative reviews of *Ball Bearings* that were adopted prior to the DSB's recommendations and rulings, 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. Therefore, the two determinations made long before the DSB's recommendations and rulings cannot be considered measures taken to comply.

4. Japan alleges that the United States argues here, as it did in *US – Softwood Lumber IV (Art. 21.5)* ("*US – SWL IV (Art. 21.5)*"), that an administrative review *initiated* prior to the DSB's recommendations and rulings cannot be a measure taken to comply. The United States, however, makes no such argument in this proceeding, but instead focuses on the date that the final results in the reviews were issued, a factor also considered important in *US – SWL IV (Art. 21.5)*.

5. As to all three of the subsequent reviews of *Ball Bearings*, the US first written submission examined factors that the Appellate Body considered in *US – SWL IV (Art. 21.5)*, and demonstrated why the present dispute is different. It is surprising that Japan thinks that the United States has asked the Panel to focus solely on "the subjective intent of the implementing Member." Japan's exclusive focus on effects is also disingenuous. The effect of the alleged measure taken to comply was just one factor examined in *US – SWL IV (Art. 21.5)*. 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. 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. Here, unlike the alleged measure taken to comply in *US – SWL IV (Art. 21.5)*, the final results of the three subsequent reviews were not made "in view of" the DSB's recommendations and rulings. This fact, when considered alongside timing, demonstrates that the three reviews are not measures taken to comply.

6. Japan considers the US arguments concerning the three subsequent reviews as inconsistent. However, it is Japan's own arguments that are plagued by a "fundamental inconsistency." 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*. Japan's positions are mutually exclusive.

7. 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 by the expiry of the reasonable period of time ("RPT"). As to Japan's *consistency* claim, the United States has not argued, nor does it argue now, that the three subsequent reviews are measures taken to comply. Moreover, the United States does not advocate an "intent-based approach" with respect to measures taken to comply.

8. Japan now tells the Panel that reliance on prior dispute settlement reports is not necessary 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. Japan's argument is based on the erroneous proposition that the United States has expressly declared the three subsequent reviews to be measures taken to comply. Moreover, 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 recommendations and rulings and the three subsequent reviews. However, there is no connection between Review Nos. 4 and 5 and the DSB's recommendations and rulings as the final results of these two reviews were issued long before the recommendations and rulings. Japan's attempt to establish close connections as to the 2005-06 administrative review of *Ball Bearings* also fails. This determination did not occur around the same time as US withdrawal of the administrative reviews subject to the DSB's recommendations and rulings, and did not closely correspond to the expiration of the RPT. In addition, unlike the alleged measure taken to comply in *US – SWL IV (Art. 21.5)*, the 2005-06 review did not incorporate elements from a Section 129 determination "in view of" the DSB's recommendations and rulings.

9. Japan, citing *US – SWL IV (Art. 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. However, even if the United States used zeroing in all three subsequent 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 *SWL IV*. For example, the Appellate Body also accorded great importance to the timing of the declared and the undeclared measures taken to comply. Here, timing counsels against a finding that the three administrative reviews are measures taken to comply.

10. In attempting to rebut US arguments on *Australia – Salmon (Art. 21.5)* and *Australia – Leather (Art. 21.5)*, Japan notes that the critical issue in an Article 21.5 proceeding is whether the implementing Member has complied with the DSB's recommendations and rulings. 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. Japan also worries about the alleged lack of a remedy were the Panel to find that the three subsequent reviews of *Ball Bearings* fall outside the scope of this proceeding. 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, they must negotiate a change to the covered agreements. And in any event, Japan has obtained relief here in the form of the removal of the specific cash deposit rates that were challenged.

11. Japan continues to assert the relevancy of *US – Upland Cotton (Art. 21.5)* to its argument that the three subsequent administrative reviews are measures taken to comply. 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. Japan also dismisses an important difference between this dispute and the one in *Upland Cotton*. The latter dispute involved an interpretation of the SCM Agreement, and not the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("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.

B. FUTURE ADMINISTRATIVE REVIEWS ARE OUTSIDE THE SCOPE OF THIS PROCEEDING

12. 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. However, 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 is separate and distinct, and under Article 6.2, Japan had to identify each such measure in its panel request. Further, the future measures are outside the scope of this proceeding 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.

13. Japan cites *Australia – Salmon (Art. 21.5)* to support its argument that subsequent administrative reviews may be challenged. That dispute is inapposite to the facts before this Panel. Unlike in *Australia – Salmon (Art. 21.5)*, Japan here 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.

14. Japan further cites *EC – Bananas III (Art. 21.5) (US)* to argue that a compliance panel may consider a measure adopted years after the end of the RPT. That point, however, is irrelevant here. In the *EC – Bananas III (Art. 21.5)* dispute, the question before that panel did not pertain to a failure to specify the measure, as required by DSU Article 6.2. That panel's findings are therefore inapposite to this dispute.

15. On 15 September 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*. Whatever concerns Japan may have had about ripeness of the US preliminary ruling are now irrelevant given Japan's request. 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. 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 this alleged measure.

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

A. JAPAN HAS FAILED TO ESTABLISH THAT THIS DISPUTE REQUIRES THE RECALCULATION OF FINAL LIABILITY DETERMINED IN THE FIVE ADMINISTRATIVE REVIEWS

16. 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. Japan argues that the United States must recalculate the final anti-dumping liability by revising the importer-specific assessment rates determined in the five administrative reviews. Japan's theory of implementation would create substantial inequalities between the implementation obligations for retrospective and prospective anti-dumping systems if implementation obligations in anti-dumping disputes extended to unliquidated imports which entered the United States prior to the date of implementation. This is because there is no analogous concept of unliquidated entries in a prospective system. 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 and recalculate final liability as to any prior unliquidated entries.

17. The additional obligation that Japan argues applies to the five administrative reviews in this dispute is to recalculate the final liability applicable to prior unliquidated entries. The crux of Japan's argument is that this obligation would exist in a prospective system if a refund proceeding under Article 9.3.2 of the AD Agreement was challenged at the WTO and the proceeding remained legally operational after the RPT. 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, the operation of the prospective system of at least one Member demonstrates that Japan's argument is incorrect.

18. Japan also argues that limiting implementation obligations to imports entering after the RPT 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. Japan is incorrect. Once a measure is found to be WTO-inconsistent, the same obligation exists under a retrospective or prospective system, including to refrain 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 RPT, and therefore no anti-dumping duties will be assessed on imports entering the United States after the end of the RPT on the basis of the five WTO-inconsistent determinations.

19. 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. Revising this final liability as Japan requests would not constitute prospective implementation because it would require Commerce to undo past

acts as to prior unliquidated entries. In this regard, the wording of Japan's argument is instructive. 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." This use of the term "recalculate" demonstrates that Japan is asking Commerce to undo past acts.

20. Japan references the fact that these entries remain unliquidated under US law after the RPT. Japan's argument is premised on a misunderstanding of liquidation. Liquidation is the ministerial act whereby US Customs determines what is owed on an entry. For entries subject to an anti-dumping order, Customs would collect the anti-dumping 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 anti-dumping duties; Commerce makes that final determination at the conclusion of an administrative review.

21. The United States calculated the final liability for the entries in the five administrative reviews but did not liquidate 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 US 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 RPT. Japan is attempting to rely on domestic US litigation to alter its WTO rights.

22. In the US retrospective anti-dumping system, the deadline for liquidation following an administrative review must occur within six months of Commerce's determination of final liability in an administrative review, unless such liquidation is enjoined by domestic litigation. 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*. For the five original administrative reviews, liquidation did not occur within six months for exactly this reason. 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.

23. 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 *General Agreement on Tariffs and Trade 1994* ("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 extend to prior unliquidated entries.

24. 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 2 January 1995. Because the five challenged administrative reviews were initiated pursuant to applications made after that date, Japan reasons that there is no manner in which 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. 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 and 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. 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. 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.

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

long as a WTO dispute involves an administrative review that was based on an application received on or after 2 January 1995, then the dispute could result in an obligation to revise that administrative review *in any manner*. Article 18.3 of the AD Agreement cannot support application of such an implausible definition of "retroactive" to the AD Agreement.

26. 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 the RPT. Japan concludes that the US 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. US 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.

27. 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 anti-dumping 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 final anti-dumping liability. Japan attempts to bolster its Article 9.3 argument by citing to *US – Upland Cotton (Art. 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. However, 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 anti-dumping systems and by making implementation obligations entirely dependent upon domestic US litigation.

B. JAPAN'S ARGUMENT IMPROPERLY RELIES ON THE ARTICLES ON RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS

28. 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. The ILC Articles are not incorporated either expressly or implicitly into the covered agreements, and do not constitute an element of 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. There is no provision in the *Vienna Convention* justifying reference to the ILC Articles. Lastly, the ILC Articles are not "relevant rules of international law" for purposes of this dispute. 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." Here, the specific WTO provisions on dispute settlement and compliance trump the general rules as set forth in the ILC Articles.

C. JAPAN HAS NOT ESTABLISHED A VIOLATION OF DSU ARTICLES 17.14, 21.1, AND 21.3, NOR A VIOLATION OF ARTICLE II OF THE GATT 1994

29. 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. Nothing Japan argues can change the fact that the United States

unconditionally accepted the recommendations and rulings of the DSB in this dispute. Japan also argues that the alleged US 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. The United States maintains that these DSU provisions do not impose a substantive obligation on Members. The panel reports to which Japan cites do not support Japan's claims as to these articles.

30. The United States reiterates its general objection to Japan's Article II claims. These Article II claims are entirely derivative, and the Panel is not required to address them to resolve this dispute. Japan also failed to request findings from the Panel under these Article II claims. Even were the Panel to address Japan's claims under Article II of the GATT 1994, the United States notes that the liability for anti-dumping duties that Japan claims resulted in collection of duties above the bound rate was incurred prior to the expiration of the RPT. 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.

D. 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

31. 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. 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

32. As the United States has explained here and in its prior submission, these reviews of *Ball Bearings from Japan* are not measures taken to comply and are not properly within the scope of this proceeding. 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

33. In the underlying dispute, Japan challenged a specific aspect of the *AFB* sunset review, namely the reliance upon margins calculated with zeroing. The Appellate Body found that the United States acted inconsistently with the AD Agreement in that review, "when it relied on margins of dumping calculated in previous proceedings through the use of zeroing." Accordingly, both Japan's challenge and the Appellate Body's finding were limited to the extent the United States relied on margins from previous proceedings calculated *with zeroing*. 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.

34. Japan's reliance on the dispute settlement reports in *US – Gambling (Art. 21.5)* and *US – Shrimp (Art. 21.5)* is misplaced. 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. Rather, the United States is asking this Panel to examine issues which were never addressed by the panel or the Appellate Body (i.e., the reliance upon margins that were determined *without zeroing* or the margins that predated the AD Agreement).

35. Commerce in the sunset review of *AFB* was required to determine 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, Commerce reviewed twenty-one respondents, eleven of which failed to cooperate. For ten of those eleven respondents, Commerce applied the dumping margin of 106.61 percent that was based upon a petition rate calculated *without* zeroing. These respondents were not subsequently reviewed during the sunset period and their non-zeroed dumping margins represent their most recent dumping experience. These high dumping margins vitiate Japan's argument that the order should have been terminated. 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. Finally, Japan cites no authority that supports its argument that a Member cannot rely upon pre-WTO margins in making a sunset determination.

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

36. Japan misapprehends the DSB's recommendations and rulings concerning the "zeroing procedures." Those recommendations and rulings applied to the *single measure* known as the "zeroing procedures," regardless of the comparison methodology used or the type of anti-dumping proceeding. Japan, however, has de-constructed that single measure, and essentially treats each use of zeroing as a separate measure that the United States was required to withdraw.

37. The original panel was explicit that the zeroing procedures were a single measure that applied in all contexts and when using all comparison methodologies. The panel concluded that the "zeroing procedures" were "*a measure* which can be challenged as such." The Appellate Body upheld the panel's conclusion. 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* anti-dumping 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, *as it did*, then the single measure is eliminated or withdrawn.

38. Japan now contradicts the very same position that it took in the original proceeding, and with which the panel and the Appellate Body agreed. Japan, for example, 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." 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 ceased to exist.
