ANNEX D

SUPPLEMENTAL SUBMISSIONS OF THE PARTIES OR EXECUTIVE SUMMARIES THEREOF

ANNEX D-1

EXECUTIVE SUMMARY OF THE SUPPLEMENTAL SUBMISSION OF JAPAN

(17 October 2008)

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

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

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

3. The Appellate Body has recognized that "Article 21.5 proceedings involve, in principle, not the original measure, but rather *a new and different measure which was not before the original panel*". Where such new measures have "*a particularly close relationship* to the declared 'measures taken to comply', and to the recommendations and rulings of the DSB", or where there are "*sufficiently close links*" among them, the Appellate Body has concluded that those new measures are subject to review by an Article 21.5 panel.

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

- the 06/07 review, like the original reviews and the reviews 4, 5 and 6, resulted from anti-dumping proceedings conducted by the United States Department of Commerce ("USDOC") and, in particular, the same type of proceeding, namely periodic reviews;

- the 06/07 review, like several of the original reviews and reviews 4, 5 and 6, was conducted pursuant to an anti-dumping order concerning "Ball Bearings and Parts Thereof From Japan", which is to say that it concerns the same subject product and the same exporting country as the original reviews and reviews 4, 5 and 6; and,

- the 06/07 review, like the original reviews and reviews 4, 5 and 6, concerns dumping determinations made with respect to exports from the same companies.

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

6. Finally, Japan notes that, as with the original reviews and reviews 4, 5 and 6, Japan contests "a specific component" of the 06/07 review, namely, the use of the zeroing procedures in making the dumping determinations. Japan challenges this specific component of the 06/07 review – and not other aspects of that measure – in these proceedings.

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

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

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

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

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

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

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

13. Before turning to the specific arguments on the timing of the 06/07 review, Japan notes that the timing of subsequent periodic reviews is a major feature of the US attempts to force all disputes regarding such reviews into fresh WTO proceedings, thereby turning dispute settlement into a Ground Hog Day. In particular, Japan notes that the United States contends that the timing of four Ball Bearing reviews – 03/04 (review 4), 04/05 (review 5), 05/06 (review 6) and 06/07 reviews – excludes each from the scope of these proceedings. In short, the United States' view is that the reviews were adopted *too soon* to be part of these proceedings (reviews 4 and 5), *not close enough* to the end of the reasonable period of time ("RPT") for implementation (review 6), or *too late* (06/07 review). It seems there is never a moment when the timing of a subsequent review would allow it to be part of compliance proceedings.

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

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

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

16. In these proceedings, the 06/07 review satisfies the circumstances identified by the panel. In contrast to the alleged measures challenged by the European Communities in *US – Zeroing II (EC)*, there is no dispute that the 06/07 review exists or that it came into existence during these panel proceedings. Furthermore, as stated above, the measure was adequately identified in Japan's panel request.

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

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

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

20. In finding that the ban was part of its terms of reference, the panel noted that Canada's panel request identified measures taken to comply that Australia '"has taken or does take"', which the panel found to be a reference to "future measures". The panel also found that "[t]he ban falls within the *category of measures specified in the Panel request*". Australia was, therefore, on notice that future measures belonging to an identified category of measures were at issue.

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

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

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

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

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

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

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

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

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

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

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

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

30. In the review proceedings, several interested parties argued that the USDOC should not use the zeroing procedures to calculate either the cash deposit or importer-specific assessment rates, because these procedures are WTO-inconsistent. However, rejecting these arguments, the USDOC decided to maintain its use of zeroing:

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

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

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

32. In addition to relying on the 06/07 review as evidence of the maintenance of the zeroing procedures, Japan also makes claims regarding that review. The sole element of the 06/07 review that Japan contests is the USDOC's use of the zeroing procedures. The Appellate Body has ruled in three separate disputes, including in the original proceedings in this dispute, that the United States acts inconsistently with the *Anti-Dumping Agreement* and the GATT 1994 by relying on zeroing to calculate margins of dumping in periodic reviews. Equally, in a report circulated on 1 October 2008, the panel in *US – Zeroing II (EC)* reached the same conclusion.

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

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

ANNEX D-2

RESPONSE OF THE UNITED STATES TO THE SUPPLEMENTAL SUBMISSION OF JAPAN

(3 November 2008)

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Table of Reports

Short Form	Full Citation
Argentina – Poultry (Panel)	Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003
Australia – Salmon (Art. 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
Japan – Film (Panel)	Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998
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 (Art. 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 (Panel)	Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, adopted 21 March 2005, as modified by the Appellate Body Report, WT/DS267/AB/R
US – Zeroing (Japan) (AB)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted 23 January 2007
US – Zeroing II (EC) (Panel)	Panel Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/R, circulated 1 October 2008, not yet adopted

I. INTRODUCTION

1. The United States would like to thank the Panel for this opportunity to respond to Japan's supplemental submission of 10 October 2008. Japan asserts that the 2006-07 administrative review of *Ball Bearings from Japan* falls within the scope of this proceeding.[1] However, this administrative review is not a measure taken to comply within the meaning of Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and is therefore outside the Panel's terms of reference. Moreover, Japan improperly uses its submission as an opportunity to re-argue whether alleged "subsequent closely connected measures" may fall within the scope of this proceeding.[2] The Panel should therefore exclude Japan's additional arguments from consideration. Even aside from the fact that the Panel should not take into account Japan's arguments on this issue, the United States has demonstrated throughout this compliance proceeding and further discusses below, that under the DSU, the Panel may not consider future measures that were not identified in Japan's panel request and that were not in existence at the time of panel establishment.

II. THIS PANEL DOES NOT HAVE JURISDICTION OVER THE 2006-07 ADMINISTRATIVE REVIEW OF *BALL BEARINGS FROM JAPAN*

A. THE 06/07 REVIEW IS NOT A MEASURE TAKEN TO COMPLY

2. Japan erroneously claims that the 06/07 review is a measure taken to comply with the DSB's recommendation and rulings.[3] Japan's argument depends on the same flawed logic that Japan used when attempting to demonstrate why the three subsequent reviews of *Ball Bearings* were allegedly within the Panel's terms of reference.[4] As the United States will show, the 06/07 review – just as the other three subsequent reviews – is not a measure taken to comply, and therefore does not fall within the scope of this proceeding under Article 21.5 of the DSU.

3. Japan relies extensively on the alleged "particularly close relationship" or "sufficiently close links" between the 06/07 review, the administrative reviews challenged in the original proceeding, and Review Nos. 4, 5, 6.[5] Japan highlights similarities, such as the fact that the reviews all involve the "same subject product", "the same exporting countries", and "the same companies".[6] Further, Japan notes that the cash deposit rate from one review replaces the rate from another, overlooking the fact that this is an incidental consequence of the US anti-dumping system.[7] Based on Japan's reasoning, every subsequent review would be swept into the scope of an Article 21.5 proceeding.

4. Japan's approach is so broad as to render the requirements of Article 21.5 of the DSU meaningless. As the Appellate Body stated in *US – Softwood Lumber IV (Art. 21.5)*, "not . . . every assessment review will necessarily fall within the jurisdiction of an Article 21.5 panel".[8] According to

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[1] Japan refers to this administrative review throughout its supplemental submission as the "06/07 review". *See, e.g.*, Japan Supplemental Submission, para. 1. For ease of reference, and to avoid confusion, the United States adopts the same terminology.

[2] Japan Panel Request, para. 12; Japan Second Written Submission, paras. 59-65.

[3] Japan Supplemental Submission, para. 3.

[4] 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* (1 May 2003 through 30 April 2004) (JTEKT, NSK, NPB and NTN); Review No. 5 – *Ball Bearings and Parts Thereof From Japan* (1 May 2004 through April 30 2005) (JTEK, NS, NPB, and NTN); Review No. 6 – *Ball Bearings and Parts Thereof From Japan* (1 May 2005 through 30 April 2006) (Asahi Seiko, JTEKT, NSK, NPB and NTN).

[5] Japan Supplemental Submission, paras. 4-5.

[6] Japan Supplemental Submission, para. 5.

[7] Japan Supplemental Submission, para. 6.

[8] *US – Softwood Lumber IV (Art. 21.5) (AB)*, para. 93 (footnote omitted).

the Appellate Body, "such an approach would be too sweeping."[9] This Panel should reject Japan's attempt to include the 06/07 review just because of the superficial similarities between that review, the original reviews, and the three subsequent reviews. If the overlap between product, exporting country, and exporting company, or the incidental operation of the anti-dumping system, was sufficient to establish the type of "particularly close relationship" found in *US – Softwood Lumber IV (Art. 21.5)*, then every administrative review would fall within the jurisdiction of an Article 21.5 panel. In line with the Appellate Body's statements in *US – Softwood Lumber IV (Art. 21.5)*, the DSU does not permit such an approach.

5. The timing of the 06/07 review is important, despite Japan's attempt to downplay and dismiss this factor as somehow irrelevant.[10] The 06/07 review was initiated at the request of interested parties, on a schedule *independent* of dispute settlement and pursuant to domestic law implementing the rights and obligations in the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement"). The results of the review were not issued around the same time as the withdrawal of the measure that brought the United States into compliance,[11] and not around the time of the expiry of the reasonable period of time ("RPT").[12] By contrast, in *US – Softwood Lumber IV (Art. 21.5)*, the determination in the first administrative review (alleged measure taken to comply) was issued a few days after the Section 129 determination (declared measure taken to comply) and both closely corresponded to the expiry of the RPT.[13] The Appellate Body accorded these facts considerable weight in finding that the subsequent review was a measure taken to comply.

6. Japan further relies on the recent panel report in *US – Zeroing II (EC)* to demonstrate that the 06/07 review is part of a "chain of measures" which falls within the scope of an Article 21.5 proceeding.[14] This report has been circulated to Members but has not been adopted by the DSB and is subject to appeal by either party. In any event, Japan misunderstands the panel's findings. In *US – Zeroing II (EC)*, the panel was not addressing the issue of whether a subsequent review was a measure taken to comply within the meaning of Article 21.5. In fact, that dispute was not a compliance dispute at all; rather, the panel was addressing the EC's "as applied" zeroing claims. Moreover, Japan relies on language from the panel's preliminary ruling that measures included in the panel request but not included in the consultations request fell within the scope of the panel proceeding.[15] The panel's treatment of that issue is irrelevant to the issue currently before this Panel, which is not considering whether measures specified in a panel request, but not a consultation request, are properly before it.

7. Perhaps of even greater significance from a systemic point of view is that Japan's "closely related" approach would mean that the terms of reference of an Article 21.5 panel could spread ever outward like ripples in a pond. This is because a measure (referred to as "measure B" for convenience) that is "closely related" to a measure taken to comply (referred to as "measure A") is itself then deemed to be a measure taken to comply by virtue of that close relationship. In that case, any measure (e.g., "measure C") that is "closely related" to measure B then itself becomes a "measure taken to comply." In turn then, any measure closely related to measure C could become a measure taken to comply, with each succeeding iteration perhaps bearing a more and more remote relationship to the original measure, measure A. Members nowhere agreed to such an approach in the DSU.

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[9] *US – Softwood Lumber IV (Art. 21.5) (AB)*, para. 87 (footnote omitted).

[10] Japan Supplemental Submission, para. 14.

[11] The cash deposit rate for the most recent administrative review of *Ball Bearings* that was subject to the DSB's recommendations and rulings (i.e., the 2002-03 review) was replaced by the cash deposit from the 2003-04 review in September 2005, about three years before the final results of the 06/07 review were announced.

[12] The RPT expired on December 24, 2007.

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

[14] Japan Supplemental Submission, para. 8.

[15] *US – Zeroing II (EC) (Panel)*, paras. 7.11-7.28.

B. THE PANEL MAY NOT CONSIDER AN ADMINISTRATIVE REVIEW NOT SPECIFIED IN JAPAN'S PANEL REQUEST

1. The Panel Should Reject Japan's Additional Arguments

8. As an initial matter, Japan has used its supplemental submission as an opportunity to attempt to rebut once again the US arguments regarding the specificity of Japan's panel request.[16] The United States recalls that it objected to Japan's attempt to include "any subsequent closely connected measures" that were not anywhere identified in Japan's panel request.[17] The United States asked for a preliminary ruling under Article 6.2 of the DSU to exclude such future measures. Japan had an opportunity to rebut the US arguments in its second written submission and attempted to do so.[18] Japan also raised this issue in its 15 September 2008 request to file a supplemental submission on an alleged additional measure taken to comply, and attempted to justify why it had the right to file a submission on future measures.[19] The United States, as part of its second written submission, responded to Japan's rebuttal submission and Japan's separate request to file a supplemental submission.[20] The Panel, without ruling on the issue of specificity, then permitted Japan to file its supplemental submission regarding why the 06/07 review was an alleged measure taken to comply.

9. Japan is now using its supplemental submission to address yet again an issue that has been fully argued by both parties and for which it did not request permission to file a supplemental submission. The Panel should disregard Japan's further arguments as to why "any subsequent closely connected measures"– in this instance, the 06/07 review – are within the scope of this proceeding. Nevertheless, the United States will respond to Japan's argument, without prejudice to its objection that Japan has improperly inserted additional argumentation into its supplemental submission.

2. Japan's Panel Request Does Not Meet the Specificity Requirement of DSU Article 6.2

10. Japan's panel request did not properly address the specific measures at issue – in this instance, the 06/07 review. 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 anti-dumping 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.

11. As the United States explained in its second written submission,[21] future administrative reviews, like the 06/07 review, also fall outside the scope of this proceeding because under the DSU, measures not yet in existence at the time of panel establishment cannot be subject to dispute settlement.[22] The results of the 06/07 review were issued in September 2008, months after Japan made its request for establishment. The simple fact that Japan had to seek to make a "supplemental submission" well after Japan was to have provided all of its written submissions only highlights that the measure was not in existence at the time of the Panel's establishment and could not have been specified by Japan in its panel request. Therefore, this subsequent administrative review cannot fall within the Panel's terms of reference.

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[16] Japan Supplemental Submission, paras. 9-28.
[17] US First Written Submission, para. 50.
[18] Japan Second Written Submission, paras. 59-65.
[19] Japan's Letter to the Panel, 15 Sept. 2008 (citing *Australia – Salmon (Art. 21.5) (Panel)*).
[20] US Second Written Submission, paras. 29-34.
[21] US Second Written Submission, para. 30.
[22] *US – Upland Cotton (Panel)*, paras. 7.158-7.160 (rejecting inclusion of the Agricultural Adjustment Act of 2003 in the panel's terms of reference because that law did not come into existence until after panel establishment) ("In this case, the Agricultural Assistance Act of 2003 could not possibly have been impairing any benefits at the date of Brazil's referral of its complaint to the DSB because it did not yet exist.").

12. Japan argues that the United States "received ample 'notice'" of Japan's intention to challenge future reviews;[23] this argument, however, is beside the point. Article 6.2 of the DSU imposes no burden on a party to show that it failed to receive adequate notice as to certain measures not identified in the panel request, or that it was somehow prejudiced by the lack of specificity in a panel request. And no such requirement is found in any other provision of the DSU, or anywhere else in the covered agreements.[24] The requirements of Article 6.2 of the DSU are clear – the panel request must "*identify* the *specific* measures at issue."[25] Measures not so identified do not fall within the panel's terms of reference. Japan could not have identified a measure not yet in existence. This is all that the United States is required to show in order to prevail on its preliminary objection under Article 6.2 of the DSU.

13. Japan cites to the recent, unadopted panel report in *US – Zeroing II (EC)* to support its erroneous argument that future administrative reviews may fall within a panel's terms of reference.[26] Again, this report has not been adopted by the DSB and may be appealed by either party. In any event, in that report, the panel actually rejected the EC's attempt to obtain "a remedy which would affect anti-dumping proceedings that the USDOC may conduct in the future" *following* panel establishment.[27] As the panel found, "in our view, Article 6.2 of the DSU, in principle, does not allow a panel to make findings regarding measures that do not exist as of the date of the panel's establishment."[28] The panel noted that there may be "exceptional circumstances" where future measures could fall within the panel's terms of reference.[29] But the panel found that this was not the case where a complaining Member was attempting to reach future anti-dumping determinations that were not in existence at the time of panel establishment.

14. Japan relies once again on the panel report in *Australia – Salmon (Art. 21.5)* and accuses the United States of misreading the panel's findings.[30] As the United States has demonstrated,[31] it is Japan that distorts the reasoning from that dispute to argue that future reviews are properly before the Panel.

15. In *Australia – Salmon (Art. 21.5)*, Canada requested leave to file a supplemental submission on a Tasmanian import ban that was adopted after the panel proceeding had begun. Australia objected that the new measure was outside the panel's terms of reference. Canada's panel request identified measures that Australia "has taken or would take" to comply "with the recommendations and rulings of the DSB by implementing the policies for non-viable salmonids outlined in AQPM 1999/51."[32] The compliance panel noted that future measures that were taken "to implement AQPM 1999/51" (namely, AQPM 1999/64, 66, 69, 70, 77, and 79) were within scope of proceeding, and that neither

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[23] Japan Supplemental Submission, para. 27.

[24] In *US – Zeroing II (EC) (Panel)*, the panel found that "neither Article 6.2 of the DSU nor any other provision of the WTO Agreement supports the argument that the defendant has to show prejudice in cases where the complaining Member's panel request falls short of the requirements of Article 6.2." *US – Zeroing II (EC) (Panel)*, para. 7.63.

[25] Emphasis added.

[26] Japan Supplemental Submission, paras. 15-17.

[27] *US – Zeroing II (EC) (Panel)*, para. 7.59.

[28] *US – Zeroing II (EC) (Panel)*, para. 7.59.

[29] The panel may have had in mind the panel report in *Japan – Film*, which it earlier dismissed as irrelevant to the issue under consideration. *See US – Zeroing II (EC)*, para. 7.54. In *Japan – Film*, the panel found that subsequent measures promulgated under a framework law that was identified in the panel request fell within its terms of reference. It considered these measures "subsidiary" or "closely related" to the law of general application specifically identified. *See Japan – Film (Panel)*, paras. 10.8-10.14. Unlike *Japan – Film*, this dispute does not involve subsequent regulations issued under a law of general application.

[30] Japan Supplemental Submission, paras. 18-29.

[31] US Second Written Submission, paras. 32-33.

[32] *Australia – Salmon (Art. 21.5) (Panel)*, para. 7.10(25) (emphasis in original).

party contested this fact.[33] The panel then reasoned that the Tasmanian measure, "*for similar reasons*" was within scope of the Article 21.5 proceeding.[34] In other words, the panel found that the Tasmanian ban fell within a "category of measures" to comply that were specified in the panel request, or was "closely related" to those measures.[35] The panel also considered it important that Australia apparently had agreed, with respect to other, future measures, that such measures were within the panel's terms of reference.[36]

16. Japan ignores the key difference from *Australia – Salmon (Art. 21.5)*. Here, Japan is not challenging future measures that implement or that are "closely related" to a framework regulation that was adopted to comply with the recommendations and rulings of the DSB. Rather, Japan is trying to challenge a subsequent administrative review, which occurred upon request of interested parties based upon provisions of the AD Agreement and on a schedule established without regard for dispute settlement proceedings. The 06/07 review, and any other subsequent reviews of *Ball Bearings*, therefore are separate and distinct measures, independent of the present dispute, and independent of other prior reviews. Japan's challenge is not analogous to challenging subsequent measures which implement or are closely related to a framework law or regulation.

III. THE PANEL SHOULD NOT REACH THE MERITS OF JAPAN'S CLAIMS CONCERNING THE 06/07 REVIEW

17. Japan claims that the 06/07 review violates Articles 2.4 and 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 due to the application of zeroing procedures.[37] As the United States has explained, this review is not a measure taken to comply and is not properly within the scope of this proceeding.[38] Therefore, this Panel should not reach the issue of the WTO consistency of this alleged measure.

IV. CONCLUSION

18. For the reasons set forth above, along with those set forth in the US written submissions, the United States requests that the Panel reject the 06-07 administrative review of *Ball Bearings from Japan* as outside the scope of this proceeding.

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[33] *Australia – Salmon* (Art. 21.5) *(Panel)*, para. 7.10(26).

[34] *Australia – Salmon (*Art. 21.5) *(Panel)*, para. 7.10(27) (emphasis added).

[35] *Australia – Salmon (Art. 21.5) (Panel)*, para. 7.10(27). The panel's reasoning was based in part on the panel report in *Japan – Film*, which similarly found that measures closely related to the implementation of a framework law could be included in a panel's terms of reference, even if they came into existence after the panel request. *See Australia – Salmon (Art. 21.5) (Panel)*, para. 7.10(26) & n.144.

[36] *Australia – Salmon (Art. 21.5) (Panel)*, para. 7.10(26).

[37] Japan Supplemental Submission, para. 34.

[38] In making its argument on the merits, Japan relies on the recent, unadopted panel report in *US – Zeroing II (EC)*, as well as the Appellate Body reports in *US – Zeroing (EC)* and *US – Stainless Steel (Mexico)*. *See* Japan Supplemental Submission, paras. 33-34 & nn. 35-37. The United States notes that dispute settlement reports are not binding except with respect to resolving the particular dispute between the parties to that dispute. *See US – Softwood Lumber Dumping (AB)*, para. 111 (citing *Japan–Alcohol Taxes (AB)*); *Argentina–Poultry (Panel)*, para. 7.41. Although panels may take the persuasiveness of other reports into account, there is no *stare decisis* in the WTO dispute settlement system, and prior reports from other disputes do not bind this Panel.

ANNEX D-3

RESPONSE OF JAPAN TO THE UNITED STATES' RESPONSE TO THE SUPPLEMENTAL SUBMISSION OF JAPAN

(5 November 2008)

I. INTRODUCTION

1. Mr. Chairman, Japan appreciates the opportunity to make a short statement regarding the United States' rebuttal to our supplemental submission on the 06/07 periodic review. Japan will not respond to every US argument, because the United States repeats many of the arguments it has made in connection with the other subsequent reviews.

II. THE PANEL'S TERMS OF REFERENCE

2. We begin with observations on the United States' argument that the terms of Japan's *panel request* do not cover the 06/07 review. This argument is contradicted by the fact that the United States understood Japan's panel request to include "future administrative reviews related to the eight identified in its panel request".[1] The United States' ability to identify the measures at issue confirms that Japan's panel request meets the specificity and due process requirements of Article 6.2.[2]

3. The United States argues that a panel request cannot include measures that come into existence during the panel proceedings.[3] In making this argument, the United States attempts to distinguish the situation in these compliance proceedings from those in *Australia – Salmon (21.5)*. In so doing, it mis-states the findings of the panel in *Australia – Salmon (21.5)*. As in its previous submissions,[4] the United States argues that a measure *imposing a regional ban* was found to be within the panel's terms of reference, because the regional ban was *taken to implement*, and was *similar to*, *federal* measures *withdrawing a federal ban* that were specified in the panel request.[5]

4. Besides reasserting its earlier argument, the United States has not explained how the introduction of a regional ban "implements" or is "similar" to the elimination of a federal ban. The regional ban did not implement any aspect of the federal measures eliminating the federal ban; imposing a new ban is not similar to eliminating an old ban.[6] Japan does not, therefore, agree with the US reading of *Australia – Salmon (21.5)*.

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[1] United States' First Written Submission, para. 50.
[2] Appellate Body Report, *Thailand – H-Beams*, para. 88.
[3] United States' Supplemental Submission, para. 11.
[4] United States' Second Written Submission, paras. 32, 33.
[5] United States' Supplemental Submission, para. 15 ("The compliance panel noted that future measures that were take to implement AQPM 1999/51 . . . were within scope of proceeding, and that neither party contested this fact. The panel then reasoned that the Tasmanian measure, '*for similar reasons*' was within scope of the Article 21.5 proceeding".).
[6] Japan's Supplemental Submission, para. 22.

5. Instead, as the United States concedes,[7] the panel found that the regional ban was within its terms of reference *because it belonged to a category of measures identified in the panel request*, namely any "measure taken to comply". Similar to *Australia – Salmon (21.5)*, the 06/07 review is within this Panel's terms of reference because it falls within a category of measures explicitly identified in the panel request, namely "any subsequent closely connected measures".

6. However, even if – as the United States asserts[8] – the panel's findings in *Australia – Salmon (21.5)* were based on the "close relationship" between the regional ban and the federal measures withdrawing the original federal ban, *Australia – Salmon (21.5)* still supports inclusion of the 06/07 review in this Panel's terms of reference. For reasons enumerated in our Supplemental Submission, the 06/07 review is, indeed, "similar" and "closely related" to other measures that the United States does not contest are identified in Japan's panel request: five original reviews, and three subsequent reviews.[9]

III. THE 06/07 REVIEW IS A "MEASURE TAKEN TO COMPLY"

7. We turn briefly to US arguments that the 06/07 review is not a "measure taken to comply". In *US – Zeroing II (EC)*, the panel found that periodic reviews under a single anti-dumping order, involving the same calculation methodology, were part of "the same subject matter" and "the same dispute", because of the close substantive links between the reviews.[10] The panel correctly held that this close relationship may be important in defining a panel's terms of reference in original proceedings.

8. The United States contends that the panel's statement in *US – Zeroing II (EC)* is "irrelevant" to these proceedings, because the statement was not made in compliance proceedings.[11] Japan disagrees. Original and compliance proceedings are, in fact, part of "the same dispute". As panels and the Appellate Body have said, "Article 21.5 proceedings do not occur in isolation from the original proceedings, but both proceedings *form part of a continuum of events*" that extends until compliance is fully achieved.[12]

9. As a result, where the original proceedings concern a chain of periodic reviews that are part of "the same subject matter" and "the same dispute", new links in that chain involving the same disputed calculation methodology are necessarily part of a "continuum of events" prolonging "the same dispute".[13] In the context of such a dispute, there is no basis for artificially splitting the chain of measures and events, either at the end of the original proceedings or after the end of the RPT.

10. The United States also suggests that the 06/07 review bears a "more remote relationship to the original measure[s]" than the other subsequent reviews.[14] Again, Japan disagrees. Japan has outlined that *the close substantive connections* linking the 06/07 review, and the other subsequent reviews, to the original measures.[15] That is, the same substantive features of the original periodic reviews – which define the contours of this dispute – are mirrored in each of the subsequent reviews. The later measures are no less substantively connected to the dispute than the earlier measures.

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[7] United States' Supplemental Submission, para. 15 ("In other words, the panel found that the Tasmanian ban fell within a "category of measures" to comply that were specified in the panel request, or was "closely related" to those measures") (underlining added).

[8] United States' Supplemental Submission, paras. 15-16.

[9] Japan's Supplemental Submission, paras. 5-7.

[10] Panel Report, *US – Zeroing II (EC)*, para. 7.28.

[11] United States' Supplemental Submission, para. 6.

[12] Appellate Body Report, *Chile – Price Band System (21.5)*, para. 136, *citing* Appellate Body Report, *Mexico – Corn Syrup (21.5)*, para. 121 (emphasis added).

[13] Panel Report, *US – Zeroing II (EC)*, para. 7.28.

[14] United States' Supplemental Submission, para. 6.

[15] *See* Japan's Supplemental Submission, paras 5-7.

11. In reality, given that the key substantive features of the periodic reviews are unchanged, the US "remoteness" argument is code for its argument on timing. In essence, the United States argues that, where there is a chain of measures with a close substantive connection to the original measures, the latest measure ceases to be part of the dispute if it is too distant in time from the original proceedings. Japan has already expressed its disagreement with this point.[16] Compliance is an "ongoing or continuous process",[17] and panels must be able to scrutinize the latest measures that undermine the DSB's recommendations and rulings. Otherwise, in a dispute regarding *recurring* measures – such as periodic reviews or recurring subsidies – an implementing Member is rewarded under Article 21.5 for its persistence in ignoring the DSB's recommendations and rulings.

12. Thank you, Mr. Chairman.

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[16] *See, e.g.*, Japan's Opening Statement, para. 32.
[17] Panel Report, *Australia – Salmon (21.5)*, para. 7.10 (sub-para. 28).