

**UNITED STATES – MEASURES RELATING TO ZEROING
AND SUNSET REVIEWS**

RECOURSE TO ARTICLE 21.5 OF THE DSU BY JAPAN

AB-2009-2

Report of the Appellate Body

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Short Title	Full case title and citation
<i>Australia – Salmon (Article 21.5 – Canada)</i>	Panel Report, <i>Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS18/RW, adopted 20 March 2000, DSR 2000:IV, 2031
<i>Brazil – Aircraft</i>	Appellate Body Report, <i>Brazil – Export Financing Programme for Aircraft</i> , WT/DS46/AB/R, adopted 20 August 1999, DSR 1999:III, 1161
<i>Brazil – Desiccated Coconut</i>	Appellate Body Report, <i>Brazil – Measures Affecting Desiccated Coconut</i> , WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, 167
<i>Brazil – Retreaded Tyres</i>	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, 1527
<i>Brazil – Retreaded Tyres</i>	Panel Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/R, adopted 17 December 2007, as modified by Appellate Body Report WT/DS332/AB/R, DSR 2007:V, 1649
<i>Canada – Continued Suspension</i>	Appellate Body Report, <i>Canada – Continued Suspension of Obligations in the EC – Hormones Dispute</i> , WT/DS321/AB/R, adopted 14 November 2008
<i>Canada – Wheat Exports and Grain Imports</i>	Appellate Body Report, <i>Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , WT/DS276/AB/R, adopted 27 September 2004, DSR 2004:VI, 2739
<i>Chile – Price Band System</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3045 (Corr.1, DSR 2006:XII, 5473)
<i>Chile – Price Band System</i>	Panel Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/R, adopted 23 October 2002, as modified by Appellate Body Report WT/DS207/AB/R, DSR 2002:VIII, 3127
<i>EC – Bananas III</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591
<i>EC – Bananas III (US)</i>	Panel Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by the United States</i> , WT/DS27/R/USA, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:II, 943
<i>EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)</i>	Appellate Body Reports, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador</i> , WT/DS27/AB/RW2/ECU, adopted 11 December 2008, and <i>Corr.1 / European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS27/AB/RW/USA and <i>Corr.1</i> , adopted 22 December 2008
<i>EC – Bed Linen (Article 21.5 – India)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, 965
<i>EC – Chicken Cuts</i>	Appellate Body Report, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts</i> , WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and <i>Corr.1</i> , DSR 2005:XIX, 9157
<i>EC – Chicken Cuts (Thailand)</i>	Panel Report, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts, Complaint by Thailand</i> , WT/DS286/R, adopted 27 September 2005, as modified by Appellate Body Report WT/DS269/AB/R, WT/DS286/AB/R, DSR 2005:XX, 9721

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<i>EC – Countervailing Measures on DRAM Chips</i>	Panel Report, <i>European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea</i> , WT/DS299/R, adopted 3 August 2005, DSR 2005:XVIII, 8671
<i>EC – Selected Customs Matters</i>	Appellate Body Report, <i>European Communities – Selected Customs Matters</i> , WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, 3791
<i>Guatemala – Cement I</i>	Appellate Body Report, <i>Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico</i> , WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, 3767
<i>India – Additional Import Duties</i>	Appellate Body Report, <i>India – Additional and Extra-Additional Duties on Imports from the United States</i> , WT/DS360/AB/R, adopted 17 November 2008
<i>India – Autos</i>	Panel Report, <i>India – Measures Affecting the Automotive Sector</i> , WT/DS146/R, WT/DS175/R and Corr.1, adopted 5 April 2002, DSR 2002:V, 1827
<i>Indonesia – Autos</i>	Panel Report, <i>Indonesia – Certain Measures Affecting the Automobile Industry</i> , WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R and Corr.1 and 2, adopted 23 July 1998, and Corr. 3 and 4, DSR 1998:VI, 2201
<i>Korea – Dairy</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3
<i>Thailand – H-Beams</i>	Appellate Body Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, 2701
<i>US – 1916 Act</i>	Appellate Body Report, <i>United States – Anti-Dumping Act of 1916</i> , WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, 4793
<i>US – Carbon Steel</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, 3779
<i>US – Certain EC Products</i>	Appellate Body Report, <i>United States – Import Measures on Certain Products from the European Communities</i> , WT/DS165/AB/R, adopted 10 January 2001, DSR 2001:I, 373
<i>US – Continued Suspension</i>	Appellate Body Report, <i>United States – Continued Suspension of Obligations in the EC – Hormones Dispute</i> , WT/DS320/AB/R, adopted 14 November 2008
<i>US – Continued Suspension</i>	Panel Report, <i>United States – Continued Suspension of Obligations in the EC – Hormones Dispute</i> , WT/DS320/R, adopted 14 November 2008, as modified by Appellate Body Report WT/DS320/AB/R
<i>US – Continued Zeroing</i>	Appellate Body Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/AB/R, adopted 19 February 2009
<i>US – FSC (Article 21.5 – EC II)</i>	Appellate Body Report, <i>United States – Tax Treatment for "Foreign Sales Corporations" – Second Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS108/AB/RW2, adopted 14 March 2006, DSR 2006:XI, 4721

Short Title	Full case title and citation
<i>US – Oil Country Tubular Goods Sunset Reviews</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, 3257
<i>US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina</i> , WT/DS268/AB/RW, adopted 11 May 2007, DSR 2007:IX, 3523
<i>US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)</i>	Panel Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina</i> , WT/DS268/RW, adopted 11 May 2007, as modified by Appellate Body Report WT/DS268/AB/RW, DSR 2007:IX-X, 3609
<i>US – Section 129(c)(1) URAA</i>	Panel Report, <i>United States – Section 129(c)(1) of the Uruguay Round Agreements Act</i> , WT/DS221/R, adopted 30 August 2002, DSR 2002:VII, 2581
<i>US – Shrimp</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755
<i>US – Softwood Lumber IV (Article 21.5 – Canada)</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 of the DSU</i> , WT/DS257/AB/RW, adopted 20 December 2005, DSR 2005:XXIII, 11357
<i>US – Stainless Steel (Mexico)</i>	Appellate Body Report, <i>United States – Final Anti-Dumping Measures on Stainless Steel from Mexico</i> , WT/DS344/AB/R, adopted 20 May 2008
<i>US – Superfund</i>	GATT Panel Report, <i>United States – Taxes on Petroleum and Certain Imported Substances</i> , L/6175, adopted 17 June 1987, BISD 34S/136
<i>US – Upland Cotton</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, 3
<i>US – Upland Cotton</i>	Panel Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/R, Corr.1, and Add.1 to Add.3, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R, DSR 2005:II, 299
<i>US – Zeroing (EC)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")</i> , WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, 417
<i>US – Zeroing (EC)</i>	Panel Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")</i> , WT/DS294/R, adopted 9 May 2006, as modified by Appellate Body Report WT/DS294/AB/R, DSR 2006:II, 521
<i>US – Zeroing (EC) (Article 21.5 – EC)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS294/AB/RW and Corr.1, adopted 11 June 2009
<i>US – Zeroing (EC) (Article 21.5 – EC)</i>	Panel Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS294/RW, adopted 11 June 2009, as modified by Appellate Body Report WT/DS294/AB/RW
<i>US – Zeroing (Japan)</i>	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews</i> , WT/DS322/AB/R, adopted 23 January 2007, DSR 2007:I, 3

Short Title	Full case title and citation
<i>US – Zeroing (Japan)</i>	Panel Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews</i> , WT/DS322/R, adopted 23 January 2007, as modified by Appellate Body Report WT/DS322/AB/R, DSR 2007:I, 97
<i>US – Zeroing (Japan)</i> <i>(Article 21.5 – Japan)</i>	Panel Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan</i> , WT/DS322/RW, circulated to WTO Members 24 April 2009

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
<i>Ad Note</i>	Interpretive Note to paragraphs 2 and 3 of Article VI of the GATT 1994
<i>Anti-Dumping Agreement</i>	<i>Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994</i>
Customs	United States Customs and Border Protection
DSB	Dispute Settlement Body
DSU	<i>Understanding on Rules and Procedures Governing the Settlement of Disputes</i>
GATS	<i>General Agreement on Trade in Services</i>
GATT 1994	<i>General Agreement on Tariffs and Trade 1994</i>
ILC Draft Articles	Draft Articles on Responsibility of States for internationally wrongful acts, adopted by the International Law Commission at its fifty-third session (2001), annexed to the United Nations General Assembly Resolution A/RES/56/83 (29 January 2002)
original panel	Panel in the original <i>US – Zeroing (Japan)</i> proceedings
original panel report	Report of the panel in the original <i>US – Zeroing (Japan)</i> proceedings, WT/DS322/R, 20 September 2006
Panel	Panel in these <i>US – Zeroing (Japan) (Article 21.5 – Japan)</i> proceedings
Panel Report	Report of the Panel in these <i>US – Zeroing (Japan) (Article 21.5 – Japan)</i> proceedings, WT/DS322/RW
RPT	Reasonable period of time, pursuant to Article 21.3 of the DSU
<i>SCM Agreement</i>	<i>Agreement on Subsidies and Countervailing Measures</i>
USDOC	United States Department of Commerce
<i>Vienna Convention</i>	<i>Vienna Convention on the Law of Treaties</i> , done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
<i>Working Procedures</i>	<i>Working Procedures for Appellate Review</i> , WT/AB/WP/5, 4 January 2005
WTO	World Trade Organization
<i>WTO Agreement</i>	<i>Marrakesh Agreement Establishing the World Trade Organization</i>

WORLD TRADE ORGANIZATION
APPELLATE BODY

United States – Measures Relating to Zeroing and Sunset Reviews

Recourse to Article 21.5 of the DSU by Japan

United States, *Appellant*
Japan, *Appellee*

China, *Third Participant*
European Communities, *Third Participant*
Hong Kong, China, *Third Participant*
Korea, *Third Participant*
Mexico, *Third Participant*
Norway, *Third Participant*
Separate Customs Territory of Taiwan, Penghu,
Kinmen and Matsu, *Third Participant*
Thailand, *Third Participant*

AB-2009-2

Present:

Sacerdoti, Presiding Member
Bautista, Member
Zhang, Member

I. Introduction

1. The United States appeals certain issues of law and legal interpretations developed in the Panel Report, *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan* (the "Panel Report").¹ The Panel was established pursuant to Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU") to consider a complaint by Japan concerning the existence and consistency with the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "Anti-Dumping Agreement") and the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994") of measures taken by the United States to comply with the recommendations and rulings of the Dispute Settlement Body (the "DSB") in *US – Zeroing (Japan)*.²

¹WT/DS322/RW, 24 April 2009.

²The recommendations and rulings of the DSB resulted from the adoption, on 23 January 2007, by the DSB, of the Appellate Body Report, WT/DS322/AB/R, and the Panel Report, WT/DS322/R, in *US – Zeroing (Japan)*. In this Report, we refer to the panel that considered the original complaint brought by Japan as the "original panel", and to its report as the "original panel report".

2. This dispute concerns the use of the so-called "zeroing" methodology by the United States Department of Commerce (the "USDOC") when calculating margins of dumping.³ In the original proceedings, the Appellate Body upheld the panel's finding that the United States' zeroing procedures constituted a measure that can be challenged "as such" in dispute settlement proceedings in the World Trade Organization (the "WTO").⁴ The original panel found that, by maintaining model zeroing procedures in the context of original investigations, the United States acts inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement*.⁵ The Appellate Body also found that:

- (a) the United States acts inconsistently with Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement* by maintaining zeroing procedures when calculating margins of dumping on the basis of transaction-to-transaction comparisons in original investigations⁶;
- (b) the United States acts inconsistently with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 by maintaining zeroing procedures in periodic reviews⁷; and
- (c) the United States acts inconsistently with Articles 2.4 and 9.5 of the *Anti-Dumping Agreement* by maintaining zeroing procedures in new shipper reviews.⁸

3. As regards Japan's "as applied" claims, the original panel held that, by using model zeroing in the anti-dumping investigation regarding imports of cut-to-length carbon quality steel products from Japan, the United States acted inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement*.⁹ This finding of the original panel was not appealed. The Appellate Body additionally found that:

³Before the original panel, Japan used the term "zeroing" to denote the methodology under which the USDOC "disregards intermediate negative dumping margins ... through the USDOC's [Anti-Dumping] Margin Calculation Computer Programme and other related procedures, in the process of establishing the overall dumping margin for the product as a whole". (Original Panel Report, footnote 668 to para. 7.45, quoting the original Request for the Establishment of a Panel by Japan, WT/DS322/8, para. 1(a) (attached as Annex A-2 to the Original Panel Report))

⁴Appellate Body Report, *US – Zeroing (Japan)*, para. 190(a).

⁵Original Panel Report, para. 7.258(a). This finding of the original panel was not appealed.

⁶Appellate Body Report, *US – Zeroing (Japan)*, para. 190(b).

⁷Appellate Body Report, *US – Zeroing (Japan)*, para. 190(c). In this Report, we use the term "periodic review" to describe the periodic review of the amount of anti-dumping duty as required in Section 751(a) of the United States Tariff Act of 1930, *United States Code*, Title 19, Section 1675(a). That provision requires the USDOC to review and determine the amount of any anti-dumping duty at least once during each 12-month period, beginning on the anniversary of the date of publication of an anti-dumping duty order, if a request for such a review has been received.

⁸Appellate Body Report, *US – Zeroing (Japan)*, para. 190(d).

⁹Original Panel Report, para. 7.258(b).

- (a) the United States acted inconsistently with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 by applying zeroing procedures in the 11 periodic reviews at issue in that appeal¹⁰; and
- (b) the United States acted inconsistently with Article 11.3 of the *Anti-Dumping Agreement* by relying, in two sunset review determinations, on margins of dumping calculated in previous proceedings through the use of zeroing.¹¹

4. The Appellate Body recommended that the DSB request the United States to bring its measures into conformity with its obligations under the *Anti-Dumping Agreement* and the GATT 1994.¹²

5. On 23 January 2007, the DSB adopted the original panel and Appellate Body reports.¹³ Pursuant to Article 21.3(b) of the DSU, the United States and Japan agreed that the reasonable period of time to implement the recommendations and rulings of the DSB would be 11 months, expiring on 24 December 2007.¹⁴

6. On 14 February 2007, the USDOC published a notice of revocation of the anti-dumping duty order on corrosion-resistant carbon steel flat products from Japan, which related to one of the sunset reviews that Japan challenged in the original proceedings.¹⁵

7. In its status report of 8 November 2007, the United States informed the DSB that the USDOC had published a notice indicating its intention to no longer use zeroing when performing weighted average-to-weighted average comparisons in original investigations. This change became effective as of 22 February 2007.¹⁶ The United States added that it was "continuing to consult internally on steps to be taken with respect to the other DSB recommendations and rulings."¹⁷

¹⁰Appellate Body Report, *US – Zeroing (Japan)*, para. 190(e).

¹¹Appellate Body Report, *US – Zeroing (Japan)*, para. 190(f).

¹²Appellate Body Report, *US – Zeroing (Japan)*, para. 191.

¹³WT/DS322/15.

¹⁴WT/DS322/20.

¹⁵Revocation Pursuant to Second Five-Year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders: Certain Corrosion-Resistant Carbon Steel Flat Products from Australia, Canada, Japan, and France, *United States Federal Register*, Vol. 72, No. 30 (14 February 2007) 7010 (Panel Exhibit US-A20).

¹⁶Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margins in Antidumping Investigations; Change in Effective Date of Final Modification, *United States Federal Register*, Vol. 72, No. 17 (26 January 2007) 3783 (Panel Exhibit US-A8).

¹⁷WT/DS322/22. On 6 December 2007, the United States provided the same status report to the DSB, with no additional information. (WT/DS322/22/Add.1)

8. On 19 November 2007, the USDOC advised interested parties that it was initiating proceedings under Section 129 of the Uruguay Round Agreements Act in order to implement the DSB's recommendations and rulings concerning the anti-dumping investigation of certain cut-to-length carbon quality steel products from Japan. On 20 May 2008, the USDOC published a notice of implementation of the Section 129 determination, in which it indicated that the margin of dumping of one Japanese exporter and the "all others" rate had been recalculated without zeroing.¹⁸

9. With respect to the 11 periodic reviews at issue in the original proceedings, the United States informed the DSB, on 10 January 2008, that:

... in each case the results were superseded by subsequent reviews. Because of this, no further action is necessary for the United States to bring these challenged measures into compliance with the recommendations and rulings of the DSB.¹⁹

10. On 21 January 2008, the United States informed the DSB that, through the elimination of zeroing in weighted average-to-weighted average comparisons, it had eliminated the single measure that Japan had challenged in the original proceedings and that the Appellate Body had found to be inconsistent "as such", and that the United States considered that it had complied with the DSB's recommendations and rulings with respect to that measure.²⁰

11. Japan did not consider that the United States had brought itself into compliance with the DSB's recommendations and rulings. Consequently, on 7 April 2008, Japan requested that the matter be referred to the original panel pursuant to Article 21.5 of the DSU²¹, and this occurred on 18 April 2008.²² Japan requested the Panel to find that the United States had failed to implement the DSB's recommendations and rulings by maintaining zeroing procedures in the context of transaction-to-transaction comparisons in original investigations, and under any comparison methodology in periodic and new shipper reviews, contrary to Articles 17.14, 21.1, and 21.3 of the DSU, Articles 2.4, 2.4.2, 9.3, and 9.5 of the *Anti-Dumping Agreement*, and Article VI:2 of the GATT 1994.²³ Japan also argued that in the case of five of the 11 periodic reviews that were found to

¹⁸Notice of Implementation of Determination under Section 129 of the Uruguay Round Agreements Act Regarding the Antidumping Duty Order on Certain Cut-to-Length Carbon-Quality Steel Plate Products from Japan, *United States Federal Register*, Vol. 73, No. 98 (20 May 2008) 29109 (Panel Exhibit US-A18). As a result, the margin for Kawasaki Steel Corporation and the "all others" rate decreased from 10.78 per cent to 9.46 per cent. (*Ibid.*, at 29109)

¹⁹WT/DS322/22/Add.2.

²⁰WT/DSB/M/245.

²¹WT/DS322/27.

²²WT/DS322/28.

²³Panel Report, para. 3.1(a).

be WTO-inconsistent in the original proceedings—Reviews 1, 2, 3, 7, and 8²⁴—the United States had failed to implement the DSB's recommendations and rulings regarding the importer-specific assessment rates determined in those Reviews, contrary to Articles 17.14, 21.1, and 21.3 of the DSU, Articles 2.4 and 9.3 of the *Anti-Dumping Agreement*, and Article VI:2 of the GATT 1994.²⁵ In addition, Japan asserted that four subsequent periodic reviews—Reviews 4, 5, 6, and 9²⁶—were "measures taken to comply" that are inconsistent with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.²⁷ Further, Japan claimed that the United States had failed to bring one of the two sunset review determinations found to be WTO-inconsistent in the original proceedings into conformity with its obligations, in violation of Articles 17.14, 21.1, and 21.3 of the DSU, and Article 11.3 of the *Anti-Dumping Agreement*.²⁸ Finally, Japan submitted that the United States acted in violation of Articles II:1(a) and II:1(b) of the GATT 1994 when it took certain

²⁴Review 1 concerned *Ball Bearings and Parts Thereof from Japan* (1 May 1999 through 30 April 2000), *United States Federal Register*, Vol. 66, No. 134 (12 July 2001) 36551 (as amended: *United States Federal Register*, Vol. 72, No. 231 (3 December 2007) 67892) (JTEKT and NTN); Review 2 concerned *Ball Bearings and Parts Thereof from Japan* (1 May 2000 through 30 April 2001), *United States Federal Register*, Vol. 67, No. 169 (30 August 2002) 55780 (as amended: *United States Federal Register*, Vol. 73, No. 57 (24 March 2008) 15481) (NTN); Review 3 concerned *Ball Bearings and Parts Thereof from Japan* (1 May 2002 through 30 April 2003), *United States Federal Register*, Vol. 69, No. 178 (15 September 2004) 55574 (JTEKT, NSK, and NTN); Review 7 concerned *Cylindrical Roller Bearings and Parts Thereof from Japan* (1 May 1999 through 31 December 1999), *United States Federal Register*, Vol. 66, No. 134 (12 July 2001) 36551 (JTEKT and NTN); and Review 8 concerned *Spherical Plain Bearings and Parts Thereof from Japan* (1 May 1999 through 31 December 1999), *United States Federal Register*, Vol. 66, No. 134 (12 July 2001) 36551 (NTN). (See Panel Report, footnote 13 to para. 3.1(b)(i))

²⁵Panel Report, para. 3.1(b)(i).

²⁶Review 4 concerned *Ball Bearings and Parts Thereof from Japan* (1 May 2003 through 30 April 2004), *United States Federal Register*, Vol. 70, No. 179 (16 September 2005) 54711 (as amended: *United States Federal Register*, Vol. 70, No. 203 (21 October 2005) 61252 (NSK)) (as amended: *United States Federal Register*, Vol. 70, No. 219 (15 November 2005) 69316 (Nippon Pillow Block ("NPB"))) (JTEKT, NSK, NPB, and NTN); Review 5 concerned *Ball Bearings and Parts Thereof from Japan* (1 May 2004 through 30 April 2005), *United States Federal Register*, Vol. 71, No. 135 (14 July 2006) 40064 (JTEKT, NSK, NPB, and NTN); Review 6 concerned *Ball Bearings and Parts Thereof from Japan* (1 May 2005 through 30 April 2006), *United States Federal Register*, Vol. 72, No. 197 (12 October 2007) 58053 (Asahi Seiko, JTEKT, NSK, NPB, and NTN); and Review 9 concerned *Ball Bearings and Parts Thereof from Japan* (Final Results for the Period 1 May 2006 to 30 April 2007), *United States Federal Register*, Vol. 73, No. 177 (11 September 2008) 52823 (JTEKT, NPB, and NTN). (See Panel Report, footnote 14 to para. 3.1(b)(ii))

²⁷Panel Report, para. 3.1(b)(ii). Although Japan had also included a claim under Article VI:1 of the GATT 1994 in its first written submission to the Panel, the Panel considered that Japan had failed to develop that claim in its subsequent submissions or statements to the Panel. Accordingly, the Panel considered that Japan had abandoned its claim under Article VI:1 of the GATT 1994. (Panel Report, footnote 16 to para. 3.1(b)(ii)) This finding is not appealed.

²⁸Panel Report, para. 3.1(c). Specifically, Japan referred to the sunset review determination of 4 November 1999 regarding the anti-dumping duty order on anti-friction bearings from Japan found to be WTO-inconsistent in the original proceedings.

actions to liquidate the entries covered by Reviews 1, 2, 7, and 8 after the expiry of the reasonable period of time.²⁹

12. The United States contended that the zeroing procedures challenged "as such" by Japan in the original proceedings no longer existed because the United States had ceased to apply the zeroing procedures in weighted average-to-weighted average comparisons in original investigations.³⁰ The United States requested a preliminary ruling that "subsequent closely connected measures", including Review 9, were not within the Panel's terms of reference.³¹ Furthermore, the United States requested a preliminary ruling that Reviews 4, 5, 6, and 9 were not "measures taken to comply" within the meaning of Article 21.5 of the DSU, and therefore fell outside the scope of the compliance proceedings.³² The United States also argued that it did not have any implementation obligations in relation to Reviews 1 through 9 because they covered imports that entered the United States prior to the expiration of the reasonable period of time. Moreover, the United States argued that it had complied with the DSB's recommendations and rulings regarding Reviews 1, 2, and 3 by withdrawing the WTO-inconsistent cash deposit rates with prospective effect, and replacing them with new cash deposit rates determined in subsequent periodic reviews.³³ The United States asserted that it was not required to take any action to comply with the DSB's recommendations and rulings regarding the sunset review of 4 November 1999, because the relevant likelihood-of-dumping determination continued to be based on a number of dumping margins not called into question by the findings of the Appellate Body in the original proceedings.³⁴ Finally, the United States asked the Panel to refrain from ruling on Japan's Article II claims, because it was not necessary to do so. The United States also asserted that the anti-dumping liability giving rise to the liquidation actions challenged by Japan was incurred prior to the expiry of the reasonable period of time.³⁵

13. The Panel Report was circulated to WTO Members on 24 April 2009. The United States' appeal concerns the following findings of the Panel:

- (a) ... the United States has failed to comply with the DSB's recommendations and rulings regarding the importer-specific assessment rates determined in Reviews 1, 2, 3, 7 and 8 that apply to entries covered by those Reviews that were, or will be, liquidated after the expiry of the RPT;

²⁹Panel Report, para. 3.1(d).

³⁰Panel Report, para. 3.2.

³¹Panel Report, para. 3.3.

³²Panel Report, para. 3.3.

³³Panel Report, para. 3.3.

³⁴Panel Report, para. 3.4.

³⁵Panel Report, para. 3.5.

- (i) Accordingly, ... the United States is in continued violation of its obligations under Articles 2.4 and 9.3 of the [*Anti-Dumping*] *Agreement* and Article VI:2 of the GATT 1994³⁶;

...

- (b) ... the United States has acted inconsistently with Articles 2.4 and 9.3 of the [*Anti-Dumping*] *Agreement* and Article VI:2 of the GATT 1994 by applying zeroing in the context of Reviews 4, 5, 6 and 9³⁷;

...

- (d) ... the United States is in violation of Articles II:1(a) and II:1(b) of the GATT 1994 with respect to certain liquidation actions taken after the expiry of the RPT, namely with respect to the USDOC liquidation instructions set forth in [Panel] Exhibits JPN-40.A and JPN-77 to JPN-80 and the [Customs] liquidation notices set forth in [Panel] Exhibits JPN-81 to JPN-87.³⁸

14. In addition, the Panel found that:

- (c) ... the United States has failed to comply with the recommendations and rulings of the DSB regarding the United States' maintenance of zeroing procedures challenged "as such" in the original proceedings. In particular, ... the United States has failed to implement the DSB's recommendations and rulings in the context of [transaction-to-transaction] comparisons in original investigations and under any comparison methodology in periodic and new shipper reviews³⁹;

- (i) Accordingly, ... the United States remains in violation of Articles 2.4, 2.4.2, 9.3 and 9.5 of the [*Anti-Dumping*] *Agreement* and Article VI:2 of the GATT 1994⁴⁰;

...

- (e) ... the United States has failed to comply with the DSB's recommendations and rulings with respect to the 1999 sunset review.

³⁶Panel Report, paras. 8.1(a) and 8.1(a)(i). The Panel declined to rule on Japan's claim that, in relation to Reviews 1, 2, 3, 7, and 8, the United States had thereby also acted inconsistently with its obligations under Articles 17.14, 21.1, and 21.3 of the DSU. (*Ibid.*, para. 8.1(a)(ii))

³⁷Panel Report, para. 8.1(b).

³⁸Panel Report, para. 8.1(d).

³⁹Panel Report, para. 8.1(c).

⁴⁰Panel Report, para. 8.1(c)(i). The Panel declined to rule on Japan's claim that the United States had thereby also acted inconsistently with its obligations under Articles 17.14, 21.1, and 21.3 of the DSU. (*Ibid.*, para. 8.1(c)(ii))

- (i) Accordingly, ... the United States remains in violation of Article 11.3 of the [*Anti-Dumping*] *Agreement*.⁴¹

...

These findings are not appealed by the United States. Nor does the United States appeal the Panel's finding that Reviews 4, 5, 6, and 9 are "measures taken to comply" within the meaning of Article 21.5.

15. The Panel concluded that, to the extent that the United States has failed to comply with the DSB's recommendations and rulings in the original proceedings, these recommendations and rulings remain operative.⁴² The Panel also recommended that the DSB request the United States to bring Reviews 4, 5, 6, and 9, and the relevant liquidation actions, into conformity with the *Anti-Dumping Agreement* and the GATT 1994.⁴³

16. On 20 May 2009, the United States notified the DSB, pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law and legal interpretations covered in the Panel Report and filed a Notice of Appeal⁴⁴, pursuant to Rule 20 of the *Working Procedures for Appellate Review*⁴⁵ (the "*Working Procedures*"). On 27 May 2009, the United States filed an appellant's submission.⁴⁶ On 15 June 2009, Japan filed an appellee's submission.⁴⁷ On the same day, the European Communities, Korea, Mexico, and Norway each filed a third participant's submission⁴⁸; and China, Hong Kong, China, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, and Thailand each notified its intention to appear at the oral hearing.⁴⁹

17. On 29 May 2009, Japan and the United States each requested the Appellate Body Division hearing this appeal to authorize public observation of the oral hearing. Japan explained that its request was being made on the understanding that any information that it had designated as

⁴¹Panel Report, paras. 8.1 and 8.1(e)(i). The Panel again declined to rule on Japan's claim that this failure to implement was inconsistent with the United States' obligations under Articles 17.14, 21.1, and 21.3 of the DSU. (*Ibid.*, para. 8.1(e)(ii))

⁴²Panel Report, para. 8.2.

⁴³Panel Report, para. 8.2.

⁴⁴WT/DS322/32 (attached as Annex I to this Report).

⁴⁵WT/AB/WP/5, 4 January 2005.

⁴⁶Pursuant to Rule 21 of the *Working Procedures*.

⁴⁷Pursuant to Rule 22 of the *Working Procedures*.

⁴⁸Pursuant to Rule 24(1) of the *Working Procedures*.

⁴⁹Pursuant to Rule 24(2) of the *Working Procedures*.

confidential would be adequately protected in the course of the hearing. Both participants relied on the reasoning provided by the Appellate Body in previous appeals⁵⁰ where public observation of the oral hearing had been authorized, and expressed a preference for simultaneous closed-circuit television broadcast to a separate room. On 2 June 2009, the Division invited the third parties to comment in writing on the requests of Japan and the United States, as well as the specific logistical arrangements proposed in the requests. Comments were received on 8 June 2009 from Korea, and on 9 June 2009 from China, the European Communities, Hong Kong, China, Mexico, Norway, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, and Thailand. The European Communities, Norway, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu expressed support for the requests of the participants. China, Hong Kong, China, Mexico, and Thailand expressed the view that the provisions of the DSU do not allow public hearings at the appellate stage. Korea shared this concern, but did not object to public observation of the oral hearing.

18. In a Procedural Ruling dated 11 June 2009, the Appellate Body Division hearing this appeal authorized the public observation of the oral hearing and adopted additional procedures on logistical arrangements in accordance with Rule 16(1) of the *Working Procedures*, which it considered would address the concerns raised by certain third participants and Japan.⁵¹

19. The oral hearing in this appeal was held on 29-30 June 2009. The participants and third participants were given the opportunity to present oral arguments and respond to questions posed by the Division hearing the appeal. Public observation took place via simultaneous closed-circuit television broadcast to a separate room.⁵²

⁵⁰*US – Continued Suspension / Canada – Continued Suspension; EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US); US – Continued Zeroing; and US – Zeroing (EC) (Article 21.5 – EC).*

⁵¹The Procedural Ruling is attached as Annex II to this Report. Notice of the opening of the hearing to public observation and registration instructions were provided on the WTO website.

⁵²Pursuant to the additional procedures adopted by the Division, China, Hong Kong, China, Korea, Mexico, and Thailand each requested that its oral statements and responses to questions remain confidential and not be subject to public observation. A total of 36 individuals registered to view the oral hearing.

II. Arguments of the Participants and Third Participants

A. *Claims of Error by the United States – Appellant*

1. The Panel's Terms of Reference – Review 9

20. The United States submits that the Panel erred in finding that Review 9 was within its terms of reference. The United States argues that, contrary to the Panel's finding, the phrase "subsequent closely connected measures" in Japan's panel request does not meet the requirement in Article 6.2 of the DSU to "identify the specific measures at issue". In addition, the United States asserts that Review 9 could not be included in the Panel's terms of reference, because its final results had not yet been published when the Panel was requested.⁵³

21. Japan's panel request identified five periodic reviews that had been the subject of the DSB's recommendations and rulings in the original proceedings (Reviews 1, 2, 3, 7, and 8) and "three closely connected periodic reviews that the United States argues 'superseded' the original reviews" (Reviews 4, 5, and 6).⁵⁴ It also referred to "any subsequent closely connected measures".⁵⁵ Japan's panel request also specified that Reviews 1-8 stemmed from three anti-dumping duty orders, namely, *Ball Bearings and Parts Thereof from Japan*, *Cylindrical Roller Bearings and Parts Thereof from Japan*, and *Spherical Plain Bearings and Parts Thereof from Japan*.⁵⁶

22. The United States argues that the phrase "subsequent closely connected measures" in Japan's panel request is "broad" and "vague"⁵⁷ and can encompass a variety of measures, including subsequent administrative determinations, ministerial corrections, or remand determinations in court proceedings. The United States maintains that the Panel relied too heavily on the United States' statement in its first written submission that Japan was trying to include in the Panel's terms of reference any future periodic reviews related to the eight periodic reviews specifically identified in the panel request.⁵⁸ The fact that the United States' speculation proved to be accurate and that it correctly guessed at Japan's motivation did not excuse Japan from complying with the specificity requirement

⁵³Review 9 was initiated on 29 June 2007. Japan submitted its panel request on 7 April 2008. The Panel was established on 18 April 2008. Preliminary results for Review 9 were published by the USDOC on 7 May 2008, and the final results were published by the USDOC on 11 September 2008. The Panel issued its Report on 24 April 2009.

⁵⁴See WT/DS322/27, para. 12.

⁵⁵See WT/DS322/27, para. 12.

⁵⁶See WT/DS322/27, para. 12.

⁵⁷United States' appellant's submission, para. 45.

⁵⁸United States' appellant's submission, footnote 56 to para. 45 (referring to Panel Report, para. 7.105, in turn quoting United States' first written submission to the Panel, para. 50).

in Article 6.2.⁵⁹ The United States considers it "irrelevant"⁶⁰ that Review 9 had already been initiated by the time of the panel request⁶¹, because Review 9 was still ongoing at the time of the panel request, and therefore any challenge to it would have been "premature".⁶²

23. The United States submits that the Panel further departed from the text of the DSU when it examined whether Japan's challenge to "subsequent closely connected measures" would "violate any due process objective of the DSU"⁶³, because there is no requirement in Article 6.2 of the DSU, or elsewhere in the covered agreements, to show that the respondent's due process right or entitlement to notice was not respected by the lack of specificity in the panel request. According to the United States, a panel is not free to override the clearly negotiated text of the DSU because of its own views on due process. The only showing that the United States was required to make was that Japan did not specifically identify Review 9 in its panel request.

24. The United States points out that the Appellate Body, in *US – Zeroing (EC) (Article 21.5 – EC)*, recognized that each periodic review is "separate and distinct", and that each review serves as a basis for the calculation of the assessment rate for each importer of the entries of subject merchandise.⁶⁴ For this reason, the United States believes that each review must be identified in the panel request. Furthermore, the United States does not consider that Articles 6.2 and 7.1 of the DSU permitted the Panel to examine measures not identified in the panel request because they allegedly form part of a "continuum" of similar measures that were identified in the panel request, or because there was an allegedly "high degree of predictability" under the United States' anti-dumping system that they would come into existence subsequent to the panel request.⁶⁵

25. Additionally, the United States argues that a future periodic review, like Review 9, cannot be subject to dispute settlement because it was "not yet in existence" at the time of the panel request.⁶⁶ The United States submits that, although the Panel appropriately referred to the panel's reasoning in

⁵⁹United States' appellant's submission, para. 45 and footnote 56 thereto.

⁶⁰United States' appellant's submission, para. 46.

⁶¹United States' appellant's submission, para. 46 (referring to Panel Report, paras. 7.110 and 7.116).

⁶²United States' appellant's submission, para. 46 (referring to Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, paras. 374 and 375, in turn referring to Appellate Body Report, *US – Continued Zeroing*, para. 210).

⁶³United States' appellant's submission, para. 55 (quoting Panel Report, para. 7.105).

⁶⁴United States' appellant's submission, para. 44 (referring to Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, paras. 192 and 193).

⁶⁵United States' appellant's submission, para. 44 (referring to Panel Report, paras. 7.110, 7.111, 7.115, and 7.116).

⁶⁶United States' appellant's submission, paras. 47 and 48.

*US – Upland Cotton*⁶⁷ and, in particular, its reliance on Article 3.3 of the DSU, the Panel failed to take into account the fact that Review 9 could not have been impairing any benefits accruing to Japan, within the meaning of Article 3.3 of the DSU, because Review 9 did not exist at the time of Japan's panel request. The Panel improperly distinguished *US – Upland Cotton* on the basis that Japan's claim against Review 9 was not "entirely speculative".⁶⁸ The United States submits that, on the contrary, Japan's claim was not "entirely predictable", because, at the time of the panel request, Japan had no way of knowing whether zeroing would be used in Review 9 or whether the review would be rescinded after its initiation.⁶⁹

26. The United States asserts that the Panel's approach is not consistent with previous Appellate Body reports, such as *EC – Chicken Cuts* and *Chile – Price Band System*.⁷⁰ According to the United States, the Panel failed to recognize that the situation arising in this dispute was not one of the "limited circumstances" referred to by the Appellate Body in *EC – Chicken Cuts* that would justify including measures enacted subsequent to the panel establishment within its terms of reference.⁷¹ With respect to *Chile – Price Band System*, the United States explains that the inclusion within the panel's terms of reference of an amendment to a measure identified in the panel request was based on the fact that the subsequent modifications did not change the essence of the measure before the panel.⁷² By contrast, in this dispute, each subsequent periodic review is "separate and distinct".⁷³ Exporters participating in each review may vary; shipments, data, and time periods are different; and the anti-dumping duty rate may change and, in some cases, fall to a *de minimis* level.⁷⁴ For the United States, this illustrates that the use of zeroing alone is not enough to identify the specific measures at issue for purposes of Article 6.2.

⁶⁷United States' appellant's submission, para. 48 (referring to Panel Report, paras. 7.115 and 7.116, in turn referring to Panel Report, *US – Upland Cotton*, paras. 7.158-7.160).

⁶⁸United States' appellant's submission, para. 49 (quoting Panel Report, para. 7.116, in turn quoting Panel Report, *US – Upland Cotton*, para. 7.158).

⁶⁹United States' appellant's submission, para. 50 (quoting Panel Report, para. 7.116). The United States notes, by way of example, that the USDOC's regulations provide that an administrative review will be rescinded if all the parties requesting a review withdraw their request for a review within 90 days of the date of publication of the notice of initiation for that review. This regulation also provides that it is within the USDOC's discretion to extend this time-limit at the parties' request. (United States' appellant's submission, footnote 71 to para. 50 (referring to *United States Code of Federal Regulations*, Title 19, Section 351.213(d), submitted as Panel Exhibit US-A2))

⁷⁰United States' appellant's submission, paras. 51 and 52.

⁷¹United States' appellant's submission, para. 51 (referring to Appellate Body Report, *EC – Chicken Cuts*, para. 156). (emphasis omitted)

⁷²United States' appellant's submission, para. 52 (referring to Appellate Body Report, *Chile – Price Band System*, para. 139).

⁷³United States' appellant's submission, para. 52 (quoting Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 192).

⁷⁴United States' appellant's submission, para. 53.

27. Finally, the United States submits that systemic considerations militate against the Panel's approach. In particular, the Panel's approach would allow parties to make new legal claims on new or amended measures midway through compliance panel proceedings, when Article 21.5 proceedings should be limited to an examination of whether a Member has complied with the DSB's recommendations and rulings at the time of the panel request.⁷⁵ Disputes would become "moving targets"⁷⁶ in a manner not contemplated by the DSU. Further, the United States observes that the Panel's approach is "asymmetrical" as only complaining parties would be allowed to include new measures. The United States refers to previous panels that have rejected respondents' requests to examine measures that came into existence after the panels' establishment with a view to showing that the alleged inconsistency no longer existed.⁷⁷

28. For these reasons, the United States requests the Appellate Body to reverse the Panel's finding that Review 9 fell within its terms of reference.

2. The Panel's Findings on Reviews 1, 2, 3, 7, and 8

29. The United States claims that the Panel erred in finding that the United States has failed to comply with the DSB's recommendations and rulings regarding the importer-specific assessment rates determined in Reviews 1, 2, 3, 7, and 8 that apply to entries covered by those Reviews that were, or will be, liquidated after the expiry of the reasonable period of time. The United States also claims that the Panel's consequential finding that the United States is in continued violation of its obligations under Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 is in error.

30. In the United States' view, the text of the GATT 1994 and of the *Anti-Dumping Agreement* "confirms that it is the legal regime in existence at the time that an import enters the Member's territory that determines whether the import is liable for the payment of antidumping duties."⁷⁸ The United States asserts that Article VI:6(a) of the GATT 1994 reflects the fact that the levying of an anti-dumping duty generally takes place on "the importation of any product". The interpretive Note to

⁷⁵In particular, the United States explains that certain procedural concerns would arise from this approach, including that parties would be obliged to make legal claims and undertake analysis of new or modified measures on short notice, without an opportunity to review the measures; and compliance panels would have to react to changes, in some cases after submissions and meetings with the parties, resulting in possible delays or the panel making findings without the benefit of parties' views. (United States' appellant's submission, para. 57)

⁷⁶United States' appellant's submission, para. 57.

⁷⁷United States' appellant's submission, para. 57 (referring to Panel Report, *India – Autos*, paras. 7.23-7.30; and Panel Report, *Indonesia – Autos*, para. 14.9).

⁷⁸United States' appellant's submission, para. 67.

paragraphs 2 and 3 of Article VI of the GATT 1994 (the "Ad Note") clarifies that WTO Members may require a cash deposit or other security in lieu of the duty. Yet, the United States emphasizes, liability is incurred at the time of entry. The United States also refers to Articles 8.6, 10.1, 10.6, and 10.8 of the *Anti-Dumping Agreement*, which it considers illustrate that "whenever the [*Anti-Dumping Agreement*] specifies an applicable date for an action, the scope of applicability is based on entries occurring on or after that date."⁷⁹ The United States asserts that the Panel erred in dismissing the relevance of these provisions of the *Anti-Dumping Agreement* and the GATT 1994, focusing instead on the DSU, because the DSU does not exist in a "vacuum" and must be read in the light of the rights and obligations contained in the other covered agreements.⁸⁰ The United States argues that, since these Article 21.5 proceedings focused on the existence, or consistency with the *Anti-Dumping Agreement* and the GATT 1994, of measures taken to comply with the recommendations and rulings of the DSB, "these agreements, along with the DSU, are crucial to determining whether the United States complied with the DSB's recommendations and rulings, including what the United States was required to do in order to implement those recommendations and rulings."⁸¹

31. The United States takes issue with the Panel's statement that a Member that chooses to apply a retrospective anti-dumping system must "respect the consequences of that choice".⁸² According to the United States, the Panel "overlook[ed]" the fact that the United States "elected to adopt a retrospective system long before there was a WTO".⁸³ Members with retrospective systems cannot be presumed to have agreed to "consequences" only now being assigned by panels or the Appellate Body. Furthermore, the United States notes that, in retrospective anti-dumping systems, the entry of merchandise triggers potential liability, while the determination of final liability and collection occurs at a later date. This is a principal feature of a retrospective system and this distinction is reflected in the text of Articles 9.3.1 and 9.3.2 of the *Anti-Dumping Agreement*. The United States asserts that the Panel's view that it need not ensure that the implementation obligations under different anti-dumping

⁷⁹United States' appellant's submission, para. 72.

⁸⁰United States' appellant's submission, para. 73 (referring to Article 3.2 of the DSU; as well as Panel Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, footnote 39 to para. 7.51; and Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 173).

⁸¹United States' appellant's submission, para. 73. The United States argues that previous panels have recognized that "prospective implementation obligations are triggered by the date of entry" and refers to the Panel Report in *US – Section 129(c)(1) URAA* as an example. (United States' appellant's submission, para. 74 (referring to Panel Report, *US – Section 129(c)(1) URAA*, para. 6.52)) In addition, the United States observes that the European Communities "took a prospective approach" to the implementation of the DSB's recommendations and rulings in *EC – Chicken Cuts*. (United States' appellant's submission, paras. 75 and 76)

⁸²Panel Report, para. 7.152.

⁸³United States' appellant's submission, para. 78.

systems be identical⁸⁴ contradicts "the Appellate Body's recognition that all systems of duty assessment must be afforded analogous treatment"⁸⁵ under the *Anti-Dumping Agreement*.

32. The United States maintains that an approach based on the date of entry of the merchandise ensures equal treatment between retrospective and prospective anti-dumping systems. The United States explains that, in a prospective system, an anti-dumping measure found to be inconsistent with the *Anti-Dumping Agreement* would have to be modified only as it applies "to imports occurring on or after the date of importation", and the respondent Member would not have to remedy the effects of the measure on imports that occurred prior to the end of the reasonable period of time.⁸⁶ A similar result would be obtained in retrospective systems if the operative date for implementation were the date of entry of the merchandise subject to anti-dumping duties, thereby preserving the neutrality between retrospective and prospective systems.⁸⁷

33. The United States notes that it is uncontested that all of the liquidations applied (or that would apply) in connection with Reviews 1, 2, 3, 7, and 8 relate to merchandise that entered the United States "long before the end"⁸⁸ of the reasonable period of time. The United States further explains that liquidation would have taken place before the end of the reasonable period of time had it not been for domestic judicial proceedings.⁸⁹ The United States observes that, in *US – Zeroing (EC)* (Article 21.5 – EC), the Appellate Body did not make "findings against actions to liquidate duties that are based on administrative review determinations issued before the end of the RPT, and that have been delayed as a result of domestic judicial proceedings".⁹⁰ In the United States' view, "a Member should not be found in non-compliance because liquidation was delayed until after the RPT due to domestic judicial proceedings".⁹¹

34. The United States points out that Article 13 of the *Anti-Dumping Agreement* requires Members to provide for independent review of certain anti-dumping administrative actions. Moreover, footnote 20 to Article 9.3.1 expressly recognizes "that the observance of the time-limits mentioned in [subparagraph 3.1] and in subparagraph 3.2 may not be possible where the product in question is subject to judicial review proceedings." Accordingly, the United States submits that, "if a

⁸⁴United States' appellant's submission, para. 79 (referring to Panel Report, para. 7.152).

⁸⁵United States' appellant's submission, para. 83.

⁸⁶United States' appellant's submission, para. 84.

⁸⁷United States' appellant's submission, para. 84.

⁸⁸United States' appellant's submission, para. 87. (original emphasis)

⁸⁹United States' appellant's submission, para. 92.

⁹⁰United States' appellant's submission, para. 94 (referring to Appellate Body Report, *US – Zeroing (EC)* (Article 21.5 – EC), para. 314).

⁹¹United States' appellant's submission, para. 94.

particular time limit is not observed due to pending judicial review, the delay caused by the judicial review is not inconsistent with the [*Anti-Dumping Agreement*]"⁹² The United States asserts that this also means that "a delay in liquidation until after the RPT as a result of judicial review should not serve as a basis to find that a Member has failed to comply with the recommendations and rulings of the DSB, since but for judicial proceedings, the Member would have liquidated prior to the RPT."⁹³

35. Referring to the Appellate Body Report in *US – Zeroing (EC) (Article 21.5 – EC)*, the United States submits that the initiation of judicial review means that "the liquidation of entries can no longer derive mechanically from the administrative reviews challenged by Japan".⁹⁴ Instead, "the timing of liquidation is controlled by the independent judiciary and *not* the administering authority".⁹⁵ Moreover, the judiciary may sustain the administering authority's determination or require changes to it. The United States explains that judicial review "severs" any "mechanical" link between the assessment of liability in the periodic review and the liquidation instructions.⁹⁶

36. The United States further explains that a finding that a Member failed to comply because liquidation was suspended until after the reasonable period of time as a result of litigation "would give private litigants the ability to control compliance by Members operating retrospective antidumping systems".⁹⁷ Such a delay would not be possible in a prospective system. The United States adds that, if such a finding were sustained, "private parties would have perverse incentives to manufacture domestic litigation and prolong liquidation past the RPT to obtain what amounts to retroactive relief".⁹⁸

37. The United States submits that the WTO dispute settlement system requires only prospective implementation of the DSB's recommendations and rulings. In support of this proposition, the United States asserts that Article 21.5 proceedings focus only on the consistency of those measures in existence at the time of panel establishment and, as such, a Member's compliance with the DSB's recommendations and rulings is "determined on a prospective basis".⁹⁹ The United States also observes that the Appellate Body has "repeatedly recognized" the prospective nature of remedies in WTO law.¹⁰⁰ The United States considers that the Panel "improperly disregarded the importance of

⁹²United States' appellant's submission, para. 96.

⁹³United States' appellant's submission, para. 96.

⁹⁴United States' appellant's submission, para. 97.

⁹⁵United States' appellant's submission, para. 97. (original emphasis)

⁹⁶United States' appellant's submission, para. 97.

⁹⁷United States' appellant's submission, para. 98.

⁹⁸United States' appellant's submission, para. 99.

⁹⁹United States' appellant's submission, para. 63.

¹⁰⁰United States' appellant's submission, para. 64 (referring to Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 299 and footnote 406 thereto).

the prospective/retrospective distinction" when determining the United States' compliance obligations and, as a result, "imposed a retroactive remedy where none is allowed".¹⁰¹

38. Accordingly, the United States requests the Appellate Body to reverse the Panel's findings and conclude, instead, that liquidation that occurred (or will occur) after the reasonable period of time in relation to Reviews 1, 2, 3, 7, and 8 does not demonstrate that the United States failed to comply with the recommendations and rulings of the DSB, because these liquidations would have occurred prior to the conclusion of the reasonable period of time but for the delay caused by domestic judicial review.¹⁰²

3. The Panel's Findings on Reviews 4, 5, 6, and 9

39. The United States contends that the Appellate Body should reverse the Panel's finding that Reviews 4, 5, and 6 are inconsistent with Article 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 for the same reason that it considers that the Panel's findings with respect to Reviews 1, 2, 3, 7, and 8 should be reversed, namely, that entries under Reviews 4, 5, and 6 were made before the end of the reasonable period of time. In addition, the United States asserts that Reviews 4, 5, and 6 had not had effects since the expiration of the reasonable period of time given that there had not been liquidation of any entries covered by these Reviews since the reasonable period of time expired.

40. The United States recalls that, in *US – Zeroing (EC) (Article 21.5 – EC)*, the Appellate Body examined, *inter alia*, whether a number of periodic reviews and resultant assessment instructions that were not part of the original dispute demonstrated a failure to comply with the DSB's recommendations and rulings.¹⁰³ According to the United States, the Appellate Body's analysis of those reviews and resultant assessment instructions suggests that, where the review determination was published and the assessment instructions were issued prior to the end of the reasonable period of time, these reviews and assessment instructions were not a basis for finding a failure to comply¹⁰⁴; however, where a measure was put in place or had "cognizable effects" after the conclusion of the reasonable period of time, that measure could provide a basis for finding that a Member failed to comply with the DSB's recommendations and rulings, to the extent that such effects after the

¹⁰¹United States' appellant's submission, para. 65.

¹⁰²United States' appellant's submission, para. 100.

¹⁰³United States' appellant's submission, para. 103 (referring to Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, paras. 326, 337, 338, and 345).

¹⁰⁴United States' appellant's submission, para. 104 (referring to Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 313 and footnote 423 thereto).

expiration of the reasonable period of time reflected the inconsistency found in the original determination. By contrast, if the measure was not put in place or did not have any "cognizable effects" after the expiration of the reasonable period of time, that measure cannot provide a basis for finding that the Member failed to comply with the DSB's recommendations and rulings in a dispute.¹⁰⁵

41. Turning to the facts of this dispute, the United States notes that Reviews 4, 5, and 6 were concluded long before the end of the reasonable period of time, and that, as a result of domestic litigation, assessment of duties calculated in these Reviews was enjoined prior to the conclusion of the reasonable period of time, and continued to be enjoined.¹⁰⁶ Applying the above reasoning to these facts, the United States considers that Reviews 4, 5, and 6 "have had no post-RPT effects of the kind that give rise to a finding of inconsistency".¹⁰⁷

42. With respect to Review 9, the United States argues that Review 9 fell outside the Panel's terms of reference.¹⁰⁸ Moreover, the United States submits that, since Review 9, like Reviews 4, 5, and 6, does not cover entries occurring after the end of the reasonable period of time, the application of zeroing in Review 9 cannot serve as a basis for a finding of inconsistency.

43. For these reasons, the United States requests the Appellate Body to reverse the Panel's finding that the United States acted inconsistently with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 by applying zeroing in the context of Reviews 4, 5, 6, and 9.

4. Article II of the GATT 1994

44. The United States submits that the Panel erred in finding that the United States is in violation of Articles II:1(a) and II:1(b) of the GATT 1994 with respect to certain USDOC liquidation instructions and United States Customs and Border Protection ("Customs") liquidation notices issued after the expiry of the reasonable period of time.¹⁰⁹ First, the United States argues that, since Japan's Article II claims are derivative of Japan's claims under Articles 2.4 and 9.3 of the *Anti-Dumping Agreement*, it was "entirely unnecessary" for the Panel to make any Article II findings.¹¹⁰ The United

¹⁰⁵United States' appellant's submission, para. 104. The United States further notes that the Appellate Body stated: "to the extent that a measure ... would be based on zeroing, the United States would fail to comply with the recommendations and rulings of the DSB ... if it were to *apply* that measure after the end of the reasonable period of time." (*Ibid.* (quoting Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 310 (emphasis added by the United States)))

¹⁰⁶United States' appellant's submission, para. 105.

¹⁰⁷United States' appellant's submission, para. 105.

¹⁰⁸See *supra*, para. 20.

¹⁰⁹The USDOC liquidation instructions are set forth in Panel Exhibits JPN-40.A, and JPN-77 through JPN-80. The Customs liquidation notices are set forth in Panel Exhibits JPN-81 through JPN-87.

¹¹⁰United States' appellant's submission, para. 107.

States contends that, if the Appellate Body reverses the Panel's findings in relation to Reviews 1, 2, 3, 7, and 8, then the Appellate Body must reverse the "derivative findings" under Article II.¹¹¹

45. In addition, the United States recalls its previous arguments that compliance with the DSB's recommendations and rulings should be evaluated by examining a Member's treatment of the merchandise on the date of entry, and not when the "ministerial" act of collection of duties occurs.¹¹² It explains that the liability for anti-dumping duties, that Japan claims resulted in duties collected beyond the United States' bound rate, was incurred prior to the expiration of the reasonable period of time, when the merchandise entered the United States. Any liquidation after the reasonable period of time resulted from a delay due to domestic judicial review.¹¹³ The United States submits that, in the same way that such liquidation cannot serve as a basis for a failure to comply with the DSB's recommendations and rulings, it cannot support a corollary finding that the United States acted inconsistently with Articles II:1(a) and II:1(b) of the GATT 1994.¹¹⁴

B. *Arguments of Japan – Appellee*

1. The Panel's Terms of Reference – Review 9

46. Japan argues that the Panel properly found that Review 9 was within its terms of reference. First, Japan submits that its panel request satisfied the requirement in Article 6.2 to identify the specific measures at issue. Japan explains that it used the term "closely connected" to identify Reviews 4, 5, and 6 and that it used the same term to identify the subsequent "closely connected" measures. Moreover, it observes that "subsequent closely connected measures" could relate solely to the ball bearings anti-dumping duty order, because, effective 1 January 2000, the United States had revoked the other two orders specified in the panel request.¹¹⁵

47. Secondly, Japan contends that the phrase "subsequent closely connected measures" identified a "category of measure", which is sufficiently specific to satisfy the requirement of Article 6.2 of the DSU. Japan submits that accepting that a category of measure can be sufficiently specific to satisfy Article 6.2 does not imply that measures falling within the category are not themselves "separate and distinct", as referred to by the United States; it means only that the category is in itself sufficiently

¹¹¹United States' appellant's submission, para. 107.

¹¹²United States' appellant's submission, para. 108.

¹¹³United States' appellant's submission, para. 108.

¹¹⁴United States' appellant's submission, para. 108.

¹¹⁵Japan's appellee's submission, para. 387 and footnote 513 thereto (referring to United States' first written submission to the Panel, para. 66, in turn quoting Revocation of Antidumping Duty Orders on Certain Bearings from Hungary, Japan, Romania, Sweden, France, Germany, Italy, and the United Kingdom, *United States Federal Register*, Vol. 65, No. 133 (11 July 2000) 42667 (Panel Exhibit US-A19)).

specific to satisfy Article 6.2.¹¹⁶ In this regard, Japan refers to *Australia – Salmon (Article 21.5 – Canada)* and *EC – Bananas III*, which, in its view, illustrate that panels and the Appellate Body have accepted a reference to a category of measures in a panel request as being sufficiently specific to satisfy Article 6.2.¹¹⁷ Furthermore, Japan argues that the category of "any subsequent closely connected measures" was broad enough to cover Review 9, as compared to panel requests in other disputes that were drafted too narrowly to justify the inclusion of certain measures.¹¹⁸

48. Japan also supports the Panel's reliance on the fact that the United States anticipated the inclusion of subsequent periodic reviews like Review 9 in its first written submission to the Panel.¹¹⁹ Japan rejects the United States' argument that its statement "was a lucky 'guess' or 'speculation' [that] proved to be accurate"¹²⁰, because, as the Panel noted, under the United States' retrospective anti-dumping duty system, periodic reviews are highly predictable. Moreover, at the time of Japan's panel request, the USDOC had already initiated Review 9 and was scheduled to issue its final determination in mid-August 2008, which was shortly thereafter extended to 4 September 2008.¹²¹

49. Japan observes that, in *EC – Chicken Cuts*, the Appellate Body identified a "general rule" that a measure must exist at the time of panel establishment to be included in a panel's terms of reference. However, the Appellate Body in that case also held that there are "limited circumstances" in which departing from the "general rule" is consistent with Article 6.2 and the purposes which that provision serves.¹²² Japan considers that, as the compliance panel in *Australia – Salmon (Article 21.5 – Canada)* found, the "ongoing or continuous" nature of compliance offers circumstances where an exception from the "general rule" is warranted.¹²³ Japan observes that, in this dispute, the compliance

¹¹⁶Japan's appellee's submission, para. 389 (referring to United States' appellant's submission, paras. 44 and 52).

¹¹⁷Japan's appellee's submission, paras. 390-393 (referring to Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.10; Panel Report, *EC – Bananas III (US)*, para. 7.27; and Appellate Body Report, *EC – Bananas III*, para. 140).

¹¹⁸Japan's appellee's submission, paras. 403-407 (referring to Panel Report, *EC – Chicken Cuts (Thailand)*, paras. 7.28 and 7.32; and Panel Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 8.125 and footnote 690 thereto).

¹¹⁹Japan's appellee's submission, paras. 394 and 395 (referring to Panel Report, para. 7.105, in turn quoting United States' first written submission to the Panel, para. 50).

¹²⁰Japan's appellee's submission, para. 397 (quoting United States' appellant's submission, footnote 56 to para. 45).

¹²¹Japan's appellee's submission, para. 398 and footnotes 527 and 528 thereto.

¹²²Japan's appellee's submission, para. 374 (referring to Appellate Body Report, *EC – Chicken Cuts*, para. 156).

¹²³Japan's appellee's submission, paras. 375, 376, 382, and 383 (referring to Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.10). Japan recalls the Panel's observation that the decision in *Australia – Salmon (Article 21.5 – Canada)* was approved by the Appellate Body in *US – Softwood Lumber IV (Article 21.5 – Canada)*. (Japan's appellee's submission, para. 377 (referring to Panel Report, para. 7.116 and footnote 142 thereto, in turn referring to Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 74).

process is "ongoing or continuous", as each of Reviews 4, 5, 6, and 9 serves as a "replacement" measure that "supersedes" the previous periodic review relating to entries of ball bearings.¹²⁴ Review 9 was the "latest link in the chain"¹²⁵ of measures under the same anti-dumping duty order and is a "measure taken to comply". Failure to include Review 9 would have made the Panel's findings incomplete, as the "zeroed" cash deposit rate established in Review 6 had "ceased to exist" during the course of the proceedings.¹²⁶ According to Japan, excluding a post-establishment measure taken to comply from the terms of reference, where the panel request is broad enough to cover that measure and the process of achieving and undermining compliance is "ongoing or continuous", "would go against the objective of 'prompt compliance'" in Article 21.1 of the DSU.¹²⁷

50. Japan explains that panels and the Appellate Body have noted that, in order to be consistent with Article 6.2, the inclusion of a measure adopted during panel proceedings within a panel's terms of reference must not compromise the "due process objective of notifying the parties and third parties of the nature of a complainant's case".¹²⁸ Japan submits that the inclusion of Review 9 did not compromise the due process objectives of Article 6.2 of the DSU. This is because the United States was not deprived of the opportunity to examine sufficiently Review 9 and understand its legal consequences, nor was it deprived of the opportunity to prepare and present its defence to claims against Review 9.¹²⁹ Japan adds that the sole element of Review 9 subject to Japan's challenge was the USDOC's use of the zeroing procedures, and the evidence in this regard was identical to the evidence submitted with respect to Reviews 4, 5, and 6.¹³⁰ Moreover, the United States presented a defence with respect to Review 9 that was virtually identical to its defence with respect to these other periodic reviews.¹³¹ Japan also observes that the United States took advantage of ample opportunities

¹²⁴Japan's appellee's submission, paras. 413-416 (referring to Panel Report, paras. 7.65-7.67, 7.71, 7.72, 7.74, and 7.75).

¹²⁵Japan's appellee's submission, para. 419 (referring to Panel Report, para. 7.114).

¹²⁶Japan's appellee's submission, para. 419.

¹²⁷Japan's appellee's submission, para. 421 (referring to Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.10).

¹²⁸Japan's appellee's submission, para. 422 (quoting Appellate Body Report, *EC – Chicken Cuts*, para. 155, in turn referring to Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.10). Japan also refers generally to Appellate Body Report, *US – Carbon Steel*, para. 126; Appellate Body Report, *Korea – Dairy*, paras. 126 and 127; Appellate Body Report, *EC – Computer Equipment*, para. 70; and Appellate Body Report, *Thailand – H-Beams*, para. 95. (Japan's appellee's submission, para. 422 and footnote 565 thereto)

¹²⁹See Japan's appellee's submission, paras. 425-439.

¹³⁰Japan's appellee's submission, paras. 429 and 430.

¹³¹Japan's appellee's submission, paras. 432-435.

to address the one aspect of its defence relating to Review 9 that varied from its defence relating to Reviews 4, 5, and 6, namely, that Review 9 was not properly within the Panel's terms of reference.¹³²

51. Further, Japan argues that third parties had the opportunity to present their views concerning Review 9, and potential third parties were not deprived of their rights. Three third parties—the European Communities, Mexico, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu—addressed whether Review 9 fell within the Panel's terms of reference, and agreed that it did.¹³³ Moreover, according to Japan, there is no reason to assume that potential third parties did not interpret the phrase "any subsequent closely connected measures" to include Review 9.

52. Finally, Japan disagrees with the United States' contention that the inclusion of Review 9 in the Panel's terms of reference would create "asymmetry" in the sense that the Panel would exercise jurisdiction over a post-establishment measure challenged by a complaining Member, but not over one relied upon by a responding Member.¹³⁴ Japan points out that, in this case, the United States asserted that it "came into compliance"¹³⁵ with the DSB's recommendations and rulings by adopting the subsequent periodic reviews, including Review 9, and the Panel examined and addressed each of them.¹³⁶ Japan argues that previous panels have examined post-establishment measures offered by a responding Member as evidence that an alleged WTO-inconsistency no longer exists.¹³⁷ In Japan's estimation, a panel's failure to do so would in fact constitute legal error.¹³⁸

53. For the foregoing reasons, Japan requests the Appellate Body to reject the United States' appeal of the Panel's finding that Review 9 properly fell within its terms of reference.

¹³²Japan's appellee's submission, paras. 436-438 (referring to United States' first written submission to the Panel, para. 50; United States' second written submission to the Panel, paras. 29-34; United States' opening statement at the meeting with the Panel, paras. 13 and 14; United States' response to Japan's Supplemental Submission, paras. 8-16; United States' appellant's submission, para. 42 and footnote 47 thereto; and Panel Report, paras. 7.103 and 7.105).

¹³³Japan's appellee's submission, para. 441 (referring to European Communities' oral statement at the meeting with the Panel, paras. 47 and 48; European Communities' third party submission, para. 27; oral statement of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu at the meeting with the Panel, paras. 7, and 12-15; and Mexico's oral statement at the meeting with the Panel, para. 12). Japan notes that an additional third party, Norway, "expressly declined to offer its views" on Review 9. (Japan's appellee's submission, footnote 596 to para. 441 (referring to Norway's third party submission to the Panel, para. 7))

¹³⁴Japan's appellee's submission, para. 444 (referring to United States' appellant's submission, para. 57).

¹³⁵Japan's appellee's submission, para. 445 (quoting United States' responses to Panel Questions dated 26 November 2008, para. 3; see also paras. 10, 13, 14, 16, and 17).

¹³⁶Japan's appellee's submission, para. 445 (referring to Panel Report, paras. 7.69-7.75).

¹³⁷Japan's appellee's submission, para. 447 (referring to Panel Report, *India – Autos*, paras. 8.4, 8.5, 8.25 and footnote 461 thereto, and 8.28).

¹³⁸Japan's appellee's submission, paras. 450 and 451 (referring to Appellate Body Report, *EC – Bananas III (Article 21.5 – US)*, paras. 271 and 479; Appellate Body Report, *US – Upland Cotton*, para. 272; Appellate Body Report, *US – Certain EC Products*, paras. 80 and 81; and Panel Report, *Chile – Price Band System*, para. 7.112).

2. The Panel's Findings on Reviews 1, 2, 3, 7, and 8

54. Japan supports the Panel's finding that the United States has failed to comply with the DSB's recommendations and rulings to bring Reviews 1, 2, 3, 7, and 8 into conformity with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994. Specifically, Japan submits that the importer-specific assessment rates determined in these Reviews, and applied to entries that were, or will be, liquidated after the expiry of the reasonable period of time, have not been revised and remain inconsistent with the United States' WTO obligations.

55. Japan rejects the United States' submission that the date of entry, rather than the date on which the anti-dumping duties are collected, is determinative in assessing compliance. Japan argues that the provisions cited by the United States—Article VI of the GATT 1994, and the *Ad Note* to paragraphs 2 and 3 of Article VI, and Articles 8.6, 10.1, 10.6, and 10.8 of the *Anti-Dumping Agreement*¹³⁹—concern the date on which an anti-dumping duty order may be applied to an entry. They do not address the issue of how a Member should implement the recommendations and rulings of the DSB, nor how the applicable date for implementation action should be determined.¹⁴⁰

56. Japan asserts that using the date of entry to determine the United States' implementation obligations, as proposed by the United States, "nullifies"¹⁴¹ the disciplines contained in Article 9.3 of the *Anti-Dumping Agreement*, because, under a retrospective system, a WTO-inconsistent importer-specific assessment rate always relates to entries occurring before the expiration of the reasonable period of time.¹⁴² Under the "date of entry" approach, these rates would be immune from the disciplines of Article 9.3 and this would result in the collection of duties in excess of an exporter's margin of dumping. Following this approach, a WTO-inconsistent importer-specific assessment rate need never be brought into conformity with Article 9.3, and the importing Member could always collect inflated anti-dumping duties.¹⁴³

57. Moreover, Japan considers that the United States' approach is contrary to the object and purpose of the dispute settlement system, which requires a WTO-inconsistent measure to be withdrawn or revised during the reasonable period of time.¹⁴⁴ Following the United States' "date of entry" approach would mean that nullification or impairment resulting from the original WTO-

¹³⁹Japan's appellee's submission, para. 230.

¹⁴⁰Japan's appellee's submission, paras. 231 and 232 (quoting Panel Report, para. 7.147).

¹⁴¹Japan's appellee's submission, para. 239.

¹⁴²Japan's appellee's submission, para. 245.

¹⁴³Japan's appellee's submission, para. 246.

¹⁴⁴Japan's appellee's submission, para. 248 (referring to Articles 3.7, 19.1, 21.1, and 21.3 of the DSU).

inconsistent measures would never be terminated and would continue after the end of the reasonable period of time, without being offset by the suspension of concessions.¹⁴⁵

58. Japan disagrees with the United States' argument that the Panel's interpretation treats retrospective and prospective duty collection systems unequally and "[u]nfairly disadvantages Members with retrospective systems".¹⁴⁶ Japan asserts that both systems are subject to the disciplines of Article 9.3 of the *Anti-Dumping Agreement*¹⁴⁷, which requires the importing Member "to 'refund' some or all of the duties 'paid' on importation".¹⁴⁸ Moreover, Japan asserts that, under either system, a review could continue to produce legal effects after the end of the reasonable period of time as a result of, for example, domestic litigation concerning that review.¹⁴⁹ Japan submits that Articles 13, 14, and 15 of the International Law Commission Draft Articles on Responsibility of States for internationally wrongful acts¹⁵⁰ (the "ILC Draft Articles") confirm that the United States is required by the DSU to bring its measures into conformity with its WTO obligations "when they continue to produce legal effects after the end of the RPT, regardless of the dates of entry" of imports.¹⁵¹

59. Japan objects to the United States' characterization of its implementation obligations as being either "retrospective" or "prospective", emphasizing that these are not "treaty terms".¹⁵² Rather, the United States' compliance obligation, pursuant to Articles 3.7, 19.1, 21.1, and 21.3 of the DSU, was to take "transformative" action to "bring" the importer-specific assessment rates in Reviews 1, 2, 3, 7, and 8 "into conformity" by the end of the reasonable period of time.¹⁵³ This obligation did not require the United States to "repay inflated duties that were collected ... *before* the end of the RPT"¹⁵⁴; instead, where the United States has not yet collected duties by the end of the reasonable period of time, "[it] is required to take action to modify or revise the [importer-specific assessment rates in Reviews 1, 2, 3, 7, and 8] to ensure that any *future* definitive anti-dumping duties collected do not exceed the properly determined margins of dumping".¹⁵⁵

¹⁴⁵Japan's appellee's submission, para. 250.

¹⁴⁶Japan's appellee's submission, para. 252 (quoting United States appellant's submission, heading IV. B.2).

¹⁴⁷Japan's appellee's submission, para. 253.

¹⁴⁸Japan's appellee's submission, para. 254.

¹⁴⁹Japan's appellee's submission, para. 257.

¹⁵⁰Draft Articles on Responsibility of States for internationally wrongful acts, adopted by the International Law Commission at its fifty-third session (9 August 2001). The text of the ILC Draft Articles is annexed to the United Nations General Assembly Resolution A/RES/56/83 (29 January 2002).

¹⁵¹Japan's appellee's submission, para. 261 and footnote 366 thereto.

¹⁵²Japan's appellee's submission, para. 206.

¹⁵³Japan's appellee's submission, paras. 217 and 219. See also paras. 174-194.

¹⁵⁴Japan's appellee's submission, para. 215. (original emphasis)

¹⁵⁵Japan's appellee's submission, para. 215. (original emphasis)

60. Japan also rejects the United States' argument that it should be excused from its obligation to bring Reviews 1, 2, 3, 7, and 8 into conformity, because the delay in liquidation was due to domestic court proceedings. Japan recalls that the panel in *Brazil – Retreaded Tyres* found that injunctions issued by a Member's own courts did not exonerate that Member from complying with its WTO obligations.¹⁵⁶ Moreover, Japan dismisses the United States' argument that it cannot be held responsible in WTO law for actions by private parties, noting that injunctions are actions taken by the United States' own courts, pursuant to powers conferred by United States law, which are attributable to the United States under WTO law.¹⁵⁷ Japan recalls the Appellate Body's finding in *US – Shrimp* that a Member "bears responsibility for acts of all its departments of government, including its judiciary".¹⁵⁸

61. Japan disagrees that Article 13 and footnote 20 of the *Anti-Dumping Agreement* support the United States' argument that, where duty collection is delayed beyond the end of the reasonable period of time as a result of domestic litigation, the United States need not bring the periodic reviews into conformity by the end of the reasonable period of time. Although footnote 20 provides an exception authorizing non-compliance with the deadlines in Article 9.3, according to Japan, this exception does not extend to the obligations in the DSU to bring WTO-inconsistent periodic reviews into conformity with WTO law.¹⁵⁹ Further, Japan submits that, even if footnote 20 could excuse a delay in compliance, it does not excuse a Member from meeting its substantive obligations under Article 9.3 of the *Anti-Dumping Agreement* once the judicial review requirements have been met and the delay has passed.¹⁶⁰

62. Japan does not consider that judicial review severs any "mechanical link" between the assessment of liability in the original determination and the liquidation instructions.¹⁶¹ According to Japan, "judicial review does not alter either the manner by which [Customs] takes measures to collect duties, or the interaction between the USDOC and [Customs]".¹⁶² Rather, "[w]ith or without litigation, the mechanism for duty collection takes the same ordinary course ... [and] *always* derive[s] mechanically from the USDOC's assessment rate through the straightforward application of the basic

¹⁵⁶Japan's appellee's submission, para. 279 (referring to Panel Report, *Brazil – Retreaded Tyres*, para. 7.305; and Appellate Body Report, *Brazil – Retreaded Tyres*, para. 252).

¹⁵⁷See Japan's appellee's submission, para. 282.

¹⁵⁸Japan's appellee's submission, para. 283 (quoting Appellate Body Report, *US – Shrimp*, para. 173).

¹⁵⁹Japan's appellee's submission, para. 290.

¹⁶⁰Japan's appellee's submission, paras. 291 and 292.

¹⁶¹Japan's appellee's submission, para. 293 (referring to the United States' appellant's submission, para. 97).

¹⁶²Japan's appellee's submission, para. 293.

laws of arithmetic".¹⁶³ Moreover, even if the original assessment rate is amended following judicial review, such amendment is relevant in Article 21.5 proceedings, not because it would break the "mechanical link" between Customs' duty collection measures and the original assessment rate, as contended by the United States, but "because the amendment might bring the measure into conformity with WTO law".¹⁶⁴ Japan notes, however, that this did not occur in this case as the revised assessment rates in Reviews 1, 2, and 3 were based on the same zeroing methodology that rendered the original assessment rate WTO-inconsistent.¹⁶⁵

63. Furthermore, Japan does not agree with the United States' suggestion that the Panel's approach creates "perverse incentives" for private parties to "manufacture domestic litigation".¹⁶⁶ Japan underscores the "considerable expenses" incurred by interested parties in pursuing judicial proceedings with respect to Reviews 1, 2, 3, 7, and 8, including challenges to the use of zeroing, which make it unlikely that domestic litigation would be "manufactured".¹⁶⁷ Japan posits that it cannot be considered "perverse" for private parties to seek to enjoin enforcement of WTO-inconsistent periodic reviews.

64. Accordingly, Japan requests the Appellate Body to uphold the Panel's findings that the United States has failed to bring the importer-specific assessment rates in Reviews 1, 2, 3, 7, and 8 into conformity with its WTO obligations after the expiry of the reasonable period of time.

3. The Panel's Findings on Reviews 4, 5, 6, and 9

65. For Japan, the United States' statement that Reviews 4, 5, 6, and 9 "cannot serve as a basis for a finding of WTO-inconsistency"¹⁶⁸ raises "a threshold issue" of whether or not the Panel was entitled to rule on the inconsistency of Reviews 4, 5, 6, and 9 in these Article 21.5 proceedings.¹⁶⁹ Japan asserts that Reviews 4, 5, 6, and 9 were "measures taken to comply" that provided the Panel with a necessary and sufficient "basis" to rule on their consistency.¹⁷⁰

¹⁶³Japan's appellee's submission, para. 294. (original emphasis)

¹⁶⁴Japan's appellee's submission, para. 295.

¹⁶⁵Japan's appellee's submission, para. 296 (referring to Panel Report, para. 7.139 and footnote 148 thereto, and para. 7.154).

¹⁶⁶Japan's appellee's submission, para. 285 (referring to United States' appellant's submission, para. 99).

¹⁶⁷Japan's appellee's submission, para. 285.

¹⁶⁸Japan's appellee's submission, para. 460 (quoting United States appellant's submission, para. 105). (underlining added by Japan) See also United States' appellant's submission, paras. 21, 24, 86, and 89.

¹⁶⁹Japan's appellee's submission, para. 461.

¹⁷⁰Japan's appellee's submission, para. 465 (referring to United States' appellant's submission, paras. 21, 24, 86, 89, and 105).

66. Japan rejects the United States' argument that the timing of a periodic review precludes a compliance panel from ruling on its consistency. Relying on the Appellate Body's finding in *US – Zeroing (EC) (Article 21.5 – EC)* that "the timing of a measure cannot be determinative of whether it bears a sufficiently close nexus with a Member's implementation of the recommendations and rulings of the DSB so as to fall within the scope of an Article 21.5 proceeding"¹⁷¹, Japan rejects the United States' argument that "the fact that Reviews 4, 5 and 6 were 'concluded long before the end of the RPT' means these reviews 'cannot provide a basis for finding that the United States acted inconsistently' with its WTO obligations".¹⁷² As such, the Panel was entitled to rule upon the consistency of Reviews 4 and 5, even though they pre-dated the DSB's recommendations and rulings and, hence, the end of the reasonable period of time.¹⁷³ For this same reason, Japan argues that Review 6, adopted after the original DSB recommendations and rulings but before the expiration of the reasonable period of time, was also properly found to be a measure taken to comply.¹⁷⁴ Finally, Japan submits that, if measures taken to comply are not adopted before the end of the reasonable period of time, the implementing Member would fail to comply with its obligations under Article 21.3 of the DSU to bring its measures into conformity by the end of the reasonable period of time.¹⁷⁵

67. Japan also rejects the United States' contention that Reviews 4, 5, 6, and 9 do not have any effects after the end of the reasonable period of time, and opposes the United States' argument that the Panel failed to explain the basis for its finding of inconsistency regarding Reviews 4, 5, 6, and 9.¹⁷⁶ Japan refers to the Panel's "express" finding, in its analysis of whether Reviews 4, 5, and 6 were measures taken to comply, that "importer-specific assessment rates determined in Reviews 4, 5, and 6 continued to have legal effect long after the adoption of the DSB's recommendations and rulings."¹⁷⁷ Japan also notes that the Panel's factual finding that some of the import entries covered by Reviews 4, 5, and 6 had not been liquidated by the time of the Panel proceedings was not appealed by the United States.¹⁷⁸ Further, Japan refers to the fact that Review 9 was adopted after the reasonable period of time and therefore necessarily began to apply and produce legal effects thereafter.

¹⁷¹Japan's appellee's submission, para. 469 (quoting Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 224).

¹⁷²Japan's appellee's submission, para. 468 (quoting United States' appellant's submission, para. 105).

¹⁷³Japan's appellee's submission, para. 470.

¹⁷⁴Japan's appellee's submission, paras. 471 and 472.

¹⁷⁵Japan's appellee's submission, para. 473.

¹⁷⁶Japan's appellee's submission, para. 479 (quoting United States' appellant's submission para. 102).

¹⁷⁷Japan's appellee's submission, para. 480 (quoting Panel Report, para. 7.79).

¹⁷⁸Japan's appellee's submission, para. 482 (referring to Panel Report, para. 7.74 and footnote 101 thereto, and para. 7.75 and footnote 102 thereto).

68. For these reasons, Japan asserts that the assessment rates from Reviews 4, 5, 6, and 9 continue to have effects after the end of the reasonable period of time and will serve as the legal basis for duty collection measures to be taken with respect to entries covered by these Reviews.¹⁷⁹

69. Japan further submits that the United States is mistaken in submitting that the "post-RPT legal effects of 'measures taken to comply'—like those of original measures—are to be ignored in assessing compliance, if the effects linger because of court injunctions."¹⁸⁰ Japan contends that, in WTO law, court injunctions are attributable to, and the responsibility of, the United States, and that they cannot "exonerate" a Member from its obligations to comply with WTO law.¹⁸¹

70. Accordingly, Japan submits that the Panel correctly found that Reviews 4, 5, 6, and 9 are "measures taken to comply" and that the Panel had a valid legal "basis" to rule on the consistency of these Reviews under Article 21.5. Therefore, Japan requests the Appellate Body to uphold the Panel's finding that the United States has acted inconsistently with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 by applying zeroing in the context of Reviews 4, 5, 6, and 9.

4. Article II of the GATT 1994

71. Japan submits that the Panel correctly found that the United States is in violation of Articles II:1(a) and II:1(b) of the GATT 1994 with respect to certain USDOC liquidation instructions and Customs liquidation notices issued after the expiration of the reasonable period of time. Japan argues that the Panel had a proper basis to examine the WTO-consistency of the USDOC liquidation instructions and Customs liquidation notices because the Panel had found that they are "measures taken to comply", and thus fell within the jurisdiction of the Panel.¹⁸² Japan disagrees with the United States' argument that Japan's claims under Article II are entirely derivative of its claims concerning the consistency of Reviews 1, 2, 7, and 8 with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994. Japan notes that its claims with respect to the duty collection measures involve "different measures, and different claims" from its claims with respect to Reviews 1, 2, 7, and 8.¹⁸³ In this regard, Japan highlights the fact that they are separate and distinct measures, with distinct content, different times of adoption, that they involve separate agencies, and give rise to

¹⁷⁹Japan's appellee's submission, para. 484.

¹⁸⁰Japan's appellee's submission, para. 489.

¹⁸¹Japan's appellee's submission, para. 489. (emphasis omitted)

¹⁸²See Japan's appellee's submission, paras. 498-506. Japan makes these submissions while acknowledging that the United States does not appeal the Panel's finding that the liquidation actions are measures taken to comply.

¹⁸³Japan's appellee's submission, para. 521.

mutually exclusive remedies in United States law. Furthermore, Japan submits that measures affecting the collection or levying of import duties at WTO-inconsistent rates are not shielded from scrutiny under Article II of the GATT 1994, if a related periodic review is challenged under separate WTO provisions.¹⁸⁴ Japan argues that the liquidation actions nullify and impair Japan's benefits under Article II of the GATT 1994, because they levy import duties in excess of the rates stipulated in the United States' Schedule of Concessions.

72. Japan asserts that the United States' other two arguments—that the relevant date for determining compliance is the date of entry of the merchandise, and that the duty collection measures would have occurred within the reasonable period of time but for domestic litigation—are jurisdictional in nature and are explicitly directed towards challenging whether the Panel had a valid basis or authority to rule upon the "consistency" of the duty collection measures.¹⁸⁵ Japan repeats that the Panel's authority to rule on the consistency of the duty collection measures is not affected by the fact that goods covered by the measures entered the United States before the end of the reasonable period of time.¹⁸⁶ Japan also reiterates that court injunctions cannot "exonerate" an implementing Member from its obligation to ensure that "measures taken to comply" are "consistent" with WTO law.¹⁸⁷

C. *Arguments of the Third Participants*

1. European Communities

73. The European Communities agrees with Japan that the Appellate Body should reject the United States' appeal in its entirety. To the extent that the United States raises issues already decided by the Appellate Body in *US – Zeroing (EC) (Article 21.5 – EC)*, the European Communities submits that, "[a]bsent any new cogent reasons"¹⁸⁸, the same principles and legal interpretation must be applied to the facts of this case.

74. With respect to Review 9, the European Communities submits that the requirement in Article 6.2 of the DSU to identify the specific measures at issue does not have a temporal scope; rather, it only requires that a panel request allow the Member concerned to understand in substantive terms the measure being referenced. In this case, the United States was put on notice as to the specific

¹⁸⁴Japan's appellee's submission, para. 522.

¹⁸⁵Japan's appellee's submission, paras. 529 and 530.

¹⁸⁶Japan's appellee's submission, para. 539.

¹⁸⁷Japan's appellee's submission, para. 546.

¹⁸⁸European Communities' third participant's submission, paras. 21, 26, and 29 (referring to Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 160).

measures challenged, because Japan had identified the periodic reviews in Annex 1 of its panel request, the procedures under United States municipal law to modify periodic reviews are limited, and Review 9 had been initiated before Japan's request.¹⁸⁹ Moreover, the European Communities distinguishes the facts before the panel in *US – Upland Cotton*, where it was not certain that the measure would come into existence, from the facts in this case, where United States municipal law provides for limited means to amend periodic reviews. The European Communities also recalls the statement by the Appellate Body in *US – Continued Zeroing* that an examination under Article 6.2 of the DSU need not involve a substantive inquiry as to the existence and precise content of the measure.¹⁹⁰

75. As regards Reviews 1, 2, 3, 7, and 8, the European Communities rejects the United States' argument that the Panel's approach would provide a "retroactive remedy" and give "retroactive effect" to the DSB's recommendations and rulings. The European Communities observes that the reference to a "remedy" would only be relevant for purposes of determining the level of nullification and impairment of benefits to Japan in the context of an Article 22.6 arbitration, which is not of concern at this stage of the proceedings. Secondly, the European Communities argues that the DSB's recommendations and rulings cannot be characterized as "retroactive", because both the omissions and the actions with respect to Reviews 1, 2, 3, 7, and 8 post-date the end of the reasonable period of time. Moreover, it is immaterial that the assessment rates pre-date the DSB's recommendations and rulings, since the entire point of the recommendations and rulings is that the original measures, including the assessment rates, be brought into conformity. The European Communities points out that the obligations in question flow from the treaty, in the sense that the DSB's recommendations and rulings merely clarify the pre-existing rights and obligations of the parties.¹⁹¹

76. The European Communities agrees with the Panel's rejection of the United States' "date of entry" argument. The European Communities argues that the provisions of the *Anti-Dumping Agreement* cited by the United States simply reflect that an import cannot be subject to an anti-dumping duty unless a measure is in place, and do not concern compliance by a Member by the end of the reasonable period of time.¹⁹² Furthermore, the European Communities asserts that Article 9.2 of the *Anti-Dumping Agreement* regulates collection of anti-dumping duties, including the amount of

¹⁸⁹European Communities' third participant's submission, para. 13.

¹⁹⁰European Communities' third participant's submission, para. 15 (referring to Appellate Body Report, *US – Continued Zeroing*, paras. 168 and 169).

¹⁹¹European Communities' third participant's submission, para. 24.

¹⁹²European Communities' third participant's submission, para. 27.

such duties, which signifies that actions to collect duties based on zeroing and applied after the end of the reasonable period of time are relevant for assessing compliance.¹⁹³

77. The European Communities submits that WTO obligations for retrospective and prospective anti-dumping systems are equal. Both require that, if duties have not been liquidated by the end of the reasonable period of time, no new WTO-inconsistent measure can be taken, regardless of the date of entry covered by that measure.¹⁹⁴ The European Communities notes that the United States focuses on the forward-looking aspect of implementation in a prospective system, while omitting to consider the backward-looking aspect of the prospective system, namely, the refund proceedings under Article 9.3.2 of the *Anti-Dumping Agreement*, in which all the pertinent WTO obligations must be complied with after the end of the reasonable period of time, even if the goods in question entered before the end of this period.¹⁹⁵ To illustrate this point, the European Communities refers to refund proceedings in which it applied a new WTO-consistent methodology following the Panel Report in *EC – Countervailing Measures on DRAM Chips*.¹⁹⁶

78. The European Communities dismisses the United States' attempt to excuse its non-compliance by referring to measures, such as injunctions, granted by its judiciary. The European Communities refers to Article 27 of the *Vienna Convention on the Law of Treaties*¹⁹⁷ (the "*Vienna Convention*"), pursuant to which "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." Moreover, Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*") and Article 18 of the *Anti-Dumping Agreement* require Members to take all necessary steps of a general or particular character to ensure WTO conformity of its municipal law.¹⁹⁸ This also applies to municipal court injunctions. The European Communities observes that neither footnote 20, nor Article 13, of the *Anti-Dumping Agreement* supports the United States' argument. Nor does the European Communities accept that court proceedings initiated by private parties should justify non-compliance, since injunctions are actions imputable to the United States and are granted because there is some prospect that the court proceedings will be successful.¹⁹⁹ The European Communities rejects the United States' reliance on the Appellate Body Report in *US – Zeroing (EC) (Article 21.5 – EC)* to support its arguments that a

¹⁹³European Communities' third participant's submission, para. 28.

¹⁹⁴European Communities' third participant's submission, paras. 30 and 33.

¹⁹⁵European Communities' third participant's submission, para. 31.

¹⁹⁶European Communities' third participant's submission, para. 32; European Communities' response to questioning at the oral hearing.

¹⁹⁷Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679.

¹⁹⁸European Communities' third participant's submission, paras. 36 and 38.

¹⁹⁹European Communities' third participant's submission, para. 39.

delay in assessment or liquidation due to judicial proceedings would sever the "mechanical" link, because this issue was not addressed by the Appellate Body in that report.²⁰⁰ The European Communities explains that the Appellate Body was not positing an *a contrario* rule, that, if an action is not "mechanistic", late compliance is justified.²⁰¹ Furthermore, the European Communities asserts that liquidation actions (incorporating the results of the judicial review proceedings) are positive acts that must be in conformity with the covered agreements when they are issued. If the WTO-inconsistent aspect of the measure was not removed in the municipal litigation, then assessment and liquidation would proceed "just as it would in any other case".²⁰²

79. The European Communities agrees with the Panel's finding that Reviews 4, 5, 6, and 9 were measures taken to comply, which are WTO-inconsistent as a result of the use of zeroing. For the same reasons explained above, the European Communities rejects the United States' arguments based on an alleged "retroactive remedy", "date of entry", and "unequal treatment of prospective and retrospective systems". In addition, the European Communities rejects the view that these Reviews "ceased to exist" and "had no effects" after the end of the reasonable period of time, since it is "self-evident" that they are necessarily either the legal basis for liquidation using zeroing or for the continued retention of cash deposits after the end of the reasonable period of time. The European Communities notes that the Panel made factual findings in this respect.²⁰³ According to the European Communities, whilst it is clear that compliance proceedings cannot normally be brought before the end of the reasonable period of time, this does not mean that any WTO-inconsistent measure taken during that period is shielded from WTO-scrutiny.²⁰⁴

2. Korea

80. Korea submits that the Appellate Body should uphold the Panel's findings in this dispute. Korea argues that, in finding that Review 9 was within its terms of reference, the Panel properly relied

²⁰⁰European Communities' third participant's submission, para. 40 (quoting United States' appellant's submission, para. 97).

²⁰¹European Communities' third participant's submission, para. 40.

²⁰²European Communities' third participant's submission, para. 41.

²⁰³European Communities' third participant's submission, para. 46 (referring to Panel Report, para. 7.79, which states, in relevant part, that "importer-specific assessment rates determined in Reviews 4, 5 and 6 continued to have legal effect long after the adoption of the DSB's recommendations and rulings.")

²⁰⁴European Communities' third participant's submission, paras. 48 and 49. The European Communities notes that the United States Court of Appeals in the *Parkdale* case rejected the argument that a new USDOC policy would be impermissibly retroactive if it were applied to prior unliquidated entries. (European Communities' third participant's submission, footnote 69 to para. 48 (referring to United States Court of Appeals, Federal Circuit, *Parkdale International v. United States*, 475 F.3d 1375, 1379 (Fed. Cir. 2007) (9 February 2007)))

on the "predictability" associated with periodic reviews under the United States' anti-dumping system and on the fact that it was part of a "continuum".²⁰⁵

81. Korea further submits that any measure taken after the expiration of the reasonable period of time must be brought into compliance "irrespective of the date of entry".²⁰⁶ Korea explains that, as long as an action occurs after the reasonable period of time, it cannot be said to be retroactive.²⁰⁷ Korea rejects the relevance of the provisions of the *Anti-Dumping Agreement* on which the United States relies, arguing that "[a]t most ... these articles only show that the date of entry carries some meaning or initiates some function in the course of the duty assessment administration of a Member".²⁰⁸ Moreover, Korea refers to *US – Zeroing (EC) (Article 21.5 – EC)* and observes that, in that report, the Appellate Body "held that the date of entry is not determinative".²⁰⁹

82. Korea asserts that the fact the liquidations were delayed because of domestic judicial proceedings cannot, and should not, affect the scope of the obligation of the implementing Member.²¹⁰ Korea does not consider the United States' argument that domestic judicial proceedings are initiated by private parties to be relevant for purposes of the disposition of this issue. Korea states that, "far from [being] a judicial tool that a private litigant could attempt to take advantage of in an effort to merely prolong the procedure", injunctions are "an extraordinary remedy the court provides after careful consideration".²¹¹ Korea emphasizes that it is not the private entity that makes a decision about an injunction, but rather "it is a [United States] judge sitting in the [United States] court".²¹² Furthermore, Korea considers that a private party should not be prevented from pursuing "every avenue available domestically" when it has standing to do so.²¹³ Korea also rejects the United States' assertion that the Panel's approach would require the United States to "revisit" prior determinations.²¹⁴ For Korea, the Panel's approach is "entirely appropriate" as it requires an implementing Member to liquidate the anti-dumping duties correctly in accordance with the *Anti-Dumping Agreement*.²¹⁵ Korea thus submits that the Appellate Body should affirm the Panel's finding that "the judicial review-

²⁰⁵Korea's third participant's submission, paras. 54 and 55 (referring to Panel Report, para. 7.105).

²⁰⁶Korea's third participant's submission, para. 28.

²⁰⁷Korea's third participant's submission, para. 23.

²⁰⁸Korea's third participant's submission, para. 24.

²⁰⁹Korea's third participant's submission, para. 27 (referring to Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 309).

²¹⁰Korea's third participant's submission, para. 33.

²¹¹Korea's third participant's submission, footnote 12 to para. 34.

²¹²Korea's third participant's submission, para. 36.

²¹³Korea's third participant's submission, para. 36.

²¹⁴Korea's third participant's submission, para. 38 (quoting United States' appellant's submission, para. 4).

²¹⁵Korea's third participant's submission, para. 38.

delayed liquidation should also fall within the parameters of [the] compliance obligation of the implementing Member."²¹⁶

83. Korea considers that the Panel's approach treats retrospective and prospective anti-dumping systems "equally".²¹⁷ Korea explains that the "obligation to cease" the inconsistent measures after the reasonable period of time is "identical" for all Members, irrespective of whether they apply a retrospective or prospective anti-dumping system.²¹⁸ Korea adds that what is challenged in this case is not the manner in which the United States conducts a periodic review, but rather actions taken by the United States after the reasonable period of time.

84. Korea also submits that the Appellate Body should uphold the Panel's finding under Article II of the GATT 1994, which Korea describes as an "important contribution".²¹⁹ Korea submits that the Panel's finding under Article II is necessary for the effective resolution of the dispute because it "shows the extent of negative impact caused by ... non-compliance".²²⁰ Furthermore, Korea explains that the findings under Article II show that the application of the zeroing practice and the continued non-compliance of the DSB's recommendations and rulings can also "potentially undermine the basic expectations the Members have within the WTO regime, including Schedules of Concessions."²²¹

3. Mexico

85. Mexico urges the Appellate Body to adhere to its prior reasoning in *US – Zeroing (EC) (Article 21.5 – EC)* and to affirm the findings of the Panel.²²² In particular, Mexico highlights two key principles articulated by the Appellate Body in *US – Zeroing (EC) (Article 21.5 – EC)* that it submits should inform the outcome of the present proceedings. First, that a measure is one "taken to comply" under Article 21.5 of the DSU if there is a sufficiently close nexus between it and the DSB's recommendations and rulings²²³; and, secondly, that the obligation to implement the recommendations and rulings of the DSB extends to measures that occur after the expiry of the

²¹⁶Korea's third participant's submission, para. 40.

²¹⁷Korea's third participant's submission, para. 45.

²¹⁸Korea's third participant's submission, para. 49.

²¹⁹Korea's third participant's submission, para. 41.

²²⁰Korea's third participant's submission, para. 42.

²²¹Korea's third participant's submission, para. 43.

²²²Mexico's third participant's submission, para. 10.

²²³Mexico's third participant's submission, para. 8 (referring to Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, paras. 221-235).

reasonable period of time where those measures "derive mechanically" from anti-dumping duty determinations made prior to the expiry of the reasonable period of time.²²⁴

86. Mexico asserts that the Panel correctly found that Review 9 fell within its terms of reference and that the phrase "subsequent closely connected measures" in Japan's panel request includes Review 9. Mexico endorses the view of the Panel that Review 9 is "a measure taken to comply" and emphasizes that "once finalised [Review 9] would become the next administrative review in the continuum of administrative reviews related to the 1989 Anti-Dumping Order."²²⁵ Mexico considers that, in the light of the predictability of the United States' retrospective anti-dumping system, the Panel appropriately distinguished the situation in this case from the situation in *US – Upland Cotton*.²²⁶ Mexico disagrees with the United States' argument that measures not yet in existence at the time of the panel request may not be subject to WTO dispute settlement.²²⁷ According to Mexico, compliance is focused on the final results of the process of implementation and the DSU does not impose a temporal limit on the measures that may be considered in determining whether compliance has been achieved. Mexico cautions that the objectives of WTO dispute settlement would be seriously undermined if a Member were allowed to continue applying WTO-inconsistent measures after the reasonable period of time had expired.

87. Next, Mexico contends that the Panel correctly found that the United States' implementation obligations are determined by the expiry date of the reasonable period of time, irrespective of the date of entry of the relevant imports, and that this is consistent with the Appellate Body's approach in *US – Zeroing (EC) (Article 21.5 – EC)*.²²⁸ Mexico submits that, accordingly, the United States fails to act in compliance when it takes any positive action after the end of the reasonable period of time that is contrary to the DSB's recommendations and rulings, regardless of the date of entry of the imports affected by the action.²²⁹ Mexico contends that to rule otherwise would permit the United States "'to extend the reasonable period of time ...' indefinitely to evade its WTO obligations" and would "deprive of meaning" the notion of a reasonable period of time.²³⁰ Mexico further argues that

²²⁴Mexico's third participant's submission, paras. 9, 27, and 30 (referring to and quoting Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, paras. 300-310).

²²⁵Mexico's third participant's submission, para. 61 (quoting Panel Report, para. 7.110).

²²⁶Mexico's third participant's submission, para. 57 (referring to Panel Report, para. 7.115).

²²⁷Mexico's third participant's submission, para. 58 (referring to United States' appellant's submission, para. 47).

²²⁸Mexico's third participant's submission, paras. 32 and 33 (referring to Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 311).

²²⁹Mexico's third participant's submission, para. 36.

²³⁰Mexico's third participant's submission, para. 36 ("*ampliar el plazo prudencial ... indefinidamente para evadir sus obligaciones bajo la OMC*"; "*privaría de todo sentido*") (quoting Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 309).

permitting liquidation to occur after the expiry of the reasonable period of time on the basis of WTO-inconsistent anti-dumping margins would be in violation of the obligation in Article 9.3 of the *Anti-Dumping Agreement* to ensure that the amount of anti-dumping duties collected does not exceed the margin of dumping established under Article 2 of the *Anti-Dumping Agreement*.²³¹

88. Mexico rejects the United States' argument that a finding of non-compliance cannot be based on the liquidation of anti-dumping duties that has been delayed until after the expiry of the reasonable period of time due to domestic judicial proceedings. Mexico considers that Articles 9.3 and 13 of the *Anti-Dumping Agreement* "do[] not address, let alone modify, the United States' compliance obligations".²³² Mexico submits that the obligation to comply derives from the provisions of the DSU, which require "universal compliance" regardless of the factual circumstances surrounding delays related thereto.²³³ Mexico also disputes the United States' suggestion that judicial review has severed the link between the liquidation of entries and the liability determined in the original review determination. Rather, the relevant analysis should be whether liquidation bears a "sufficiently close nexus" with the recommendations and rulings of the DSB.²³⁴ Mexico asserts that it does and, therefore, the liquidation actions are "measures taken to comply". Further, Mexico explains that it is of no relevance that private litigants caused the delay in liquidation. Although the *Anti-Dumping Agreement* requires Members to afford private litigants the opportunity to pursue judicial proceedings, and delayed liquidation is an "entirely predictable consequence" of the domestic procedures chosen by the United States to implement this obligation, this does not relieve the United States of its compliance obligations under the DSU.²³⁵ Mexico notes that the Appellate Body in *US – Zeroing (EC) (Article 21.5 – EC)* did not explicitly decide the issue of whether judicial delay can excuse non-compliance. However, according to Mexico, the Appellate Body's ruling that compliance implies not only cessation of zeroing in the assessment of duties, but also in consequent measures that "derive mechanically" from that assessment, clearly supports the notion that actions to liquidate that are delayed as a result of judicial proceedings cannot be excluded from the compliance obligations of the United States.²³⁶

²³¹Mexico's third participant's submission, para. 37.

²³²Mexico's third participant's submission, para. 41 ("*no se refieren, ni mucho menos modifican, las obligaciones de cumplimiento de Estados Unidos*").

²³³Mexico's third participant's submission, para. 41.

²³⁴Mexico's third participant's submission, para. 42.

²³⁵Mexico's third participant's submission, para. 44 ("*consecuencia enteramente previsible*").

²³⁶Mexico's third participant's submission, para. 45 (referring to Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 310).

89. Finally, Mexico argues that WTO Members with retrospective anti-dumping systems are not unfairly disadvantaged when actions that "derive mechanically" from the assessment of duties are included in those Members' implementation obligations. Mexico disagrees with the United States that the Panel's approach has "retroactive effects", stating that the implementation obligation "does not require repayment of duties that have already been assessed and collected on liquidated entries"²³⁷; rather, it focuses on future actions taken after the reasonable period of time to collect anti-dumping duties. Mexico also takes issue with the United States' contention that it "elected to adopt a retrospective system long before there was a WTO" and it "cannot be presumed to have agreed to 'consequences' only now being assigned" by panels and the Appellate Body.²³⁸ Mexico explains that, after adopting a retrospective system, the United States later negotiated and agreed to the *WTO Agreement*, and it must be presumed to have had full knowledge of the inherent differences between retrospective and prospective systems.²³⁹ Mexico highlights that the implementation obligations under both systems are equal in the sense that no new action that is inconsistent with the DSB's recommendations and rulings may be taken in either system after the end of the reasonable period of time. Mexico points to the discrimination that the United States' interpretation would create in allowing Members with retrospective systems to evade their WTO obligations for an extended period of time, while requiring Members with a prospective system to comply immediately.

4. Norway

90. Norway supports the Panel's findings that Review 9 fell within the Panel's terms of reference, and that the United States failed to comply with the DSB's recommendations and rulings with respect to the importer-specific assessment rates determined in Reviews 1, 2, 3, 7, and 8.

91. Norway disagrees with the United States that Review 9 was not sufficiently specified in Japan's panel request and that it fell outside the Panel's terms of reference because it did not exist when the panel request was made. Norway submits that the phrase "subsequent closely connected measures" in the panel request was specific enough to meet the requirements of Article 6.2, since previous panels have accepted references to a category of measures.²⁴⁰ Norway agrees with the Panel that the facts of this case show that inclusion of Review 9 "should not in any way [have] come as a

²³⁷Mexico's third participant's submission, para. 50 ("*no requiere el volver a pagar los derechos que ya fueron determinados y cobrados sobre entradas liquidadas*").

²³⁸Mexico's third participant's submission, para. 51 (quoting United States' appellant's submission, para. 78).

²³⁹Mexico's third participant's submission, para. 51.

²⁴⁰Norway's third participant's submission, para. 16 (referring to Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.10; Panel Report, *EC – Bananas III (US)*, para. 7.27; and Appellate Body Report, *EC – Bananas III*, para. 140).

surprise to the United States"²⁴¹ because it was clear from the United States' first written submission to the Panel that the United States was aware that the phrase would cover Review 9.²⁴² Norway further notes that, under the United States' retrospective duty assessment system, Review 9 was predictable and came into existence as part of a "chain" or "continuum" of measures, and Review 9 had been initiated before the Panel was requested. Norway recalls that the Appellate Body has held that future measures may, under exceptional circumstances, be included in a panel's terms of reference.²⁴³ Norway submits that the Panel properly relied on the Panel Report in *Australia – Salmon (Article 21.5 – Canada)* to find that a measure introduced during compliance panel proceedings should be included within a panel's terms of reference, due to the "special characteristics of compliance proceedings", and in particular the "ongoing or continuous" nature of compliance.²⁴⁴ Moreover, Norway states that there was no infringement of the parties' and third parties' due process rights. Norway points out that the third parties received all of the submissions relating to Review 9 before the third party meeting with the Panel, and that they therefore had ample opportunity to respond to Japan's claim.²⁴⁵

92. Norway recalls that the Appellate Body has already rejected the argument that the relevant date for assessing compliance is the date of entry of the subject merchandise.²⁴⁶ Furthermore, Norway does not consider that domestic judicial proceedings, as envisaged in Article 13 of the *Anti-Dumping Agreement*, provide an exception to compliance obligations under the DSU. Drawing on *Brazil – Retreaded Tyres* and *US – Shrimp*, Norway asserts that domestic court injunctions, even when initiated by private parties, cannot serve as a justification for non-compliance with a Member's WTO-obligations, since they remain acts of its government for which it must be held responsible.²⁴⁷ Finally, Norway underscores that footnote 20 to the *Anti-Dumping Agreement* provides an exception only to the time-limits contained in Article 9.3 of that Agreement, and not, as the United States argues, an exception to compliance obligations.²⁴⁸

²⁴¹Norway's third participant's submission, para. 22.

²⁴²Norway's third participant's submission, para. 18 (referring to Panel Report, para. 7.105; and United States' first written submission to the Panel, para. 50).

²⁴³Norway's third participant's submission, para. 8 (referring to Appellate Body Report, *EC – Chicken Cuts*, para. 156).

²⁴⁴Norway's third participant's submission, para. 11 (quoting Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.10).

²⁴⁵Norway's third participant's submission, para. 28.

²⁴⁶Norway's third participant's submission, para. 32 (referring to Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, paras. 308 and 309).

²⁴⁷Norway's third participant's submission, paras. 38-40 (referring to Panel Report, *Brazil – Retreaded Tyres*, para. 7.305; Appellate Body Report, *Brazil – Retreaded Tyres*, para. 252; and Appellate Body Report, *US – Shrimp*, para. 173).

²⁴⁸Norway's third participant's submission, para. 43.

III. Issues Raised in This Appeal

93. The following issues are raised in this appeal:

- (a) Whether the Panel erred in finding that Review 9 fell within its terms of reference because:
 - (i) it was not properly identified in Japan's panel request, as required by Article 6.2 of the DSU; and
 - (ii) it had not been completed when Japan requested the establishment of the Panel.

- (b) Whether the Panel erred in finding that the United States has failed to comply with the DSB's recommendations and rulings regarding the importer-specific assessment rates determined in Reviews 1, 2, 3, 7, and 8 that apply to imports covered by those Reviews that were, or will be, collected after the expiry of the reasonable period of time, because:
 - (i) the United States' compliance obligations must be determined based on the date of importation and not on the basis of the date of collection of the anti-dumping duties; and
 - (ii) collection was delayed beyond the reasonable period of time due to the periodic reviews being subjected to domestic judicial proceedings.

- (c) Whether the Panel erred in finding that the United States has acted inconsistently with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 by applying zeroing in the context of Reviews 4, 5, 6, and 9, because:
 - (i) the United States' compliance obligations must be determined based on the date of importation and not on the basis of the date of collection of the anti-dumping duties;
 - (ii) collection was delayed beyond the reasonable period of time due to the periodic reviews being subjected to domestic judicial proceedings; and
 - (iii) Reviews 4, 5, and 6 had not had effects after the reasonable period of time, given that collection had been suspended as a result of court injunctions.

- (d) Whether the Panel erred in finding that the United States is in violation of Articles II:1(a) and II:1(b) of the GATT 1994 with respect to certain liquidation actions taken after the expiry of the reasonable period of time, namely, with respect to the USDOC liquidation instructions set forth in Panel Exhibits JPN-40.A, and JPN-77 to JPN-80, and the Customs liquidation notices set forth in Panel Exhibits JPN-81 to JPN-87.

IV. The Panel's Terms of Reference – Review 9

94. We begin by examining the United States' appeal of the Panel's finding that Review 9 fell within its terms of reference. Review 9 is a periodic review of an anti-dumping duty order on imports of ball bearings from Japan.²⁴⁹ It followed successively from Reviews 1 through 6²⁵⁰, which were all periodic reviews stemming from the same anti-dumping duty order on ball bearings from Japan. Review 9 covered imports for the period 1 May 2006 to 30 April 2007. The notice of initiation of the Review was published by the United States Department of Commerce (the "USDOC") on 29 June 2007²⁵¹, preliminary results were published on 7 May 2008²⁵², and final results were published on 11 September 2008.²⁵³

95. The panel and Appellate Body reports in the original proceedings were adopted by the DSB on 23 January 2007. The reasonable period of time mutually agreed between the United States and Japan, pursuant to Article 21.3(b) of the DSU, expired on 24 December 2007.

²⁴⁹See *supra*, footnote 26. See also Panel Report, footnote 14 to para. 3.1(b)(ii).

²⁵⁰Reviews 1, 2, 3, 4, 5, 6, and 9 are periodic reviews concerning imports of ball bearings from Japan entering the United States in 1999-2007, with the exception of the period 1 May 2001 to 30 April 2002, that is, between Reviews 2 and 3. Although Japan also made claims in the original proceedings regarding entries of ball bearings from Japan for the periods 1998-1999 and 2001-2002, Japan explained that it was not pursuing claims in these compliance proceedings regarding the 1998-1999 and 2001-2002 periodic reviews, because the United States had liquidated all entries covered by those two reviews by the end of the reasonable period of time. (See Panel Report, para. 7.66 and footnote 92 thereto) Reviews 7 and 8, which are also subject to these compliance proceedings, concerned imports from Japan of cylindrical roller bearings and spherical plain bearings for the period 1 May 1999 to 31 December 1999.

²⁵¹Initiation of Antidumping and Countervailing Duty Administrative Reviews, Request for Revocation in Part and Deferral of Administrative Review, *United States Federal Register*, Vol. 72, No. 125 (29 June 2007) 35690. (See Panel Report, footnote 134 to para. 7.110)

²⁵²Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom: Preliminary Results of Antidumping Duty Administrative Reviews and Intent to Rescind Reviews in Part, *United States Federal Register*, Vol. 73, No. 89 (7 May 2008) 25654. The due date for the completion of these preliminary results was extended twice: Extension of Time Limit for Preliminary Results of Antidumping Duty Administrative Reviews, *United States Federal Register*, Vol. 73, No. 11 (16 January 2008) 2887, extending the due date from 31 January 2008 to 15 April 2008; and Extension of Time Limit for Preliminary Results of Antidumping Duty Administrative Reviews, *United States Federal Register*, Vol. 73, No. 77 (21 April 2008) 21311, extending the due date from 15 April 2008 to 30 April 2008.

²⁵³See *supra*, footnote 26, and Panel Report, footnote 14 to para. 3.1(b)(ii).

96. Before we proceed to analyze the arguments raised by the United States' appeal, we first provide a brief overview of the Panel's analysis of this issue in these Article 21.5 proceedings, and then summarize the arguments of the participants and third participants on appeal.²⁵⁴

A. *Article 21.5 Proceedings*

97. Japan requested the establishment of an Article 21.5 panel on 7 April 2008. Paragraph 12 of Japan's panel request reads:

This request concerns five of the 11 periodic reviews mentioned in paragraph 1(vi) [of the panel request], plus three closely connected periodic reviews that the United States argues "superseded" the original reviews. The United States used zeroing in each of these reviews and, despite the DSB's recommendations and rulings, has omitted to eliminate zeroing from any of them. These eight periodic reviews are identified in Annex 1 of this Request, and stem from anti-dumping duty orders on "Ball Bearings and Parts Thereof From Japan", "Cylindrical Roller Bearings and Parts Thereof From Japan", and "Spherical Plain Bearings and Parts Thereof From Japan". This request also concerns United States Government instructions and notices, issued since the end of the RPT, to liquidate entries covered by these eight reviews. Further, the request concerns any amendments to the eight periodic reviews and the closely connected instructions and notices, as well as any subsequent closely connected measures.²⁵⁵

98. Before the Panel, the United States sought a preliminary ruling that the phrase "subsequent closely connected measures" in Japan's panel request failed to identify the "alleged subsequent measures" for purposes of Article 6.2 of the DSU.²⁵⁶ The United States expressed concern that Japan was trying to include in the Panel's terms of reference any future periodic reviews related to the eight reviews identified in its panel request which, according to the United States, would be "improper".²⁵⁷

99. Japan did not refer to or make any claims with respect to Review 9 in its first or second written submissions to the Panel.²⁵⁸ On 11 September 2008, during the course of the Article 21.5 Panel proceedings, the USDOC published the final results of Review 9. On 15 September 2008,

²⁵⁴Review 9 was not discussed in the original proceedings, given that it was initiated subsequent to the adoption of the DSB's recommendations and rulings.

²⁵⁵WT/DS322/27, para. 12.

²⁵⁶United States' first written submission to the Panel, para. 50. See also Panel Report, paras. 7.84 and 7.100.

²⁵⁷United States' first written submission to the Panel, para. 50.

²⁵⁸Japan filed its first and second written submissions to the Panel on 30 June and 27 August 2008, respectively. Japan stated in its first submission that it reserved "the rights to address any other subsequent closely connected measures." (Japan's first written submission to the Panel, footnote 40 to para. 28)

Japan requested leave and later obtained permission from the Panel to file a supplemental submission in which it argued that Review 9 is inconsistent with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 by virtue of the application of zeroing in that Review.²⁵⁹ In response to Japan's submission, the United States objected that the phrase "subsequent closely connected measures" did not cover Review 9. The United States argued that, in any event, Review 9 was a "future measure, not in existence" at the time of the panel request, and therefore could not fall within the Panel's jurisdiction.²⁶⁰

100. The Panel found that Review 9 fell within its terms of reference for three reasons. First, the Panel found that the phrase "subsequent closely connected measures" in Japan's panel request was sufficiently specific for purposes of Article 6.2 of the DSU.²⁶¹ In addition to examining the wording of Japan's panel request, the Panel considered that whether or not a panel request "adequately put[] the responding party on notice regarding the case against it" is a relevant consideration for assessing whether the request meets the requirements of Article 6.2.²⁶² In this case, the Panel noted the high degree of predictability of the future occurrence of subsequent periodic reviews in the United States' retrospective anti-dumping duty system, and considered that the United States should reasonably have expected that future periodic reviews would fall within the Panel's jurisdiction.²⁶³ Moreover, the Panel noted that the United States had clearly anticipated the inclusion of subsequent periodic reviews because, in its first written submission, the United States had expressed concern that Japan was trying to include in the Panel's terms of reference any future periodic reviews related to the eight periodic reviews identified in the panel request.²⁶⁴ The Panel concluded that "a finding that the phrase 'subsequent closely connected measures' satisfies the terms of Article 6.2 would not violate any due process objective of the DSU."²⁶⁵

101. Secondly, the Panel found that Review 9 was properly included within the scope of the Article 21.5 proceedings. The Panel based its finding on the fact that Review 9 had already been

²⁵⁹Japan requested leave to file a supplemental submission on 15 September 2008. The United States objected to Japan's request to file a supplemental submission. The Panel informed the parties that it had accepted Japan's request to file a supplemental submission on 1 October 2008. (See Panel Report, para. 7.109) Japan's supplemental submission was filed on 10 October 2008. The United States responded to Japan's supplemental submission on 3 November 2008. Japan commented on the United States' response on 5 November 2008. The Panel met with the parties on 4 and 5 November 2008; and with the third parties on 5 November 2008.

²⁶⁰See Panel Report, paras. 7.84 and 7.100.

²⁶¹Panel Report, para. 7.107.

²⁶²Panel Report, para. 7.105.

²⁶³Panel Report, paras. 7.102 and 7.105.

²⁶⁴Panel Report, para. 7.105 (quoting United States' first written submission to the Panel, para. 50).

²⁶⁵Panel Report, para. 7.105.

initiated at the time of Japan's panel request²⁶⁶; was "identical in nature and effect" to Reviews 4, 5, and 6, which the Panel had found to be within the scope of the Article 21.5 proceedings²⁶⁷; and applied the zeroing methodology.²⁶⁸ The Panel concluded that, like Reviews 4, 5, and 6, Review 9 was sufficiently closely connected to the original dispute to constitute a "measure taken to comply", within the meaning of Article 21.5.²⁶⁹

102. Thirdly, the Panel examined the United States' argument that a measure not yet in existence at the time of the panel request, such as Review 9, could not be the subject of WTO dispute settlement. The Panel observed that "although Review 9 did not exist at the time of the panel request, a chain of measures or a continuum existed, in which each new review superseded the previous one. Review 9 eventually came into existence as a part of this chain."²⁷⁰ The Panel found that "[i]n these particular circumstances, where the measure in issue eventually came into existence as part of a continuum that existed at the time of the panel request, and where the process for bringing about the measure's existence was already underway, ... Review 9 is within the panel's terms of reference."²⁷¹ The Panel subsequently found that the evidence submitted by Japan—including computer program excerpts, as well as USDOC Issues and Decision Memoranda—demonstrated that zeroing had been used in Review 9 and that, therefore, Review 9 was inconsistent with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.²⁷²

B. *Claims and Arguments on Appeal*

103. The United States requests that the Appellate Body reverse the Panel's finding that Review 9 was part of its terms of reference. The United States submits that Articles 6.2 and 7.1 of the DSU required Japan to identify each periodic review in its panel request, since each review is "separate and distinct".²⁷³ Consequently, the phrase "subsequent closely connected measures" in Japan's panel request did not meet the requirement in Article 6.2 to "identify the specific measures at issue". In addition, the United States argues that the Panel took into account factors that are irrelevant to an analysis under Article 6.2, such as the United States' statement in its first written submission that

²⁶⁶Panel Report, para. 7.110.

²⁶⁷Panel Report, para. 7.114 (referring to Panel Report, para. 7.82). The Panel explained that Review 9 "supersedes those measures, and is therefore the latest link in the chain of assessment incorporating those measures."

²⁶⁸Panel Report, para. 7.114.

²⁶⁹Panel Report, para. 7.114.

²⁷⁰Panel Report, para. 7.116.

²⁷¹Panel Report, para. 7.116.

²⁷²Panel Report, paras. 7.160, 7.161, 7.166, and 7.168. See also *ibid.*, para. 8.1(b). The Panel arrived at the same conclusion in relation to Reviews 4, 5, and 6.

²⁷³United States' appellant's submission, para. 44.

Japan was trying to include future reviews in the Panel's terms of reference, the predictability of the United States' anti-dumping system, the fact that Review 9 had been initiated by the time of the panel request, and the alleged due process objectives of Article 6.2 of the DSU. Moreover, the United States reiterates that Review 9 cannot be subject to WTO dispute settlement proceedings because it was a "future" measure in the sense that it did not exist at the time the Panel was requested.²⁷⁴ The United States also highlights certain systemic considerations that militate against the Panel's approach.²⁷⁵ Finally, the United States refers to past disputes in which respondents, in claiming that inconsistencies had been removed, unsuccessfully requested panels to examine measures that came into existence after the panels were established.²⁷⁶ The United States describes the Panel's approach as "asymmetrical", because it would favour complainants over respondents.²⁷⁷

104. Japan agrees with the Panel's findings with respect to Review 9, and submits that the language of its panel request was specific enough to satisfy the requirements of Article 6.2.²⁷⁸ Moreover, Japan points out that previous panels and the Appellate Body have found that referring to a "category of measure" is sufficiently specific to satisfy the requirements of Article 6.2 of the DSU.²⁷⁹ Japan agrees with the Panel's emphasis on the fact that the United States had anticipated the inclusion of Review 9 in its first written submission to the Panel²⁸⁰, and that, under the United States' retrospective anti-dumping system, periodic reviews are predictable.²⁸¹ Further, Japan notes that Review 9 had been initiated by the USDOC over nine months before Japan's panel request, and was due to be completed during the course of the Panel proceedings.²⁸² Japan also finds support in the panel's reasoning in *Australia – Salmon (Article 21.5 – Canada)* that the "ongoing" and "continuous" nature of compliance under the WTO dispute settlement system warrants the inclusion of measures that come into existence during Article 21.5 panel proceedings.²⁸³ Japan considers that the inclusion of Review 9 is consistent with the due process objectives of Article 6.2 of the DSU. Moreover, it disagrees that the inclusion of

²⁷⁴United States' appellant's submission, para. 47.

²⁷⁵United States' appellant's submission, paras. 56 and 57.

²⁷⁶United States' appellant's submission, para. 57 and footnote 81 thereto (referring to Panel Report, *India – Autos*, paras. 7.23-7.30; and Panel Report, *Indonesia – Autos*, para. 14.9).

²⁷⁷United States' appellant's submission, para. 57.

²⁷⁸Japan's appellee's submission, paras. 385-387.

²⁷⁹Japan's appellee's submission, paras. 389-393 (referring to Panel Report, *EC – Bananas III (US)*, para. 7.27; Appellate Body Report, *EC – Bananas III*, para. 140; and Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.10).

²⁸⁰Japan's appellee's submission, paras. 395 and 396 (referring to Panel Report, para. 7.105, in turn quoting United States' first written submission to the Panel, para. 50).

²⁸¹Japan's appellee's submission, paras. 396-400 (referring to Panel Report, paras. 7.102, 7.106, 7.111, and 7.116).

²⁸²Japan's appellee's submission, para. 398.

²⁸³Japan's appellee's submission, paras. 382 and 411-413 (quoting Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.10).

Review 9 would create "asymmetry" to the disadvantage of respondents, as argued by the United States.²⁸⁴

105. The third participants addressing this issue—the European Communities, Korea, Mexico, and Norway—support the Panel's inclusion of Review 9 in its terms of reference.²⁸⁵

C. *Analysis*

106. The United States' appeal focuses on two aspects of the Panel's analysis.²⁸⁶ First, the United States argues that the phrase "subsequent closely connected measures" in Japan's panel request does not meet the requirement of Article 6.2 of the DSU to "identify the specific measures at issue". Secondly, the United States submits that the Panel erred in finding that Review 9 was properly within the Panel's terms of reference because Review 9 had not been completed when Japan submitted its panel request to the DSB. The United States considers that Review 9 was a "future measure" that "cannot form part of a [p]anel's terms of reference".²⁸⁷ We recall that the notice of initiation of Review 9 was published on 29 June 2007. Japan requested that the matter be referred to a panel under Article 21.5 of the DSU on 7 April 2008, and the matter was referred to the Panel on 18 April 2008.²⁸⁸ The preliminary and final results of Review 9²⁸⁹ were published on 7 May and 11 September 2008, respectively, at which time the Panel proceedings were already underway.

1. Whether Japan's Panel Request Meets the Requirement of Article 6.2 of the DSU to "Identify the Specific Measures at Issue"

107. Article 6.2 of the DSU provides, in relevant part:

The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

²⁸⁴Japan's appellee's submission, paras. 444-452.

²⁸⁵European Communities' third participant's submission, paras. 10-17; Korea's third participant's submission, paras. 54-57; Mexico's third participant's submission, paras. 55-63; and Norway's third participant's submission, paras. 5-28.

²⁸⁶The United States included in its Notice of Appeal the paragraph in which the Panel found that Review 9 was a "measure taken to comply". (See WT/DS322/32, footnote 1 to para. 1 (referring to, *inter alia*, Panel Report, para. 7.114)) However, the United States did not make any arguments with respect to this finding in its appellant's submission. At the oral hearing, the United States confirmed that it does not appeal the Panel's finding that Review 9 is a "measure taken to comply" within the meaning of Article 21.5 of the DSU.

²⁸⁷United States' appellant's submission, para. 58.

²⁸⁸WT/DS322/27 and WT/DS322/28, respectively.

²⁸⁹See *supra*, footnotes 26 and 252.

Taken together, the identification of the specific measures at issue and the provision of a brief summary of the legal basis of the complaint comprise the "matter referred to the DSB", which forms the basis for a panel's terms of reference under Article 7.1 of the DSU.²⁹⁰

108. The Appellate Body has stated that, pursuant to Article 6.2, a panel request must be "sufficiently precise" for two reasons.²⁹¹ First, it forms the basis for the terms of reference of the panel, pursuant to Article 7 of the DSU²⁹²; and, secondly, the terms of reference, and the request for the establishment of a panel on which they are based, serve the due process objective of notifying respondents and potential third parties of the nature of the dispute and of the parameters of the case to which they must begin preparing a response.²⁹³ The Appellate Body has explained that, in assessing the sufficiency of the panel request, a panel must "examine the request for the establishment of the panel very carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU"²⁹⁴, and that compliance with the requirements of Article 6.2 must be "demonstrated on the face" of the panel request²⁹⁵, read "as a whole"²⁹⁶, and "on the basis of the language used".²⁹⁷

109. In order to evaluate whether Japan's panel request complies with the requirements of Article 6.2 of the DSU, we must also take into account that these are compliance proceedings brought pursuant to Article 21.5 of the DSU. Article 21.5 directs compliance panels to examine the "existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB. The Appellate Body has stated that, although Article 6.2 is generally applicable to panel requests under Article 21.5, "the requirements of Article 6.2, as they apply to an original

²⁹⁰See Appellate Body Report, *Guatemala – Cement I*, para. 72; Appellate Body Report, *US – Carbon Steel*, para. 125; and Appellate Body Report, *US – Continued Zeroing*, para. 160.

²⁹¹Appellate Body Report, *EC – Bananas III*, para. 142.

²⁹²See, for instance, Appellate Body Report, *EC – Bananas III*, para. 142.

²⁹³Appellate Body Report, *US – Continued Zeroing*, para. 161; Appellate Body Report, *US – Carbon Steel*, para. 126; Appellate Body Report, *EC – Bananas III*, para. 142.

²⁹⁴Appellate Body Report, *EC – Bananas III*, para. 142; Appellate Body Report, *US – Continued Zeroing*, para. 161.

²⁹⁵Appellate Body Report, *US – Carbon Steel*, para. 127. See also Appellate Body Report, *US – Continued Zeroing*, para. 161.

²⁹⁶Appellate Body Report, *US – Continued Zeroing*, para. 161; Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 169; Appellate Body Report, *US – Carbon Steel*, para. 127.

²⁹⁷Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 164. In addition, the Appellate Body has explained that the "specific measure" is "what is being challenged by the complaining Member", while the brief summary of the legal basis of the complaint "aims to explain succinctly how or why the measure at issue is considered by the complaining Member to be violating the WTO obligation in question." (Appellate Body Report, *EC – Selected Customs Matters*, para. 130 (emphasis omitted))

panel request, need to be adapted to a panel request under Article 21.5."²⁹⁸ In Article 21.5 proceedings, the "specific measures at issue" are measures "that have a bearing on compliance with the recommendations and rulings of the DSB."²⁹⁹ This indicates that the "requirements of Article 6.2 of the DSU, as they apply to an Article 21.5 panel request, must be assessed in the light of the recommendations and rulings of the DSB in the original ... proceedings that dealt with the same dispute."³⁰⁰ The complaining party must, *inter alia*:

... cite the recommendations and rulings that the DSB made in the original dispute as well as in any preceding Article 21.5 proceedings, which, according to the complaining party, have not yet been complied with ... either identify, with sufficient detail, the measures allegedly taken to comply with those recommendations and rulings, as well as any omissions or deficiencies therein, or state that *no* such measures have been taken by the implementing Member ... provide a legal basis for its complaint, by specifying how the measures taken, or not taken, fail to remove the WTO-inconsistencies found in the previous proceedings, or whether they have brought about new WTO-inconsistencies.³⁰¹ (original emphasis; footnote omitted)

110. With this guidance in mind, we examine whether Japan's panel request met the requirements of Article 6.2, read in the light of Article 21.5 of the DSU.

111. We begin with a textual analysis of Japan's panel request. The reference to "subsequent closely connected measures" is made in paragraph 12, which falls within sub-section B of Part III,

²⁹⁸The Appellate Body stated in *US – FSC (Article 21.5 – EC II)*:

The Appellate Body has, to date, not been called upon to determine the precise scope of the phrase "these dispute settlement procedures" in Article 21.5 and how it relates to Article 6.2 of the DSU. We do not consider it necessary, for purposes of resolving the present dispute, to determine the precise scope of this phrase. However, we are of the view that the phrase "these dispute settlement procedures" does encompass Article 6.2 of the DSU, and that Article 6.2 is generally applicable to panel requests under Article 21.5. At the same time, given that Article 21.5 deals with compliance proceedings, Article 6.2 needs to be interpreted in the light of Article 21.5. In other words, the requirements of Article 6.2, as they apply to an original panel request, need to be adapted to a panel request under Article 21.5.

(Appellate Body Report, *US – FSC (Article 21.5 – EC II)*, para. 59 (footnotes omitted))

²⁹⁹Appellate Body Report, *US – FSC (Article 21.5 – EC II)*, para. 61.

³⁰⁰Appellate Body Report, *US – FSC (Article 21.5 – EC II)*, para. 61.

³⁰¹Appellate Body Report, *US – FSC (Article 21.5 – EC II)*, para. 62 (referring to Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 67).

entitled "Periodic Reviews".³⁰² Paragraph 12 begins by stating that the request concerns five of the 11 periodic reviews that were challenged in the original proceedings (the "original reviews"), as well as three "closely connected periodic reviews" that the United States had argued "superseded" the original reviews. The original reviews (identified as Reviews 1, 2, 3, 7, and 8) and the "closely connected" periodic reviews (identified as Reviews 4, 5, and 6) are listed in Annex 1 of the panel request. Japan's request alleges that the United States used zeroing in each of these Reviews, and had omitted to eliminate zeroing with respect to any of them. The request further states that these eight periodic reviews stem from three anti-dumping duty orders on *Ball Bearings and Parts Thereof from Japan*, *Cylindrical Roller Bearings and Parts Thereof from Japan*, and *Spherical Plain Bearings and Parts Thereof from Japan*.³⁰³ Thereafter, the request refers to United States government instructions and notices, issued after the end of the reasonable period of time, to liquidate duties on the entries covered by these eight periodic reviews. Finally, in the last line of paragraph 12, Japan states that "the request concerns any amendments to the eight periodic reviews and the closely connected instructions and notices, as well as any *subsequent closely connected measures*."³⁰⁴

112. In our view, the plain meaning of the phrase "subsequent closely connected measures", as it appears in paragraph 12 of Japan's panel request, indicates that the measures being referred to would have to be enacted after (that is, "subsequent" to) the eight periodic reviews identified by Japan in its request and would have to relate (be "closely connected") to these eight reviews. As paragraph 12 falls within the sub-section entitled "Periodic Reviews", the necessary implication is that the phrase refers to periodic reviews that followed some or all of the eight periodic reviews listed in the panel request. These eight periodic reviews related to the three anti-dumping duty orders identified in Japan's request. However, given that the anti-dumping duty orders on cylindrical roller bearings and spherical plain bearings had been revoked by the USDOC at the time of Japan's panel request³⁰⁵, any subsequent periodic review could relate only to the anti-dumping duty order on ball bearings. We

³⁰²See *supra*, para. 97. Japan's request for the establishment of a panel has main parts: Part I covers the background to Japan's panel request, including the DSB's recommendations and rulings from the original proceedings; Part II deals with the alleged implementation action or inaction by the United States; Part III then outlines the measures at issue and claims made by Japan in these Article 21.5 proceedings; and Part IV sets out the conclusion.

³⁰³Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings, and Parts Thereof from Japan, *United States Federal Register*, Vol. 54, No. 92 (15 May 1989) 20904. The United States revoked the anti-dumping duty orders on cylindrical roller bearings and spherical plain bearings, effective 1 January 2000. (See United States' first written submission to the Panel, para. 66)

³⁰⁴Emphasis added.

³⁰⁵Japan's appellee's submission, para. 387 (referring to United States' first written submission to the Panel, para. 66, in turn referring to Revocation of Antidumping Duty Orders on Certain Bearings from Hungary, Japan, Romania, Sweden, France, Germany, Italy, and the United Kingdom, *United States Federal Register*, Vol. 65, No. 133 (11 July 2000) 42667 and 42668 (Panel Exhibit US-A19)).

therefore disagree with the United States that the phrase "subsequent closely connected measures" was too "broad" and "vague" for purposes of identifying the measure at issue under Article 6.2 of the DSU.³⁰⁶

113. We share the Panel's view that the use of the term "closely connected" earlier in paragraph 12 of the panel request provides additional support for finding that "subsequent closely connected measures" refers to periodic reviews of the anti-dumping duty order on ball bearings, which were conducted after the reviews listed in the panel request. The Panel looked at the language—"closely connected periodic reviews"—used to describe the periodic reviews (Reviews 4, 5, and 6) that had followed the reviews found to be WTO-inconsistent in the original proceedings (Reviews 1, 2, and 3) and noted the similarity in the reference to subsequent "closely connected" measures.³⁰⁷ The Panel also described the close connection among successive periodic reviews occurring under the same anti-dumping order in the United States' retrospective anti-dumping duty system.³⁰⁸ The Panel noted that, in this case, three of the periodic reviews challenged in the original proceedings (Reviews 1, 2, and 3), as well as the other three periodic reviews challenged in the compliance proceedings as "measures taken to comply" (Reviews 4, 5, and 6), were part of a continuum of periodic reviews "superseding" each other³⁰⁹, whose purpose was the ongoing assessment of anti-dumping duties owed under the same anti-dumping duty order on ball bearings issued in 1989.³¹⁰ Thus, the use of the term "closely connected" earlier in paragraph 12 of Japan's panel request provides contextual support for the conclusion that the term "subsequent closely connected measures" is referring to Review 9. Review 9, being the subsequent periodic review, occurring under the same anti-dumping duty order on ball bearings as Reviews 1 through 6, was "closely connected" to those listed in Japan's panel request.

114. The object of these Article 21.5 proceedings is to determine whether the United States has complied with the DSB's recommendations and rulings. The Appellate Body in the original proceedings found that the United States acts inconsistently with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 by maintaining zeroing procedures in

³⁰⁶United States' appellant's submission, para. 45. Although the United States argues that "subsequent closely connected measures" could encompass measures such as ministerial corrections or remand determinations in court proceedings, it acknowledges that "subsequent administrative determinations" could fall within the measures contemplated by the reference to "subsequent closely connected measures".

³⁰⁷Panel Report, para. 7.103.

³⁰⁸See Panel Report, para. 7.102.

³⁰⁹Panel Report, para. 7.116. The Panel described these consecutive reviews as forming a "chain of measures or a continuum ... in which each new review superseded the previous one".

³¹⁰Panel Report, para. 7.103. The 1989 anti-dumping duty order referred to by the Panel was the same order referred to above in *supra*, footnote 303.

periodic reviews.³¹¹ In addition to this "as such" finding, the Appellate Body found that the United States acted inconsistently with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 by applying zeroing procedures in the 11 periodic reviews at issue in that appeal.³¹² If zeroing were used in Review 9, it would mean that the United States has not ceased using zeroing procedures in periodic reviews, contrary to the DSB's recommendations and rulings. Thus, Review 9 is a measure that has "a bearing on compliance with the recommendations and rulings of the DSB" and this must be taken into account in assessing whether Japan's panel request meets the requirements of Article 6.2, read in the light of Article 21.5.³¹³

115. The United States argues that Article 6.2 requires that each periodic review should have been identified in Japan's panel request, since each is "separate and distinct" and serves as the basis for the calculation of the assessment rate for each importer of the specific entries covered by the review.³¹⁴ In making this argument, the United States relies on a statement of the Appellate Body in *US – Zeroing (EC) (Article 21.5 – EC)*, that successive periodic review determinations are "separate and distinct measures".³¹⁵

116. We do not believe that the Appellate Body's prior reference to subsequent periodic reviews as "separate and distinct" contradicts the notion that a periodic review can be identified for purposes of Article 6.2 of the DSU through the use of the phrase "subsequent closely connected measures". Although recognizing that each periodic review is a "separate and distinct" measure (in the sense that it is not an "amendment" of the previous periodic review³¹⁶), the Appellate Body in *US – Zeroing (EC) (Article 21.5 – EC)* nonetheless underscored the link between subsequent periodic reviews by stating that "subsequent reviews ... issued under the same respective anti-dumping duty order as the measures challenged in the original proceedings, ... constitute[] 'connected stages ... involving the imposition, assessment and collection of duties under the same anti-dumping order'."³¹⁷ The periodic reviews, moreover, involved the same products, from the same countries, and formed part of a

³¹¹ Appellate Body Report, *US – Zeroing (Japan)*, para. 190(c).

³¹² Appellate Body Report, *US – Zeroing (Japan)*, para. 190(e).

³¹³ Appellate Body Report, *US – FSC (Article 21.5 – EC II)*, para. 61. See also *supra*, para. 109.

³¹⁴ United States' appellant's submission, para. 44. For the United States, each successive review is distinct from the one before it, in that exporters may vary between reviews; each review involves different shipments and different data from different time periods; and the anti-dumping duty rate may change, and in some cases may fall to a *de minimis* level. (*Ibid.*, para. 53)

³¹⁵ United States' appellant's submission, footnote 54 to para. 44 (referring to Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, paras. 192 and 193).

³¹⁶ Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 192.

³¹⁷ Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 230 (quoting Appellate Body Report, *US – Continued Zeroing*, para. 181).

continuum of events.³¹⁸ It is precisely because it has similar connections that Review 9 can be properly described as a "subsequent closely connected measure". Further, the text of Article 6.2 of the DSU does not require that a measure be referred to individually in order to be properly identified for purposes of that Article. The Appellate Body has stated that the measures at issue must be identified with sufficient precision in order that the matter referred to a panel may be discerned from the panel request.³¹⁹ Whereas a more precise way to identify a measure would be to indicate its name and title in the panel request³²⁰, there may be circumstances in which a party describes a measure in a more generic way, which nonetheless allows the measure to be discerned. In this case, the phrase "subsequent closely connected measures" is sufficiently precise to identify Review 9, given that it is a periodic review of the same anti-dumping duty order on imports of ball bearings from Japan and immediately followed Reviews 1 through 6.

117. We consider that our previous analysis is sufficient to establish that Japan's panel request met the requirement of Article 6.2 to "identify the specific measures at issue". The United States, however, disagrees with the Panel that a "relevant consideration"³²¹ for determining whether the specific measures at issue are properly identified under Article 6.2 is whether the panel request adequately puts the responding party on notice regarding the case against it.³²² The United States submits that the Panel elevated "due process objectives" over the text of Article 6.2 by considering whether Japan's challenge to "subsequent closely connected measures" would "violate any due process objective of the DSU".³²³

118. As we observed earlier, one of the purposes of a panel's terms of reference is to fulfil the due process objective of notifying respondents and potential third parties of the nature of the dispute and of the parameters of the case to which they must begin preparing a response.³²⁴ We see no error in the Panel having examined whether Japan's panel request adequately put the United States "on notice" regarding the case against it.³²⁵ Nor do we find error in the Panel's finding that the United States was reasonably put on notice by Japan's panel request. The Panel noted that the United States had

³¹⁸ Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 240.

³¹⁹ Appellate Body Report, *US – Continued Zeroing*, para. 168.

³²⁰ For example, Japan could have referred to the notice of initiation of Review 9 in its panel request.

³²¹ Panel Report, paras. 7.104 and 7.105 (referring to Appellate Body Report, *Brazil – Desiccated Coconut*, p. 22, DSR 1997:I, 167, at 186).

³²² United States' appellant's submission, para. 55.

³²³ Panel Report, para. 7.105. In response to questioning at the oral hearing as to whether or not it had been prejudiced by the alleged lack of specificity in Japan's panel request, the United States responded that it was not required to make any showing of prejudice in this case in addition to proving that Japan's panel request did not meet the specificity requirement in Article 6.2 of the DSU.

³²⁴ See *supra*, para. 108.

³²⁵ Panel Report, para. 7.105.

anticipated in its first written submission "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".³²⁶ Thus, the Panel found that "it is clear from the United States' First Written Submission that the United States realized Japan was identifying" such future periodic reviews.³²⁷ The Panel also referred to the fact that Review 9 had been initiated at the time of the panel request, and was due to be completed during the Panel proceedings by virtue of the operation of the United States' anti-dumping regime.³²⁸ We consider that the Panel did not err in its analysis of the matter and in considering the due process objectives as relevant for purposes of deciding whether Review 9 was within its terms of reference.

119. Further, we do not believe that the inclusion of Review 9 in the Panel's terms of reference adversely affected the United States' due process rights. In addition to the factors taken into account by the Panel, which are noted above, we observe that, once the final results of Review 9 were published, and Japan had filed its supplemental submission, the United States was given an opportunity to respond in writing to the arguments raised in that submission. Moreover, Japan's arguments concerning Review 9 were similar to those raised with regard to Reviews 4, 5, and 6, in that they also challenged the use of zeroing in a "chain of assessment incorporating those measures".³²⁹ The United States had further opportunities to make arguments at the Panel meeting with the parties and in response to the Panel's questions. In our view, the above suggests that the United States had ample opportunities, during the course of the Panel proceedings and prior to the Panel's deliberations, to make arguments, answer questions, and respond to Japan's submission with respect to Review 9.³³⁰ Potential third parties were sufficiently put on notice by Japan's panel request, given the inclusion of the reference to "subsequent closely connected measures", the connections between Review 9 and Reviews 1 through 6, and the fact that Japan was challenging the use of the same zeroing methodology. The third parties also had opportunity to present arguments and respond to the claims made by Japan with respect to Review 9.³³¹ Based on the above, we agree with the

³²⁶Panel Report, para. 7.105 (quoting United States' first written submission to the Panel, para. 50).

³²⁷Panel Report, para. 7.106.

³²⁸See Panel Report, paras. 7.110 and 7.111.

³²⁹Panel Report, para. 7.114.

³³⁰See Japan's appellee's submission, paras. 428-439.

³³¹As a third party in the Panel proceedings, Norway submits that the third parties were given sufficient notice of Review 9, and were provided with ample opportunity to respond to claims with respect to Review 9. (Norway's third participant's submission, paras. 26-28. See also Japan's appellee's submission, para. 441 (referring to European Communities' oral statement at the meeting with the Panel, paras. 47 and 48); European Communities' third party submission to the Panel, para. 27; oral statement of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu at the meeting with the Panel, paras. 7, and 12-15; and Mexico's oral statement at the Panel meeting, para. 12)

Panel's conclusion that "a finding that the phrase 'subsequent closely connected measures' satisfies the terms of Article 6.2 would not violate any due process objective of the DSU".³³²

2. Whether Review 9 Was Properly Included in the Panel's Terms of Reference Even Though It Had Not Been Completed at the Time of Japan's Panel Request

120. The second error alleged by the United States is that Review 9 was a "future measure" that had not yet come into existence at the time of Japan's panel request, and therefore could not have been included within the Panel's terms of reference.³³³ The United States submits that the DSU does not allow for the inclusion of such "future measures" within a panel's terms of reference.³³⁴

121. We recall that Article 6.2 of the DSU provides that the request for the establishment of a panel "shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." Apart from the reference in the present tense to the fact that the complainant must identify the measures "at issue", Article 6.2 does not set out an express temporal condition or limitation on the measures that can be identified in a panel request. Indeed, in *US – Upland Cotton*, where the issue was raised in the context of measures that had expired prior to the panel proceedings, the Appellate Body explained that "nothing inherent in the term 'at issue' sheds light on whether measures at issue must be currently in force, or whether they may be measures whose legislative basis has expired".³³⁵ In *EC – Chicken Cuts*, the Appellate Body stated that "[t]he term 'specific measures at issue' in Article 6.2 suggests that, as a general rule, the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel."³³⁶ Nevertheless, the Appellate Body also stated in that case that "measures enacted subsequent to the establishment of the panel may, in certain limited circumstances, fall within a panel's terms of reference".³³⁷

³³²Panel Report, para. 7.105.

³³³United States' appellant's submission, paras. 43, 47, and 58.

³³⁴United States' appellant's submission, paras. 44 and 47.

³³⁵Appellate Body Report, *US – Upland Cotton*, para. 269.

³³⁶Appellate Body Report, *EC – Chicken Cuts*, para. 156. The Appellate Body explained that:

These measures should also have been the subject of consultations prior to the establishment of the panel, although the Appellate Body has held that there is no need for a "*precise and exact identity*" between the measures addressed in consultations and the measures identified in the panel request.

(*Ibid.*, footnote 315 to para. 156 (referring to Appellate Body Report, *Brazil – Aircraft*, para. 132) (original emphasis))

³³⁷Appellate Body Report, *EC – Chicken Cuts*, para. 156.

122. We observed earlier that the requirements of Article 6.2 must be read in the light of the specific function of Article 21.5 proceedings and that the "specific measures at issue" to be identified in these proceedings are measures that have a bearing on compliance with the recommendations and rulings of the DSB.³³⁸ A measure that is initiated before there has been recourse to an Article 21.5 panel, and which is completed during those Article 21.5 panel proceedings, may have a bearing on whether there is compliance with the DSB's recommendations and rulings. Thus, if such a measure incorporates the same conduct that was found to be WTO-inconsistent in the original proceedings, it would show non-compliance with the DSB's recommendations and rulings. To exclude such a measure from an Article 21.5 panel's terms of reference because the measure was not completed at the time of the panel request but, rather, was completed during the Article 21.5 proceedings, would mean that the disagreement "as to the existence or consistency with a covered agreement of measures taken to comply" would not be fully resolved by that Article 21.5 panel. New Article 21.5 proceedings would therefore be required to resolve the disagreement and establish whether there is compliance. Thus, an *a priori* exclusion of measures completed during Article 21.5 proceedings could frustrate the function of compliance proceedings. It would also be inconsistent with the objectives of the DSU to provide for the "prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired", as reflected in Article 3.3, and to "secure a positive solution to a dispute", as contemplated in Article 3.7.

123. We recall that the Panel described the connection between Review 9 and the previous periodic reviews as follows:

Review 9 is identical in nature and effect to Reviews 4, 5 and 6. Review 9 supersedes those measures, and is therefore the latest link in the chain of assessment incorporating those measures. Review 9 also continues to apply the zeroing methodology found to be WTO-inconsistent in the original proceeding. Like Reviews 4, 5 and 6, therefore, Review 9 is sufficiently closely connected to the original dispute to constitute a "measure taken to comply" within the meaning of Article 21.5.³³⁹ (footnote omitted)

124. While the United States questions the relevance of these considerations for purposes of determining whether Review 9 properly fell within the Panel's terms of reference, it has not challenged the Panel's finding that Review 9 is a "measure taken to comply". We disagree with the United States that the elements identified by the Panel are not relevant to the determination of whether Review 9 could properly be included in the Panel's terms of reference. As we noted above, Review 9

³³⁸See *supra*, para. 109.

³³⁹Panel Report, para. 7.114.

related to the same anti-dumping duty order as Reviews 1, 2, and 3, which were found to be inconsistent in the original proceedings, and to the three subsequent reviews (Reviews 4, 5, and 6) being challenged by Japan as "measures taken to comply". Japan's panel request expressly referred to "subsequent closely connected measures". Review 9 had been initiated at the time the matter was referred to the Panel and was due to be completed during the Article 21.5 proceedings. Under these circumstances, we consider that the Panel was correct in finding that Review 9 was within its terms of reference, as doing so enabled it to fulfil its mandate to resolve the "disagreement" between the parties and determine, in a prompt manner, whether the United States had achieved compliance with the DSB's recommendations and rulings.

125. As a further argument to support its view that Review 9 could not fall within the Panel's terms of reference, the United States relies on the Appellate Body's statement in *EC – Chicken Cuts* that "[t]he term 'specific measures at issue' in Article 6.2 suggests that, as a general rule, the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel", and that only in "certain limited circumstances" will measures enacted subsequent to a panel's establishment fall within the Panel's terms of reference.³⁴⁰ According to the United States, the circumstances of this case, including the fact that it is a compliance proceeding, do not justify the inclusion of Review 9 in the Panel's terms of reference. As the United States itself recognizes, however, in *EC – Chicken Cuts*, the Appellate Body did not rule that Article 6.2 categorically prohibits the inclusion, within a panel's terms of reference, of measures that come into existence or are completed after the panel is requested. Rather, the Appellate Body noted explicitly that, in certain circumstances, such measures could be included in a panel's terms of reference. Moreover, whereas the statement in *EC – Chicken Cuts* to which the United States refers was made in the context of original WTO proceedings, we are dealing here with Article 21.5 proceedings. As we explained earlier³⁴¹, the requirements of Article 6.2 must be adapted to a panel request under Article 21.5, and the scope and function of Article 21.5 proceedings necessarily inform the interpretation of the Article 6.2 requirements in such proceedings. The proceedings before us present circumstances in which the inclusion of Review 9 was necessary for the Panel to assess whether compliance had been achieved, and thereby resolve the "disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings".

³⁴⁰United States' appellant's submission, para. 51 (quoting Appellate Body Report, *EC – Chicken Cuts*, para. 156).

³⁴¹See *supra*, paras. 109 and 122.

126. In addition, the United States argues that Review 9 could not have been impairing any benefits accruing to Japan, within the meaning of Article 3.3 of the DSU. The United States relies on a statement by the panel in *US – Upland Cotton* that a measure implemented under legislation that, at the time of the panel request, "did not exist, had never existed and might not subsequently have ever come into existence" was not within the panel's terms of reference because such legislation could not have been impairing any benefits accruing to the complainant, in the sense of Article 3.3 of the DSU.³⁴²

127. First, we note that the specific finding of the panel in *US – Upland Cotton*, on which the United States relies, was not appealed. Secondly, the Panel in these compliance proceedings found that the situation before it differed from the one presented to the panel in *US – Upland Cotton*. We agree that the circumstances of these compliance proceedings are different from those before the panel in *US – Upland Cotton*. In this case, Review 9 had already been initiated at the time of the panel request, was due to be completed during the Panel proceedings, and was the most recent periodic review stemming from the same anti-dumping duty order on imports of ball bearings from Japan. Thirdly, we recall that the Appellate Body in *US – Upland Cotton* stated that, as regards the initiation of dispute settlement proceedings, Article 3.3 focuses "on the perception or understanding of an aggrieved Member".³⁴³ In the circumstances of this case, Japan had a basis to consider that Review 9, as part of a "chain of measures or a continuum"³⁴⁴ in which zeroing was used, could lead to the impairment of benefits accruing to it under the *Anti-Dumping Agreement* and the GATT 1994. Moreover, as we explained above, the inclusion of Review 9 was consistent with the objective envisaged in Article 3.3, namely, ensuring the prompt settlement of the dispute.³⁴⁵ It was then for the Panel to determine whether Review 9 fell within the scope of its jurisdiction and assess its consistency with the covered agreements.

128. The United States refers to "systemic" considerations that it believes would arise if one were to read the DSU as permitting compliance panels to examine new measures or modifications made

³⁴²United States' appellant's submission, para. 49 (referring to Panel Report, para. 7.115, in turn quoting Panel Report, *US – Upland Cotton*, para. 7.158). Article 3.3 of the DSU reads:

The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.

³⁴³Appellate Body Report, *US – Upland Cotton*, para. 264.

³⁴⁴Panel Report, para. 7.116.

³⁴⁵For the same reasons, we disagree with the United States that the challenge to Review 9 prior to the issuance of a final determination was "premature". (United States appellant's submission, para. 46 and footnote 58 thereto)

during the course of proceedings.³⁴⁶ While we recognize that, in certain circumstances, these concerns may be relevant, we do not consider this to be the case here since, as we have found above, the United States and the third parties were given adequate notice and opportunities to respond to Japan's allegations concerning Review 9.³⁴⁷

129. The United States raises an additional argument that accepting the Panel's approach could lead to "asymmetry" in the sense that, on the one hand, complaining parties would be allowed to challenge measures that are subsequent to the panel request, while, on the other hand, similar requests by respondents for the inclusion of measures coming into existence during panel proceedings have been rejected by panels.³⁴⁸ We do not detect such asymmetrical treatment of complainants and respondents. In some cases, modifications of measures during the panel proceedings have been taken into account to the benefit of respondents. In *US – Zeroing (EC) (Article 21.5 – EC)*, developments subsequent to the establishment of the panel were considered by the Appellate Body and, in the light of those developments, the Appellate Body found that the United States had "ultimately" not failed to comply with the DSB's recommendations and rulings in relation to certain sunset reviews.³⁴⁹ Therefore, we do not agree that the alleged "asymmetry" in the treatment of complaining and respondent parties arises in the manner suggested by the United States.³⁵⁰

130. For these reasons, we agree with the Panel that Japan's panel request met the requirement of Article 6.2 of the DSU to "identify the specific measures at issue" as regards Review 9. Further, we agree that, in the particular circumstances of these compliance proceedings, it was proper to include Review 9 within the Panel's terms of reference, even though Review 9 had not been completed when

³⁴⁶United States' appellant's submission, para. 56. In support of its arguments, the United States refers to the fact that Members would be obliged to make legal claims and undertake an analysis of new or modified measures on short notice, without a meaningful opportunity to review these measures; and, further, that compliance panels would have to react to such changes even after some or all of the written submissions had been filed and the meetings with the parties had been completed. The United States expresses concern that, in such circumstances, panels would be placed in a position of having to decide whether to restart the proceedings, or be required to make findings without the full benefit of the views of the parties and third parties. (United States' appellant's submission, para. 57)

³⁴⁷See *supra*, para. 119.

³⁴⁸See United States' appellant's submission, para. 57 (referring to Panel Report, *India – Autos*, paras. 7.23-7.30; and Panel Report, *Indonesia – Autos*, para. 14.9).

³⁴⁹See Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, paras. 376-381. In that appeal, the Appellate Body relied on negative likelihood-of-injury determinations made by the United States International Trade Commission and the consequent revocation of the anti-dumping duty order after the establishment of the panel in declining to find that the United States had "ultimately" failed to comply with the recommendations and rulings of the DSB in respect of certain sunset reviews, even though, at the time of the panel establishment, there had been affirmative final likelihood-of-dumping determinations by the USDOC.

³⁵⁰Moreover, we note that the prior panel reports to which the United States refers do not concern Article 21.5 proceedings.

Japan requested the establishment of a panel. Accordingly, we uphold the Panel's finding that Review 9 was properly within its terms of reference.³⁵¹

V. Collection of Duties After the Expiration of the Reasonable Period of Time – Reviews 1 through 9

A. Introduction

131. We turn next to the United States' appeal of the Panel's finding that the United States has failed to comply with the DSB's recommendations and rulings regarding the importer-specific assessment rates determined in Reviews 1, 2, 3, 7, and 8 that apply to entries covered by those Reviews that were, or will be, liquidated after the expiry of the reasonable period of time. We also examine the United States' appeal of the Panel's finding that the United States has acted inconsistently with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 by applying zeroing in the context of Reviews 4, 5, 6, and 9.

132. Reviews 1 through 6 and 9 are periodic reviews of an anti-dumping duty order on imports of ball bearings from Japan.³⁵² Review 7 is a periodic review of an anti-dumping duty order on imports of cylindrical roller bearings from Japan.³⁵³ Review 8 is a periodic review of an anti-dumping duty order on imports of spherical plain bearings from Japan.³⁵⁴ Reviews 1, 2, 3, 7, and 8 were challenged by Japan in the original proceedings. The Appellate Body found in those proceedings that, by applying zeroing procedures in these five Reviews (along with six others), the United States acted inconsistently with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement*, and with Article VI:2 of the GATT 1994.³⁵⁵ In these Article 21.5 proceedings, Japan has claimed that the United States has failed

³⁵¹Panel Report, paras. 7.107, 7.114, and 7.116.

³⁵²See *supra*, footnotes 24 and 26. See also Panel Report, footnote 13 to para. 3.1(b)(i), and footnote 14 to para. 3.1(b)(ii).

The Panel noted that Japan's claims also referred to certain amendments to Reviews 1, 2, and 3 and that these amendments were covered by Japan's request for panel establishment. Before the Panel, the United States asserted that these amendments were not relevant to the Article 21.5 proceedings, because "they were the result of [United States] court orders unrelated to the DSB's recommendations and rulings in this dispute and did not alter the zeroing procedures employed in Reviews 1, 2 and 3." However, the Panel observed that the importer-specific assessment rates resulting from Reviews 1, 2, and 3 were recalculated following the amendments challenged by Japan. The Panel therefore included these recalculated importer-specific assessment rates in the scope of its findings, since the recalculated importer-specific assessment rates replace those initially determined by the USDOC. As the Panel explained, "it is the recalculated importer-specific assessment rates that should have been brought into conformity". (Panel Report, footnote 148 to para. 7.139) The Panel further noted that the United States had not formally challenged the inclusion of the amendments. The Panel's inclusion of the amendments has not been challenged by the United States in this appeal.

³⁵³See *supra*, footnote 24. See also Panel Report, footnote 13 to para. 3.1(b)(i).

³⁵⁴See *supra*, footnote 24. See also Panel Report, footnote 13 to para. 3.1(b)(i).

³⁵⁵Appellate Body Report, *US – Zeroing (Japan)*, para. 190(e).

to comply with the DSB's recommendations and rulings in respect of Reviews 1, 2, 3, 7, and 8. Japan has also challenged Reviews 4, 5, 6, and 9, asserting that they are "measures taken to comply" within the meaning of Article 21.5 of the DSU.³⁵⁶

133. The final results of Reviews 1 through 9 were challenged by private parties before the United States domestic courts. Injunctions enjoining liquidation of the anti-dumping duties in connection with all nine periodic reviews were issued by the United States Court of International Trade.³⁵⁷ As a result, the collection of anti-dumping duties was suspended. In some cases, domestic litigation has ended and the injunctions have been lifted.³⁵⁸ In other cases, domestic litigation remains pending and the injunctions remain in force.³⁵⁹

134. Section B provides a brief summary of the Panel's analysis of these issues. The arguments raised on appeal by the participants and third participants are set out in Section C. Our analysis of the United States' appeal is in Section D.

B. *Article 21.5 Proceedings*

1. Reviews 1, 2, 3, 7, and 8

135. Before the Panel, Japan asserted that the United States should have taken steps before the end of the reasonable period of time to bring into conformity the importer-specific assessment rates determined in Reviews 1, 2, 3, 7, and 8, but that the United States has failed to do so.³⁶⁰ Japan claimed that the United States' failure to act is in violation of Articles 17.14, 21.1, and 21.3 of the DSU, and in continued violation of Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.³⁶¹ For its part, the United States argued that it did not have any implementation obligations in respect of those importer-specific assessment rates, because they concerned merchandise that had entered the United States before the expiration of the reasonable period of time.³⁶²

³⁵⁶See *supra*, footnote 26. See also Panel Report, para. 3.1(b)(ii).

³⁵⁷This process is described *infra*, at para. 171.

³⁵⁸Domestic litigation has ended in respect of Reviews 1-3, 7, and 8. (See Annexes 1-3, 7, and 8 to Japan's responses to the Panel's questions. At the oral hearing, the United States conceded that these Annexes correctly reflected the chronology of the domestic proceedings.)

³⁵⁹Domestic litigation is pending in respect of Reviews 4-6 and 9. (See Annexes 4-6 and 9 to Japan's responses to the Panel's questions. At the oral hearing, the United States conceded that these Annexes correctly reflected the chronology of the domestic proceedings.)

³⁶⁰Panel Report, para. 7.117.

³⁶¹Panel Report, para. 7.117.

³⁶²Panel Report, para. 7.118.

136. The Panel first examined the United States' argument that Japan was seeking a "retrospective" remedy, while the DSU provides for prospective relief only.³⁶³ The Panel observed that "neither the DSU nor the [*Anti-Dumping*] *Agreement* uses the terms 'prospective' or 'retrospective' to describe Members' implementation obligations" and thus did not consider it "appropriate" to resolve the issue on that basis.³⁶⁴ The Panel then turned to the DSU and, in particular, to Articles 3.7, 19.1, and 21.3, which the Panel interpreted as requiring the United States "to bring Reviews 1, 2, 3, 7 and 8 'into conformity'", by the end of the reasonable period of time, by withdrawing, modifying or replacing them, "if they had not already expired".³⁶⁵

137. Next, the Panel reviewed the United States' argument that it had met its compliance obligations by eliminating the cash deposit rates established by the periodic reviews that were found to be WTO-inconsistent in the original proceedings and that there was nothing else that it needed to do to come into compliance.³⁶⁶ The Panel rejected this argument, noting that the United States had not explained how it had complied with the DSB's recommendations and rulings regarding the relevant importer-specific assessment rates. The Panel observed, in this regard, that the United States considered that "it was not required to implement in respect of the importer-specific assessment rates because they relate to import entries occurring before the expiry of the RPT."³⁶⁷ This argument was also rejected by the Panel, which reasoned:

Thus, although the United States may be correct in asserting that "whenever the [*Anti-Dumping*] *Agreement* specifies an applicable date for an action, the scope of applicability is based on entries occurring on or after that date", the point is that the [*Anti-Dumping*] *Agreement* does not specify any applicable date for implementation action. Accordingly, the [*Anti-Dumping*] *Agreement* does not require that the "scope of applicability" of implementation action be based on the date of import entry.³⁶⁸

138. Instead, the Panel determined the "scope of applicability" of the United States' implementation obligations by reference to Articles 3.7, 19.1, and 21.3 of the DSU.³⁶⁹ The Panel observed that "[t]here is no reference in those provisions to the date of import entry", instead finding

³⁶³Panel Report, para. 7.140 (referring to United States' first written submission to the Panel, para. 54).

³⁶⁴Panel Report, para. 7.140. The Panel did not consider it necessary to rely on Articles 13-15 of the ILC Draft Articles, which Japan had raised in its submission. (*Ibid.*, footnote 152 to para. 7.140 (referring to Japan's second written submission to the Panel, para. 149))

³⁶⁵Panel Report, para. 7.144.

³⁶⁶Panel Report, para. 7.145 (referring to United States' first written submission to the Panel, para. 54).

³⁶⁷Panel Report, para. 7.146.

³⁶⁸Panel Report, para. 7.147 (quoting United States' first written submission to the Panel, para. 64).

³⁶⁹Panel Report, para. 7.147 (quoting United States' first written submission to the Panel, para. 64).

that these provisions, taken collectively, prescribe that the relevant date for implementation is the date of expiry of the reasonable period of time.³⁷⁰ Thus, the Panel stated:

If a measure found to be WTO-inconsistent is to be applied after the expiry of the RPT, that measure must have been brought "into conformity", irrespective of the date of entry of the imports covered by that measure.³⁷¹

139. After articulating this general standard, the Panel proceeded to apply it to the specific measures before it. The Panel held that the United States was obliged to have brought the "importer-specific assessment rates determined in Reviews 1, 2, 3, 7 and 8 (and subsequent amendments thereto) 'into conformity' with the covered agreements by 24 December 2007 [that is, by the end of the reasonable period of time]".³⁷² The Panel observed that this had not occurred because the importer-specific assessment rates had not been withdrawn and continued to have legal effect after the expiration of the reasonable period of time "in the sense that they continued to provide authority for the collection of anti-dumping duties in respect of the relevant (unliquidated) import entries".³⁷³ The Panel further noted that "the status of those [importer-specific assessment rates] has not changed since the original proceeding, in which they were found to be WTO-inconsistent."³⁷⁴

140. The Panel then reviewed the United States' argument that this approach creates inequality between retrospective and prospective anti-dumping systems.³⁷⁵ The United States asserted that, under a prospective system, implementation obligations can never affect the liquidation of anti-dumping duties because liquidation occurs at the time of entry. Thus, it is impossible that such entries could remain unliquidated at the expiry of the reasonable period of time, which would be the time by

³⁷⁰Panel Report, para. 7.148.

³⁷¹Panel Report, para. 7.148.

³⁷²Panel Report, para. 7.149. (footnote omitted)

³⁷³Panel Report, para. 7.149. In support of this proposition, the Panel stated:

We are guided in this regard by the Panel Report, *EC – Commercial Vessels*, in which the panel required the European Communities to take action to implement the recommendations and rulings of the DSB with respect to WTO-inconsistent measures "to the extent that [they] continue to be operational".

(*Ibid.*, footnote 163 to para. 7.149 (referring to Panel Report, *EC – Commercial Vessels*, para. 8.4))

³⁷⁴Panel Report, para. 7.149.

³⁷⁵In response, Japan argued that the implementation obligations under both prospective and retrospective assessment systems are the same. This is because:

... under a prospective assessment system, a periodic review found to be WTO-inconsistent could produce legal effects after the end of the RPT ... such review would have to be brought into conformity at the end of the RPT, even though the relevant (unliquidated) entries occurred before that date.

(Panel Report, para. 7.151)

when a Member would need to implement the DSB's recommendations and rulings. The United States argued that this is saliently different from retrospective systems where liquidation of anti-dumping duties can occur after the expiry of the reasonable period of time. This makes it possible for implementation obligations to affect the liquidation of such duties. According to the United States, such unequal treatment of retrospective anti-dumping systems, as compared to the treatment of prospective anti-dumping systems, is contrary to the Appellate Body's view that "[t]he *Anti-Dumping Agreement* is neutral as between different systems for levy and collection of anti-dumping duties."³⁷⁶ The United States insisted that the correct parameter by which a Member's compliance obligations should be defined is the date of entry, which would avoid any inequality between anti-dumping systems.

141. The Panel found it unnecessary to examine the United States' argument because:

... we do not consider that our task is to ensure that the implementation obligations under prospective and retrospective assessment systems are identical. The fact is that the two systems are different, and it is presumably such differences that lead Members to choose one system over the other ... Having chosen one system over the other, Members must respect the consequences of that choice.³⁷⁷

142. The Panel gave three reasons as to why this approach was not, contrary to the allegations of the United States, at odds with the Appellate Body's view that "[t]he *Anti-Dumping Agreement* is neutral as between different systems for levy and collection of anti-dumping duties"³⁷⁸:

First, we note that the Appellate Body's statement confirms the fact that prospective and retrospective assessment systems are indeed "different". Second, the Appellate Body's statement concerns the [*Anti-Dumping*] *Agreement*, not the DSU. Third, the fact that the underlying differences between the prospective and retrospective assessment systems may have practical consequences for how Members come into compliance with the recommendation and rulings of the DSB does not mean that the DSU favours one system over the other; it is simply a reflection of those underlying differences.³⁷⁹

143. Finally, the Panel addressed the United States' argument that the Panel should "not allow factors 'not provided for by the terms of' the covered agreements, such as the rights of private parties

³⁷⁶Panel Report, para. 7.152 (quoting Appellate Body Report, *US – Zeroing (Japan)*, para. 163).

³⁷⁷Panel Report, para. 7.152.

³⁷⁸Panel Report, para. 7.152 (quoting Appellate Body Report, *US – Zeroing (Japan)*, para. 163).

³⁷⁹Panel Report, para. 7.152.

in domestic litigation, 'to add to or diminish the rights and obligations of Members'".³⁸⁰ The United States asserted that the sole reason that liquidation had not occurred before the end of the reasonable period of time was because of domestic litigation. The Panel rejected this argument and found that the reasons why a Member finds itself in continuing violation of its WTO obligations are not a relevant consideration under Articles 3.7, 19.1, and 21.3 of the DSU.³⁸¹ Rather, according to the Panel, those "provisions require universal compliance by the end of the RPT, no matter the factual circumstances of any given case."³⁸²

144. The Panel concluded that the United States has failed to comply with the recommendations and rulings of the DSB regarding the importer-specific assessment rates determined in Reviews 1, 2, 3, 7, and 8 that apply to entries covered by those Reviews that were, or will be, liquidated after the expiry of the reasonable period of time and, consequently, remains in violation of Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.³⁸³

2. Reviews 4, 5, 6, and 9

145. In the course of the Panel proceedings, the United States requested a preliminary ruling that Reviews 4, 5, and 6 were not properly within the scope of the Article 21.5 proceedings.³⁸⁴ The Panel rejected the United States' request and found that Reviews 4, 5, and 6 were sufficiently closely connected to the original dispute, such that they should be treated as measures "taken to comply" with the recommendations and rulings of the DSB.³⁸⁵ As noted earlier³⁸⁶, the Panel also rejected the United States' assertion that Review 9 was not properly within the Panel's terms of reference. The Panel then proceeded to examine Japan's claim that Reviews 4, 5, 6, and 9 are inconsistent with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, because the United States applied zeroing in each Review when calculating margins of dumping to determine cash deposit rates and importer-specific assessment rates.³⁸⁷

146. The Panel considered the evidence submitted by Japan in support of its claim, beginning with the "standard zeroing line", a line of computer code, which Japan claimed was applied in Reviews 4,

³⁸⁰Panel Report, footnote 167 to para. 7.153 (referring to United States' second written submission to the Panel, para. 56).

³⁸¹Panel Report, para. 7.153.

³⁸²Panel Report, para. 7.153.

³⁸³Panel Report, para. 7.154. The Panel did not consider it necessary to examine Japan's claims under Articles 17.14, 21.1, and 21.3 of the DSU. (*Ibid.*, para. 7.155)

³⁸⁴Panel Report, para. 7.12.

³⁸⁵Panel Report, para. 7.82.

³⁸⁶See *supra*, Section IV.

³⁸⁷Panel Report, paras. 7.156 and 7.157.

5, 6, and 9.³⁸⁸ The Panel also considered the USDOC Issues and Decision Memoranda for Reviews 4, 5, 6, and 9.³⁸⁹ On the basis of this evidence, the Panel found that Japan had established a *prima facie* case that the United States applied zeroing in Reviews 4, 5, 6, and 9.³⁹⁰ It further noted that the United States did not deny that it applied zeroing in those determinations.³⁹¹ The Panel disagreed with the United States that there was a need to provide evidence demonstrating that individual importer-specific assessment rates were affected by zeroing. The Panel noted that the Appellate Body's findings in the original proceedings were not based on evidence that particular importers had sales with negative margins or that individual importer-specific assessment rates were affected by the application of zeroing procedures.³⁹² The Panel, in any event, referred to evidence proffered by Japan establishing the quantitative impact of zeroing on the duty collection rates established in the Reviews, including calculations made by Japan of what the exporter-specific margins of dumping and importer-specific assessment rates in Reviews 4, 5, 6, and 9 would have been if the "standard zeroing line" of computer code had been switched off. The Panel rejected the United States' position that it was improper for Japan to rely on USDOC programs that had been revised by Japan so as to show the impact of zeroing on the relevant margins and assessment rates.³⁹³ Further, the Panel noted that, although the United States did not concede that the results obtained by Japan would be the results obtained by the USDOC if it had not employed zeroing, the absence of such concession was not equivalent to a rebuttal of Japan's evidence, or a demonstration that the results of Japan's calculations were somehow erroneous.³⁹⁴

147. On this basis, the Panel rejected the United States' arguments against the evidence submitted by Japan to show that the relevant margins of dumping and assessment rates reflected zeroing. It found that the United States had failed to rebut Japan's *prima facie* case and, as a consequence, found that the exporter-specific margins of dumping and importer-specific assessment rates in Reviews 4, 5, 6, and 9 were affected (in the sense of being inflated) by zeroing.³⁹⁵ In concluding that the application

³⁸⁸The Panel noted that this evidence had taken the form of computer program excerpts submitted as Panel Exhibits JPN-91.1.A, JPN-91.1.B, JPN-91.1.C, JPN-91.1.D, JPN-91.2.A, JPN-91.2.B, JPN-91.2.C, JPN-91.2.D, JPN-91.3.A, JPN-91.3.B, JPN-91.3.C, JPN-91.3.D, JPN-91.3.E, JPN-91.4.A, and JPN-91.4.B. The Panel also noted that the Panel Exhibit JPN-91 series updates and supplements the Panel Exhibits JPN-42, JPN-43, and JPN-44 series. (Panel Report, para. 7.160 and footnote 173 thereto)

³⁸⁹These documents are set forth in Panel Exhibits JPN-74, JPN-75, JPN-76, and JPN-67.B, respectively. (Panel Report, para. 7.161)

³⁹⁰Panel Report, para. 7.161.

³⁹¹Panel Report, para. 7.161.

³⁹²Panel Report, para. 7.162.

³⁹³Panel Report, para. 7.164.

³⁹⁴Panel Report, paras. 7.164 and 7.165 (referring to Appellate Body Report, *US – Continued Zeroing*, paras. 340 and 341).

³⁹⁵Panel Report, para. 7.166.

of zeroing in the context of Reviews 4, 5, 6, and 9 is inconsistent with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, the Panel explained that it was guided by the adopted report of the Appellate Body in the original proceedings.³⁹⁶

C. *Claims and Arguments on Appeal*

148. As we have set forth in detail in Section II, the United States appeals the Panel's findings concerning Reviews 1, 2, 3, 7, and 8 on two grounds. First, the United States asserts that a determination that a WTO Member has failed to comply with the DSB's recommendations and rulings may not be based on duties relating to entries made prior to the expiration of the reasonable period of time, even if liquidation of those duties occurs after the expiration of that period.³⁹⁷ Secondly, the United States submits that, even if the date of liquidation was relevant for assessing compliance, liquidation actions that take place after the reasonable period of time as a result of domestic litigation cannot provide a basis for a finding of non-compliance.³⁹⁸ Relying on the Appellate Body Report in *US – Zeroing (EC) (EC – Article 21.5)*, the United States further maintains that the liquidation actions that have been delayed as a result of domestic litigation cannot be said to "derive mechanically" from the challenged periodic reviews, and therefore cannot be deemed to be WTO-inconsistent.³⁹⁹

149. The United States also challenges the Panel's finding that the United States acted inconsistently with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 by applying zeroing in the context of Reviews 4, 5, 6, and 9.⁴⁰⁰ The United States appeals this finding on the same two grounds that it appeals the findings relating to Reviews 1, 2, 3, 7, and 8. In addition, the United States challenges the finding concerning Reviews 4, 5, and 6, on the grounds that these reviews had not had effects after the expiration of the reasonable period of time because "assessment of duties calculated in these reviews was enjoined prior to the conclusion of the RPT and continues to be enjoined".⁴⁰¹

150. Japan asserts that the Panel correctly rejected the United States' argument that the relevant date for determining whether there has been compliance is the date of entry of the merchandise subject to the anti-dumping duties.⁴⁰² Moreover, Japan argues that "the United States' responsibility for its duty collection actions taken after the end of the RPT is not diminished, or otherwise altered,

³⁹⁶Panel Report, para. 7.168.

³⁹⁷United States' appellant's submission, para. 87.

³⁹⁸United States' appellant's submission, paras. 91-100.

³⁹⁹United States' appellant's submission, para. 97.

⁴⁰⁰United States' appellant's submission, para. 101.

⁴⁰¹United States' appellant's submission, para. 105.

⁴⁰²Japan's appellee's submission, para. 238.

because of [United States] court conduct that is attributable to the United States".⁴⁰³ Japan also disagrees with the United States' submission that domestic judicial proceedings "sever" the mechanical link between the assessment of liability in the periodic review and the liquidation actions, explaining that "judicial review does not alter either the manner by which [Customs] takes measures to collect duties, or the interaction between the USDOC and [Customs]".⁴⁰⁴

151. As regards Reviews 4, 5, 6, and 9, Japan asserts that the United States' appeal should be rejected to the extent that it is based on the same grounds as the appeal of the Panel's findings concerning Reviews 1, 2, 3, 7, and 8. Japan opposes the United States' argument that Reviews 4, 5, and 6 have had no effects subsequent to the expiration of the reasonable period of time, relying for support on the Panel's finding that the importer-specific assessment rates determined in these Reviews "continued to have legal effect long after the adoption of the DSB's recommendations and rulings".⁴⁰⁵ Japan additionally observes that Review 9 was adopted after the expiration of the reasonable period of time "and, hence, began to apply, and produce legal effects, after that date".⁴⁰⁶

152. The European Communities considers that the Appellate Body should uphold the Panel's findings concerning Reviews 1, 2, 3, 7, and 8 and Reviews 4, 5, 6, and 9.⁴⁰⁷ Mexico and Korea agree with the Panel that any measure taken after the reasonable period of time must be brought into compliance, irrespective of the date of entry of the merchandise.⁴⁰⁸ Mexico and Korea do not consider that domestic judicial proceedings provide a justification for non-compliance.⁴⁰⁹ Norway submits that the Panel correctly found that the United States has failed to comply with the DSB's recommendations and rulings with respect to Reviews 1, 2, 3, 7, and 8.⁴¹⁰

⁴⁰³Japan's appellee's submission, para. 284.

⁴⁰⁴Japan's appellee's submission, para. 293.

⁴⁰⁵Japan's appellee's submission, para. 480 (quoting Panel Report, para. 7.79).

⁴⁰⁶Japan's appellee's submission, para. 483. (emphasis omitted)

⁴⁰⁷European Communities' third participant's submission, paras. 4 and 43.

⁴⁰⁸Mexico's third participant's submission, para. 32; Korea's third participant's submission, para. 28.

⁴⁰⁹Mexico's third participant's submission, para. 39; Korea's third participant's submission, paras. 31 and 32.

⁴¹⁰Norway's third participant's submission, para. 31.

D. *Analysis*

1. What Is the Scope and Timing of the Obligation to Comply with the DSB's Recommendations and Rulings?

153. The United States' appeal concerns the obligation of WTO Members to comply with the DSB's recommendations and rulings. The DSU contains several provisions that specifically address this obligation.

154. The obligation to comply with the DSB's recommendations and rulings arises once the DSB has adopted a panel or Appellate Body report⁴¹¹ that has concluded that a measure is inconsistent with a covered agreement. In accordance with Article 19.1, implementation requires that the Member concerned bring the WTO-inconsistent measure into conformity with the relevant covered agreement(s). Article 3.7 of the DSU states that, "[i]n the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements." Although the "withdrawal" of the WTO-inconsistent measure could be understood as requiring abrogation of the measure, it has been accepted that "alternative means of implementation may exist and that the choice belongs, in principle, to the Member".⁴¹² As the Appellate Body has explained, "the inconsistent measure to be withdrawn can be brought into compliance by modifying or replacing it with a revised measure."⁴¹³

155. Under Article 21.5 of the DSU, disagreements "as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" must be resolved through recourse to WTO dispute settlement procedures, and, wherever possible, must be referred to the original panel. Article 21.5 has been interpreted by the Appellate Body, in *US – FSC (Article 21.5 – EC II)*, to mean that, "in compliance proceedings, an Article 21.5 panel may have to examine whether the 'measures taken to comply' implement fully, or only partially, the recommendations and rulings adopted by the DSB".⁴¹⁴ The Appellate Body has additionally explained that "[t]he requirements in Article 21.5 to examine whether compliance measures exist and whether the measures taken to comply are consistent with the covered agreements ... suggest that

⁴¹¹Pursuant to Articles 16.4 and 17.14 of the DSU.

⁴¹²Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 173. In its interpretation, the Appellate Body relied on the second sentence of Article 19.1 and on Article 21.3 of the DSU.

⁴¹³Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, footnote 367 to para. 173.

⁴¹⁴Appellate Body, *US – FSC (Article 21.5 – EC II)*, para. 93.

substantive compliance is required".⁴¹⁵ This, in turn, requires that the implementing Member rectify the inconsistencies found in the original proceedings and that the implementing measure is not in other ways inconsistent with the covered agreements.⁴¹⁶

156. The timeframe within which compliance must be effected is addressed in Article 21, which is entitled "Surveillance of Implementation of Recommendations and Rulings". Article 21.1 provides that "[p]rompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members." The reference to "essential" underscores the importance of the obligation to comply with the DSB's recommendations and rulings. The reference to "prompt" compliance emphasizes the need for the timely implementation of DSB recommendations and rulings.

157. The timing of implementation is also addressed in Article 21.3 of the DSU, which reads, in relevant part:

At a DSB meeting held within 30 days after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB. If it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so. (footnote omitted)

According to this provision, implementation of the recommendations and rulings of the DSB must be done "immediately", unless it is "impracticable" to do so. In other words, the requirement is immediate compliance. However, Article 21.3 recognizes that immediate compliance may not always be practicable, in which case it foresees the possibility of the implementing Member being given a reasonable period of time to comply. An important consideration is that the reasonable period of time is not determined by the implementing Member itself. Instead, the reasonable period of time may be proposed by the implementing Member and approved by the DSB, mutually agreed by the parties, or determined through binding arbitration. This confirms that the reasonable period of time is a limited exemption from the obligation to comply immediately. As the Appellate Body has stated, "the

⁴¹⁵Appellate Body Reports, *US – Continued Suspension and Canada – Continued Suspension*, para. 308. The United States indicated that "Article 21.5 must also be read in the context of provisions such as DSU Article 22.8", at least for purposes of ascertaining whether a "measure taken to comply" exists. (United States' response to Panel Question 6, para. 14)

⁴¹⁶Appellate Body Reports, *US – Continued Suspension and Canada – Continued Suspension*, para. 305.

obligation to comply with the recommendations and rulings of the DSB has to be fulfilled by the end of the reasonable period of time at the latest".⁴¹⁷

158. Accordingly, the mandate of an Article 21.5 panel is to determine whether a WTO Member has implemented the DSB's recommendations and rulings fully and in a timely manner. An Article 21.5 panel is not called upon to modify the reasonable period of time agreed or determined under Article 21.3. A WTO Member will not have met its obligation to implement the DSB's recommendations and rulings if measures taken to comply are inconsistent with the covered agreements or if there is an omission in implementation. Moreover, Article 21.3 requires that the obligation to implement fully the DSB's recommendations and rulings be fulfilled by the end of the reasonable period of time at the latest and, consequently, the WTO-inconsistent conduct must cease at the latest by that time.

2. Is the Date of Importation the Relevant Parameter for Determining Compliance?

159. Having set out above our general understanding of a WTO Member's obligation to comply with the DSB's recommendations and rulings, we turn now to the first issue raised by the United States' appeal, that is, whether the obligation to comply applies also in respect of imports that entered the territory of the implementing WTO Member prior to the expiration of the reasonable period of time, when matters concerning those imports have not been fully settled by the end of the reasonable period of time.

160. A similar issue was raised by the United States in the recent appeal in *US – Zeroing (EC)* (*Article 21.5 – EC*), where the Appellate Body stated:

We also agree with the Panel's statement that "[t]o implement the DSB's recommendations and rulings, the United States was at least obligated, after 9 April 2007, to cease using the 'zeroing' methodology in the calculation of anti-dumping duties, not only with respect to imports entered after the end of the reasonable period of time, but also in the context of decisions involving the calculation of dumping margins made after the end of the reasonable period of time with respect to imports entered before that date." ... We consider that measures that, in the ordinary course of the imposition of anti-dumping duties, derive *mechanically* from the assessment of duties would establish a failure to comply with the recommendations and rulings of the DSB to the extent that they are based on zeroing and

⁴¹⁷Appellate Body Report, *US – Zeroing (EC)* (*Article 21.5 – EC*), para. 299.

that they are applied after the end of the reasonable period of time.⁴¹⁸
(original emphasis; footnote omitted)

Thus, the Appellate Body has found that there may be circumstances where a WTO Member's obligation to implement the recommendations and rulings of the DSB applies in respect of conduct relating to imports that entered that Member's territory prior to the expiration of the reasonable period of time.⁴¹⁹ Irrespective of the date on which the imports entered the territory of the implementing Member, the WTO-inconsistencies must cease by the end of the reasonable period of time. There will not be full compliance where the implementing Member fails to take action to rectify the WTO-inconsistent aspects of a measure that remains in force after the end of the reasonable period of time. Likewise, actions taken by the implementing Member after the end of the reasonable period of time must be WTO-consistent, even if those actions are in respect of imports that entered the Member's territory before the end of the reasonable period of time. Therefore, we agree with the Panel's statement that, "[i]f a measure found to be WTO-inconsistent is to be applied after the expiry of the RPT, that measure must have been brought 'into conformity', irrespective of the date of entry of the imports covered by that measure".⁴²⁰ Indeed, any conduct of the implementing Member that was found to be WTO-inconsistent by the DSB must cease by the end of the reasonable period of time. Otherwise, that Member would continue to act in a WTO-inconsistent manner after the end of the reasonable period of time, contrary to Articles 3.7, 19.1, 21.1, 21.3, and 21.5 of the DSU.

161. The measures at issue in the present case are periodic reviews of anti-dumping duty orders. The Panel explained that, in the United States' anti-dumping system, periodic reviews involve the determination of "importer-specific assessment rates for previous entries imported during the review period" and "exporter-specific cash deposit rates that will apply prospectively to future import entries".⁴²¹ Where the importer-specific assessment rates or cash deposits rates determined by the implementing Member are found to be WTO-inconsistent, that Member is under an obligation to rectify the inconsistencies. In order to comply fully with this obligation, the inconsistencies must be rectified by the end of the reasonable period of time. Where the periodic reviews cover imports that entered the implementing Member's territory prior to the expiration of the reasonable period of time, the WTO-inconsistencies may not persist after the reasonable period of time has expired. Thus, for example, importer-specific assessment rates that were found to be WTO-inconsistent may not remain in effect after the expiration of the reasonable period of time. In other words, the WTO-inconsistent

⁴¹⁸Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 311.

⁴¹⁹We will henceforth refer to the respondent Member subject to the obligation to comply with the DSB's recommendations and rulings as the "implementing Member".

⁴²⁰Panel Report, para. 7.148.

⁴²¹Panel Report, para. 7.66.

conduct must cease completely, even if it is related to imports that entered the implementing Member's territory before the reasonable period of time expired. Otherwise, full compliance with the DSB's recommendations and rulings cannot be said to have occurred.

162. In order to support its view that the date of entry is the relevant parameter for assessing compliance, the United States relies on Article VI and the interpretive Note to paragraphs 2 and 3 of Article VI (the "Ad Note") of the GATT 1994, and Articles 8.6, 10.1, 10.6, and 10.8 of the *Anti-Dumping Agreement*, which it considers to be relevant context. According to the United States, these provisions "confirm[] that it is the legal regime in existence at the time that an import enters the Member's territory that determines whether the import is liable for the payment of antidumping duties".⁴²²

163. We now examine whether these provisions support the position of the United States. The first sentence of Article VI:2 of the GATT 1994 states that, "[i]n order to offset or prevent dumping, a Member may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product". Article VI:6(a) provides that a WTO Member shall not levy an anti-dumping duty on the importation of any product of the territory of another WTO Member "unless it determines that the effect of the dumping ... is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry." The United States considers it particularly relevant that the *Ad Note* allows a WTO Member to require "reasonable security (bond or cash deposit) for the payment of anti-dumping ... duty pending final determination of the facts in any case of suspected dumping". We fail to see how these provisions support the view that the date of entry is the relevant parameter for determining compliance. These provisions do not address the issue of whether the implementing Member may leave a measure found to be inconsistent with the *Anti-Dumping Agreement* and Article VI of the GATT 1994 in place unchanged after the end of the reasonable period of time, because that measure covered imports that entered the implementing Member's territory prior to the expiration of the reasonable period of time.

164. As regards the provisions of the *Anti-Dumping Agreement* cited by the United States, we note that Article 8.6 states that, where an undertaking is violated, definitive anti-dumping duties "may be levied in accordance with this Agreement on products entered for consumption not more than 90 days before the application of such provisional measures, except that any such retroactive assessment shall

⁴²²United States' appellant's submission, para. 67. We address, in para. 172 *infra*, the general relationship between provisions of the *Anti-Dumping Agreement* and the DSU, in the light of Article 1.2 of the DSU and Appendix 2 thereto.

not apply to imports entered before the violation of the undertaking".⁴²³ Article 10.1 establishes that provisional measures and anti-dumping duties shall apply only to products entered after the decision to take such measures was taken (subject to exceptions).⁴²⁴ Article 10.6 stipulates that a definitive anti-dumping duty may be levied on products entered not more than 90 days prior to the application of provisional measures if certain conditions are met.⁴²⁵ Article 10.8 stipulates that no duties can be levied retroactively pursuant to Article 10.6 on products entered prior to the date of initiation of the investigation.⁴²⁶ These provisions set forth precise timeframes and conditions limiting retroactive application of provisional and definitive measures in the context of the initial imposition of anti-dumping measures. However, these provisions do not address a Member's compliance obligations after the DSB has adopted recommendations and rulings and the reasonable period of time for implementation has expired. Articles 8.6, 10.1, 10.6, and 10.8 of the *Anti-Dumping Agreement* do not provide a textual basis for the argument that the determination of whether an implementing Member

⁴²³ Article 8.6 of the *Anti-Dumping Agreement* reads:

Authorities of an importing Member may require any exporter from whom an undertaking has been accepted to provide periodically information relevant to the fulfilment of such an undertaking and to permit verification of pertinent data. In case of violation of an undertaking, the authorities of the importing Member may take, under this Agreement in conformity with its provisions, expeditious actions which may constitute immediate application of provisional measures using the best information available. In such cases, definitive duties may be levied in accordance with this Agreement on products entered for consumption not more than 90 days before the application of such provisional measures, except that any such retroactive assessment shall not apply to imports entered before the violation of the undertaking.

⁴²⁴ Article 10.1 of the *Anti-Dumping Agreement* provides:

Provisional measures and anti dumping duties shall only be applied to products which enter for consumption after the time when the decision taken under paragraph 1 of Article 7 and paragraph 1 of Article 9, respectively, enters into force, subject to the exceptions set out in this Article.

⁴²⁵ Article 10.6 of the *Anti-Dumping Agreement* states:

A definitive anti dumping duty may be levied on products which were entered for consumption not more than 90 days prior to the date of application of provisional measures, when the authorities determine for the dumped product in question that:

- (i) there is a history of dumping which caused injury or that the importer was, or should have been, aware that the exporter practises dumping and that such dumping would cause injury, and
- (ii) the injury is caused by massive dumped imports of a product in a relatively short time which in light of the timing and the volume of the dumped imports and other circumstances (such as a rapid build up of inventories of the imported product) is likely to seriously undermine the remedial effect of the definitive anti dumping duty to be applied, provided that the importers concerned have been given an opportunity to comment.

⁴²⁶ Article 10.8 of the *Anti-Dumping Agreement* reads:

No duties shall be levied retroactively pursuant to paragraph 6 on products entered for consumption prior to the date of initiation of the investigation.

has complied with the DSB's recommendations and rulings should exclude actions or omissions relating to imports that entered that Member's territory before the end of the reasonable period of time.

165. The United States argues further that disregarding the date of entry of the merchandise, for purposes of determining compliance with the DSB's recommendations and rulings, disadvantages WTO Members with retrospective anti-dumping systems.⁴²⁷ Before the Panel, the United States submitted that, "since anti-dumping duties under a prospective system are collected, or liquidated, at the time of entry, there is in principle no possibility of entries remaining unliquidated at the end of any RPT."⁴²⁸ This is because, according to the United States, Members with prospective anti-dumping systems have no further obligations once the merchandise subject to anti-dumping duties enters their territory. Therefore, the United States considers that "inequality" between retrospective and prospective anti-dumping systems would be created if the date of entry is not used as the relevant parameter.⁴²⁹ The United States adds that this would be contrary to the Appellate Body's own statement that "[t]he *Anti-Dumping Agreement* is neutral as between different systems for levy and collection of anti-dumping duties."⁴³⁰

166. The United States' argument is difficult to reconcile with the text of Article 9.3.2 of the *Anti-Dumping Agreement*, which requires that WTO Members with prospective anti-dumping systems provide a mechanism allowing importers to request refunds of any duty paid in excess of the margin of dumping.⁴³¹ Under Article 9.3.2, a WTO Member with a prospective anti-dumping system may be required to take administrative action subsequent to the entry of the merchandise if an importer requests a refund of any duty paid in excess of the margin of dumping. This has been acknowledged

⁴²⁷United States' appellant's submission, para. 11 and Section IV.B.2.

⁴²⁸Panel Report, para. 7.150. The Panel summarized the United States' arguments on this point as follows:

We understand the United States to argue that, since anti-dumping duties under a prospective system are collected, or liquidated, at the time of entry, there is in principle no possibility of entries remaining unliquidated at the end of any RPT. Even if the prospective anti-dumping duty were found to be WTO-inconsistent, the collection, or liquidation, of that duty would remain unaffected by the relevant Member's implementation obligations, since it would have occurred long before the end of the RPT. Under a retrospective system, though, the collection of anti-dumping duties might not occur until after the expiry of the RPT. If the relevant Member's implementation obligations were not restricted to the date of the import entry in respect of which collection is being made, those implementation obligations would affect the collection of the anti-dumping duty.

⁴²⁹United States' appellant's submission, para. 61.

⁴³⁰Appellate Body Report, *US – Zeroing (Japan)*, para. 163.

⁴³¹See Appellate Body Report, *US – Zeroing (Japan)*, para. 160.

by Japan and the European Communities.⁴³² Like Article 9.3.1, which concerns retrospective anti-dumping systems, Article 9.3.2 provides for strict time-limits on the duration of a refund procedure. Footnote 20, on which the United States relies for its arguments on judicial delay⁴³³, and which applies to both Articles 9.3.1 and 9.3.2, recognizes that the observance of these time-limits "may not be possible where the product in question is subject to judicial review proceedings." Therefore, where actions or omissions relating to a refund procedure are challenged both domestically and in WTO dispute settlement, delays in the completion of a refund procedure until after the end of the reasonable period of time cannot be excluded. Should such a refund procedure not be completed before the end of the reasonable period of time, a WTO Member with a prospective anti-dumping system would have compliance obligations in respect of that refund procedure concerning past imports. Such a Member would thus find itself in a situation similar to that of an implementing Member applying a retrospective anti-dumping system. This confirms that, under both retrospective and prospective anti-dumping systems, entries made prior to the expiration of the reasonable period of time also may be affected by compliance obligations. As a consequence, we disagree with the United States that disregarding the date of entry of the merchandise for purposes of determining compliance would result in retrospective anti-dumping systems being treated less favourably than prospective anti-dumping systems.

167. An additional concern raised by the United States is that failing to determine compliance by reference to the date of entry would amount to retroactive relief, which, in the United States' view, is "at odds with the prospective nature of compliance under the WTO dispute settlement system".⁴³⁴ The United States considers that such an approach results in retroactive relief because it concerns entries that occurred prior to the expiry of the reasonable period of time. As we explained earlier, the DSU requires cessation of all WTO-inconsistent conduct either immediately upon adoption of the DSB's recommendations and rulings or no later than upon expiration of the reasonable period of time,

⁴³²See Japan's appellee's submission, para. 41. In support of the proposition that WTO Members with prospective anti-dumping systems grant refunds to importers, the European Communities refers to the decision of the European Court of Justice in *Ikea Wholesale Ltd v. Commissioners of Customs & Excise* (C-351/04 – 27/9/07). (See European Communities' third participant's submission, para. 48; see also Panel Exhibit US-A69) At the oral hearing, the European Communities explained that, in that case, importers were granted refunds on duties paid in the specific context of zeroing, following the decision in the Appellate Body Report in *EC – Bed Linen (Article 21.5 – India)*. The European Communities also directed our attention to the refund procedures that were undertaken in the context of the *EC – Countervailing Measures on DRAM Chips* case. (See European Communities' third participant's submission, para. 32) The European Communities stated that refunds were granted with respect to imports that entered the European Communities prior to the expiry of the reasonable period of time and were calculated using a WTO-consistent methodology after the expiry of the reasonable period of time. At the oral hearing, Korea confirmed that refunds had been granted in this case.

⁴³³See *infra*, para. 175.

⁴³⁴United States' appellant's submission, para. 5.

regardless of the date of importation. There is no "retroactive relief" involved when a WTO Member's conduct is examined as of the end of the reasonable period of time, which is the proper reference point. As the Appellate Body stated in *US – Zeroing (EC) (Article 21.5 – EC)*, "the obligation to comply with the recommendations and rulings of the DSB has to be fulfilled by the end of the reasonable period of time at the latest, and ... the WTO-inconsistency has to cease by the end of the reasonable period of time with prospective effect."⁴³⁵

168. We note, finally, that Article 9 of the *Anti-Dumping Agreement* covers the imposition and collection of anti-dumping duties.⁴³⁶ Any actions taken to collect anti-dumping duties based on importer-specific assessment rates determined in a periodic review are also subject to the obligation set out in Article 9, including the obligation in paragraph 3 that "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2".⁴³⁷ Where a WTO Member has been found to have violated the *Anti-Dumping Agreement* and the GATT 1994 by using zeroing in a periodic review, it fails to comply with the DSB's recommendations and rulings if it collects, subsequent to the expiration of the reasonable period of time, anti-dumping duties based on rates that were determined in the periodic review using zeroing. If it did so, the obligation in

⁴³⁵Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 299. (footnote omitted) The Appellate Body also stated:

... because compliance with the recommendations and rulings of the DSB implies cessation of zeroing in the assessment of final duty liability, and in the measures that, in the ordinary course of the imposition of anti-dumping duties, derive mechanically from the assessment of duties, whether the implementation is prospective or retroactive should not be determined by reference to the date when liability arises, but rather by reference to the time when final dumping duty liabilities are assessed or when measures that result mechanically from the assessment of duties occur. We consider that the obligation to cease using zeroing in the assessment of anti-dumping duty liability at the latest as of the end of the reasonable period of time "is eminently prospective in nature".

(*Ibid.*, para. 309 (footnote omitted))

⁴³⁶The title of Article 9 of the *Anti-Dumping Agreement* is "Imposition and Collection of Anti-Dumping Duties".

⁴³⁷As Japan points out, the United States stated before the Panel that it "does not dispute that Article 9.3 of the [Anti-Dumping] Agreement obliges WTO Members to ensure that the amount of antidumping duty collected not exceed the margin of dumping established under Article 2 of the [Anti-Dumping] Agreement". (United States' second written submission to the Panel, para. 64 (quoted in Japan's appellee's submission, para. 242))

Article 9.3 that "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2" would not be respected.⁴³⁸

169. Therefore, we disagree with the United States' argument that "the determinative fact for establishing whether a Member has complied with the DSB's recommendations and rulings is the date merchandise enters that Member's territory."⁴³⁹ We find, instead, that the DSU requires cessation of all WTO-inconsistent conduct immediately upon the adoption of the DSB's recommendations and rulings or no later than upon expiration of the reasonable period of time. Consequently, in the case of periodic reviews of anti-dumping duty orders, the obligation to comply covers actions or omissions subsequent to the reasonable period of time, even if they relate to imports that entered the territory of a WTO Member at an earlier date.

3. What Is the Relevance of Delays Resulting from Domestic Judicial Proceedings?

170. The second issue raised by the United States' appeal relates to the specific reason for which collection of anti-dumping duties was delayed in respect of the periodic reviews subject to these Article 21.5 proceedings. The question is whether actions or omissions that occur after the expiration of the reasonable period of time due to domestic judicial proceedings are excluded from the implementing Member's compliance obligations.⁴⁴⁰

171. The United States has explained that, under its retrospective system, the determination of final liability (including the determination of importer-specific assessment rates) is made by the USDOC in the context of a periodic review.⁴⁴¹ Once final liability is determined, the USDOC sends liquidation

⁴³⁸This is similar to what would occur if zeroing were allowed in periodic reviews, while being disallowed in the original anti-dumping determination. As the Appellate Body explained in *US – Stainless Steel (Mexico)*:

... a reading of Article 9.3 of the *Anti-Dumping Agreement* that permits simple zeroing in periodic reviews would allow WTO Members to circumvent the prohibition of zeroing in original investigations that applies under the first sentence of Article 2.4.2 of the *Anti-Dumping Agreement*. This is because, in the first periodic review after an original investigation, the duty assessment rate for each importer will take effect from the date of the original imposition of anti-dumping duties. Consequently, zeroing would be introduced although it is not permissible in original investigations.

(Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 109)

⁴³⁹United States' appellant's submission, para. 85.

⁴⁴⁰The United States itself framed the issue as follows: "a key question in this appeal is whether the United States failed to comply with the DSB's recommendations and rulings after the end of the RPT, because it liquidated entries after that date for which liquidation had been suspended due to judicial review". (United States' appellant's submission, para. 92)

⁴⁴¹United States' response to Panel Question 14, para. 27.

instructions to the United States Customs and Border Protection ("Customs"). This will usually occur within 15 days of publication of the final results of the periodic review.⁴⁴² Where litigation is initiated before the USDOC has issued the liquidation instructions and a United States court enjoins liquidation, the USDOC will issue instructions to Customs ordering it not to liquidate the entries during the pendency of domestic litigation.⁴⁴³ Litigation may also be initiated after the issuance of liquidation instructions, provided that Customs has not already liquidated the relevant entries. If a United States court issues an injunction in this scenario, the USDOC will send instructions to Customs notifying it of the injunction and will require Customs to suspend liquidation of the entries until the conclusion of domestic litigation. Upon the conclusion of domestic litigation and the consequent lifting of any applicable injunctions, the USDOC will send instructions to Customs ordering liquidation of the entries in accordance with the court's decision and Customs will collect duties accordingly.⁴⁴⁴ The United States emphasizes that the "determination of final liability is separate and distinct from liquidation".⁴⁴⁵ It has also described liquidation—that is, the process of collection of anti-dumping duties—as a "ministerial act" because Customs "collects the antidumping duties based on [the USDOC's] determination" and Customs "does not have the authority to recalculate or otherwise revise these duties".⁴⁴⁶

172. According to the United States, the relevant provisions for purposes of deciding the question before us are Article 13 and footnote 20 to Article 9.3.1 of the *Anti-Dumping Agreement*.⁴⁴⁷ Japan, by contrast, refers to several provisions of the DSU that it considers indicate the actions that a respondent Member must take to implement the DSB's recommendations and rulings.⁴⁴⁸ We note, in this regard, that neither provision of the *Anti-Dumping Agreement* to which the United States refers is listed in Appendix 2 of the DSU as a special or additional rule and procedure that would prevail in case of conflict, in accordance with Article 1.2 of the DSU.⁴⁴⁹ Accordingly, the rule in Article 1.2 is inapplicable in this case. Therefore, both the *Anti-Dumping Agreement* and the DSU should be taken into account in this dispute and should be interpreted harmoniously. We begin our analysis with the

⁴⁴²United States' response to Panel Question 17, para. 32.

⁴⁴³United States' appellant's submission, para. 34.

⁴⁴⁴United States' response to Panel Question 17, para. 32; United States' response to questioning at the oral hearing.

⁴⁴⁵United States' response to Panel Question 17, para. 32.

⁴⁴⁶United States' response to Panel Question 14, para. 27. (footnote omitted)

⁴⁴⁷United States' appellant's submission, paras. 95-100.

⁴⁴⁸Japan's appellee's submission, paras. 175-186.

⁴⁴⁹Japan argues that "there are *no* 'special or additional rules and procedures' in the *Anti-Dumping Agreement* that justify excusing the United States from the requirement to 'bring [Reviews 1, 2, 3, 7 and 8] into conformity' with WTO law, under Article 19.1 of the DSU." (Japan's appellee's submission, para. 205 (original emphasis and square brackets))

provisions of the *Anti-Dumping Agreement* that the United States considers relevant to the issue raised on appeal, after which we will turn to the provisions of the DSU.

173. Tribunals or procedures for the independent review of certain administrative anti-dumping actions are required under Article 13 of the *Anti-Dumping Agreement*, which provides:

Each Member whose national legislation contains provisions on anti-dumping measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 11. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question.

174. The requirement in Article 13 of the *Anti-Dumping Agreement* to maintain tribunals or procedures for independent review of administrative anti-dumping actions applies to all WTO Members regardless of whether they operate a retrospective or prospective anti-dumping system. The participants agree that the independent review procedures referred to in Article 13 apply to periodic reviews.⁴⁵⁰ We share the view that the phrase "administrative actions relating to final determinations" covers periodic reviews under retrospective anti-dumping systems.

175. We note that the obligation in Article 13 is general in nature, requiring the maintenance of tribunals or procedures for the prompt review of administrative anti-dumping actions. Article 13 does not speak directly to the issue raised in the present appeal, as it contains no mention that judicial review procedures may excuse non-compliance with the DSB's recommendations and rulings by the end of the reasonable period of time. The United States argues on appeal that "[a] Member that maintains a system that provides for judicial review and judicial remedies for the review of administrative actions should not be subject to findings that it failed to comply based on a delay that is a consequence of judicial review."⁴⁵¹ As we understand it, the consistency with Article 13 of the United States' judicial review procedures of anti-dumping actions is not being challenged in these Article 21.5 proceedings. What is being challenged is the United States' failure to rectify, by the end of the reasonable period of time, the importer-specific assessment rates determined in the periodic reviews with the use of zeroing. The fact that WTO Members are required to maintain independent review procedures for administrative anti-dumping actions does not exonerate them from the requirement to comply with the DSB's recommendations and rulings within the reasonable period of

⁴⁵⁰United States' response to questioning at the oral hearing; Japan's response to questioning at the oral hearing.

⁴⁵¹United States' appellant's submission, para. 95.

time.⁴⁵² We see no conflict between the obligation to maintain independent review procedures under Article 13 and the obligation to comply with the DSB's recommendations and rulings. Accordingly, we do not consider that Article 13 provides support for the proposition that a WTO Member is excused from complying with the DSB's recommendations and rulings by the end of the reasonable period of time, where a periodic review has been challenged in that Member's domestic courts and this has resulted in the collection of duties being delayed.

176. The United States also relies upon footnote 20 to Article 9.3.1 of the *Anti-Dumping Agreement*, which provides that "[i]t is understood that the observance of the time-limits mentioned in this subparagraph and in subparagraph 3.2 may not be possible where the product in question is subject to judicial review proceedings." The United States considers that the text of footnote 20 implies that "delay in liquidation until after the RPT as a result of judicial review should not serve as a basis to find that a Member has failed to comply with the recommendations and rulings of the DSB, since but for judicial proceedings, the Member would have liquidated prior to the RPT."⁴⁵³

177. Footnote 20 to Article 9.3.1 of the *Anti-Dumping Agreement* expressly recognizes that domestic judicial proceedings may result in delays and that this may excuse exceeding the time-limits imposed under Articles 9.3.1 and 9.3.2 for the conduct of periodic reviews and for refund procedures under retrospective and prospective systems. Footnote 20 does not deal with compliance with the DSB's recommendations and rulings. The fact that the text of footnote 20 expressly limits its application to Articles 9.3.1 and 9.3.2 weighs against invoking footnote 20 to excuse delays in complying with obligations set out in other provisions of the covered agreements, particularly the obligation to comply "promptly" with the DSB's recommendations and rulings, which is described as "essential" in Article 21.1 of the DSU.

178. Turning to the DSU, we recall that Article 21.3 of the DSU requires immediate compliance with the DSB's recommendations and rulings, unless this is impracticable, in which case an implementing Member is allowed a "reasonable period of time" to do so. The "reasonable period of time" is determined under one of the three options provided in Article 21.3. The purpose of

⁴⁵²There was a debate between the participants at the oral hearing about whether the United States' executive branch can take actions in connection with a periodic review that is the object of domestic litigation during the pendency of those domestic judicial proceedings. The United States indicated that the USDOC loses jurisdiction over a periodic review while it is under review by the United States courts. Japan asserted that the USDOC can request that the court return (or "remand") the case back to it. We note that whatever restrictions there are on the United States' executive branch taking actions during the pendency of domestic judicial proceedings would derive solely from United States law and not from the text of Article 13 of the *Anti-Dumping Agreement*. Therefore, they would not provide a basis for delaying compliance with the DSB's recommendations and rulings beyond the end of the reasonable period of time.

⁴⁵³United States' appellant's submission, para. 96.

Article 21.5 proceedings is to assess whether an implementing Member has fully complied with the DSB's recommendations and rulings, and not to modify the reasonable period of time. Moreover, the very text of Article 21.3 indicates that the "reasonable period of time" is an exception to immediate compliance, thus implying that further delays would not be justified, whatever the circumstances. In *US – Zeroing (EC) (Article 21.5 – EC)*, the Appellate Body stated that the "implementing Member would be able to extend the reasonable period of time and delay compliance depending on when it chooses to undertake final duty assessment" if the approach based on the date of entry, as advocated by the United States, was followed.⁴⁵⁴ The Appellate Body also cautioned there that "[s]uch a result would deprive of meaning the notion of 'reasonable period of time' in which a Member shall comply, as provided for in Article 21.3 of the DSU, and be contrary to the implementation mechanism of the DSU."⁴⁵⁵ The same rationale is applicable in respect of delays in implementation due to domestic judicial proceedings. Such delays in implementation cannot exonerate a Member from its compliance obligations and are not consistent with the overall objectives of "prompt" and "immediate" compliance in Articles 21.1 and 21.3.

179. Relying on the Appellate Body Report in *US – Zeroing (EC) (Article 21.5 – EC)*, the United States argues further that, where liquidation is delayed because of domestic judicial proceedings, it can no longer be said to "derive mechanically" from the periodic reviews challenged by Japan.⁴⁵⁶ According to the United States, "judicial review severs any so-called 'mechanical' link between the assessment of liability in the original review determination and the liquidation instructions".⁴⁵⁷

180. We recall that, in *EC – Zeroing (EC)(Article 21.5 – EC)*, the Appellate Body found that "measures that, in the ordinary course of the imposition of anti-dumping duties, derive *mechanically* from the assessment of duties would establish a failure to comply with the recommendations and rulings of the DSB to the extent that they are based on zeroing and that they are applied after the end of the reasonable period of time."⁴⁵⁸ Later in the same report, the Appellate Body stated that it was not expressing any opinion on the question, which it was not required to decide, "of whether actions to liquidate duties that are based on administrative review determinations issued before the end of the reasonable period of time, and that have been delayed as a result of judicial proceedings, fall within the scope of the implementation obligations" of the respondent Member.⁴⁵⁹

⁴⁵⁴ Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 309.

⁴⁵⁵ Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 309.

⁴⁵⁶ United States' appellant's submission, paras. 94 and 97.

⁴⁵⁷ United States' appellant's submission, para. 97.

⁴⁵⁸ Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 311. (original emphasis)

⁴⁵⁹ Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 314.

181. As the European Communities observes⁴⁶⁰, the United States is reasoning *a contrario* on the basis of the Appellate Body's ruling in *US – Zeroing (EC) (Article 21.5 – EC)*. The premise underlying the United States' argument is that, if the liquidation actions do not mechanically derive from the challenged reviews, then such actions would be outside the scope of the United States' compliance obligations. We do not read the Appellate Body's statements in *US – Zeroing (EC)(Article 21.5 – EC)* as suggesting that, if the liquidation actions do not mechanically derive from the challenged reviews, then such actions would be outside the scope of the implementing Member's compliance obligations. Nor do we consider that such an *a contrario* approach is warranted. The emphasis in that case was on the fact that actions that somehow automatically derived from previous periodic reviews affected by zeroing would also be in breach if taken after the end of the reasonable period of time. Liquidation that occurs after the reasonable period of time due to court proceedings, and does not derive mechanically from the periodic review, but is somehow autonomous—as the United States claims is the case in the current proceedings—would also be impermissible if the use of zeroing had not been rectified. Hence, we do not see why such actions—be they "mechanically derived" or not from the challenged periodic reviews—would be exempted from the United States' obligation to comply with the DSB's recommendations and rulings by the end of the reasonable period of time.

182. To support its argument that liquidation actions that are delayed as a result of judicial proceedings do not derive mechanically from the challenged periodic reviews, the United States points out that "the timing of liquidation is controlled by the independent judiciary and *not* the administering authority."⁴⁶¹ We note that a WTO Member "bears responsibility for acts of all its departments of government, including its judiciary."⁴⁶² This is supported by Article 18.4 of the *Anti-Dumping Agreement*, Article XVI:4 of the *WTO Agreement*, and Article 27 of the *Vienna Convention*.⁴⁶³ The judiciary is a state organ and even if an act or omission derives from a WTO Member's judiciary, it is nevertheless still attributable to that WTO Member. Thus, the United States cannot seek to avoid the obligation to comply with the DSB's recommendations and rulings within the reasonable period of time, by relying on the timing of liquidation being "controlled by the

⁴⁶⁰European Communities' third participant's submission, para. 40.

⁴⁶¹United States' appellant's submission, para. 97. (original emphasis)

⁴⁶²Appellate Body Report, *US – Shrimp*, para. 173.

⁴⁶³Article 18.4 of the *Anti-Dumping Agreement* requires each Member to "take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply for the Member in question." Article XVI:4 of the *WTO Agreement* states that "[e]ach Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements." Article 27 of the *Vienna Convention* provides that a "party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

independent judiciary". In any event, the periodic reviews, and the collection of duties after the reasonable period of time by the USDOC and Customs, are not judicial acts; nor has Japan attributed the failure to comply to the United States courts. We also note that the actions that follow the completion of judicial proceedings in the present case do not appear to be in any way different from the collection of duties in the absence of such proceedings, such as was the case in the scenarios examined in *US – Zeroing (EC) (Article 21.5 – EC)*.

183. The United States argues further that liquidation is a "ministerial" act because Customs "collects the antidumping duties based on [USDOC's] determination" and Customs "does not have the authority to recalculate or otherwise revise these duties".⁴⁶⁴ We note that the Panel record indicates that what occurred after the expiry of the reasonable period of time was not just the action of liquidation, that is, collection of anti-dumping duties by Customs, but also the issuance of liquidation instructions by the USDOC to Customs to assess those anti-dumping duties.⁴⁶⁵ In any event, defining the act of collection of anti-dumping duties as "ministerial" does not shield it from being subject to the disciplines of Article VI of the GATT 1994 and the *Anti-Dumping Agreement*, in particular, Article 9, which is entitled "Imposition and Collection of Anti-Dumping Duties". Irrespective of whether an act is defined as "ministerial" or otherwise under United States law, and irrespective of any discretion that the authority issuing such instructions or taking such action may have, the United States, as a Member of the WTO, is responsible for those acts in accordance with the covered agreements and international law.⁴⁶⁶

184. The United States also refers to the initiation of domestic judicial proceedings by private parties and argues that "a finding that a Member failed to comply because liquidation was suspended until after the RPT due to litigation would give private litigants the ability to control compliance by Members operating retrospective antidumping systems."⁴⁶⁷ We note, however, that, regardless of whether court proceedings are initiated by private parties, it is the court that decides whether or not to grant an injunction⁴⁶⁸ and private parties do not control the timing or content of the court's decisions.

⁴⁶⁴United States' response to Panel Question 14, para. 27. (footnote omitted) The term "ministerial" is defined by Merriam Webster's Dictionary of Law as "relating to or being an act done after ascertaining the existence of a specified state of facts in obedience to legal and esp. statutory mandate without exercise of personal judgment or discretion". (*Merriam Webster's Dictionary of Law*, L.P.Wood (ed.) (Merriam-Webster Inc., 1996), p. 313)

⁴⁶⁵See Panel Exhibits JPN-40.A, JPN-77, JPN-78, JPN-79, and JPN-80.

⁴⁶⁶See Article 4 of the ILC Draft Articles. Japan has relied on the ILC Draft Articles in its appellee's submission, paras. 261-276.

⁴⁶⁷United States' appellant's submission, para. 98.

⁴⁶⁸The United States seems to acknowledge this when it argues that "the timing of liquidation is controlled by the independent judiciary and *not* the administering authority." (United States' appellant's submission, para. 97 (original emphasis))

Thus, we are not persuaded that the initiation by private parties of domestic judicial proceedings is relevant for determining the scope of the United States' compliance obligations in this case.⁴⁶⁹

185. In addition, the United States submits that the precise action to be taken once domestic litigation is completed will depend on the outcome of judicial review. The United States does not allege that its courts would order the USDOC to rectify the use of zeroing.⁴⁷⁰ Rather, the United States asserted at the oral hearing that, as a result of the decision of the domestic court, there could be circumstances where the USDOC would have to recalculate the importer-specific assessment rates without using zeroing, such as where all relevant export prices are below normal value. This example is not to the point because zeroing does not manifest itself in such a case in which all export prices are below normal value. Moreover, we note that domestic litigation has been completed in relation to Reviews 1, 2, 3, 7, and 8 and there is no indication on the Panel record that the use of zeroing was corrected in any of these Reviews.⁴⁷¹ In fact, the United States expressly stated before the Panel that "[a]ny results of the zeroing procedures employed in Review Nos. 1, 2, and 3 were not altered through the court-ordered reexaminations".⁴⁷²

186. An additional concern would arise if the United States' position concerning delays resulting from judicial review was accepted, because the requirement to provide independent review is not limited to anti-dumping measures. For example, Article X:3(b) of the GATT 1994 requires that there be independent review of administrative determinations dealing with customs matters.⁴⁷³ Article 23

⁴⁶⁹Therefore, we are not persuaded by the United States' submission that determining an implementing Member's obligations other than by the date of entry would give private parties "perverse incentives to manufacture domestic litigation and prolong liquidation" beyond the reasonable period of time. (See United States' appellant's submission, para. 99)

⁴⁷⁰See *infra*, footnote 493.

⁴⁷¹This issue is also discussed in relation to Reviews 4, 5, and 6 at *infra*, para. 194.

⁴⁷²United States' comments on Japan's responses to Panel Questions, para. 20. Japan pointed out to the Panel that, for Reviews 1, 2, and 3, "instead of recalculating the margins and [importer-specific assessment rates] *without zeroing, the USDOC has actually amended the final results of the periodic reviews on the basis of calculations that included zeroing* with effect subsequent to (1) the adoption of the DSB's recommendations on 23 January 2007 and/or (2) the end of the RPT on 24 December 2007." (Japan's response to Panel Question 19(a), para. 35 (original emphasis))

⁴⁷³Article X:3(b) of the GATT 1994 provides:

Each Member shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers; *Provided* that the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts.

of the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*") requires that there be tribunals or procedures for independent review of certain countervailing duty determinations.⁴⁷⁴ Article VI:2(a) of the *General Agreement on Trade in Services* (the "*GATS*") calls for the establishment of tribunals or procedures for the review of administrative decisions affecting trade in services.⁴⁷⁵ Thus, exempting measures subject to domestic judicial proceedings from the obligation to comply with the DSB's recommendations and rulings by the end of the reasonable period of time could potentially have considerable implications for the effectiveness of WTO dispute settlement in areas beyond anti-dumping.

187. Therefore, the fact that collection of anti-dumping duties is delayed as a result of domestic judicial proceedings does not provide a valid justification for the failure to comply with the DSB's recommendations and rulings by the end of the reasonable period of time.

4. Reviews 1, 2, 3, 7, and 8

188. Reviews 1, 2, 3, 7, and 8 were challenged by Japan in the original proceedings. The Appellate Body found that the United States acted inconsistently with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 by applying zeroing procedures in those Reviews.⁴⁷⁶ In these Article 21.5 proceedings, the Panel found that the importer-specific rates determined in Reviews 1, 2, 3, 7, and 8 "had not been withdrawn" by the end of the reasonable period of time, but rather "continued to have legal effect ... in the sense that they continued to provide the authority for the collection of anti-dumping duties in respect of the relevant (unliquidated) import

⁴⁷⁴Article 23 of the *SCM Agreement* states:

Judicial Review

Each Member whose national legislation contains provisions on countervailing duty measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 21. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question, and shall provide all interested parties who participated in the administrative proceeding and are directly and individually affected by the administrative actions with access to review.

⁴⁷⁵Article VI:2(a) of the *GATS* reads:

Each Member shall maintain or institute as soon as practicable judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services. Where such procedures are not independent of the agency entrusted with the administrative decision concerned, the Member shall ensure that the procedures in fact provide for an objective and impartial review.

⁴⁷⁶Appellate Body Report, *US – Zeroing (Japan)*, para. 190(e).

entries".⁴⁷⁷ The Panel further found "the absence of any modification of those importer-specific assessment rates" and therefore concluded that "the status of those measures has not changed since the original proceeding, in which they were found to be WTO-inconsistent".⁴⁷⁸

189. The United States does not appeal any of these findings. Instead, the United States argues, first, that it had no compliance obligations in respect of Reviews 1, 2, 3, 7, and 8, because they cover merchandise imported into the United States before the expiration of the reasonable period of time; and, secondly, that any liquidations pursuant to Reviews 1, 2, 3, 7, and 8 would have occurred before the expiration of the reasonable period of time but for the fact that they were challenged in domestic judicial proceedings. We have found above that both arguments of the United States are premised on an incorrect interpretation of the *Anti-Dumping Agreement* and the DSU.⁴⁷⁹ Consequently, we uphold the Panel's finding that "the United States has failed to comply with the recommendations and rulings of the DSB regarding the importer-specific assessment rates determined in Reviews 1, 2, 3, 7 and 8 that apply to entries covered by those Reviews that were, or will be, liquidated after the expiry of the RPT".⁴⁸⁰ For the same reasons, we also uphold the Panel's finding that "the United States remains in violation of Articles 2.4 and 9.3 of the [*Anti-Dumping*] *Agreement*, and Article VI:2 of the GATT 1994, in respect of those importer-specific assessment rates."⁴⁸¹

5. Reviews 4, 5, and 6

190. As regards Reviews 4, 5, and 6, the United States additionally notes that liquidation of duties remained suspended as a result of pending judicial proceedings.⁴⁸² Referring to the Appellate Body Report in *US – Zeroing (EC) (Article 21.5 – EC)*, the United States submits that Reviews 4, 5, and 6 could not have provided a basis for a finding of inconsistency with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 at the time of Japan's panel request. The United States argues that, because "assessment of duties calculated in these reviews was enjoined prior to the conclusion of the RPT and continues to be enjoined", these Reviews "have had no post-RPT effects of the kind that give rise to a finding of inconsistency".⁴⁸³

⁴⁷⁷Panel Report, para. 7.149. (footnote omitted) The Panel understood "the United States to accept that importer-specific assessment rates form part of the measures at issue in the original proceeding." (*Ibid.*, footnote 157 to para. 7.146) The United States has not challenged this finding on appeal.

⁴⁷⁸Panel Report, para. 7.149. (footnote omitted)

⁴⁷⁹See *supra*, paras. 169 and 187.

⁴⁸⁰Panel Report, paras. 7.154 and 8.1(a).

⁴⁸¹Panel Report, paras. 7.154 and 8.1(a)(i).

⁴⁸²United States' appellant's submission, para. 101.

⁴⁸³United States' appellant's submission, para. 105.

191. Japan disagrees with the United States' assertion that Reviews 4, 5, and 6 have had no effects after the end of the reasonable period of time. It observes that the Panel made the following explicit finding on this point:

[I]mporter-specific assessment rates determined in Reviews 4, 5 and 6 continued to have legal effect long after the adoption of the DSB's recommendations and rulings.⁴⁸⁴

Japan also refers to the Panel's finding that Japan demonstrated that some of the import entries covered by the importer-specific assessment rates determined in Reviews 4, 5, and 6 had not been liquidated when the Article 21.5 proceedings were initiated.⁴⁸⁵ Thus, Japan asserts that "[t]he assessment rates from these Reviews continue to have effects after the end of the RPT and will serve as the legal basis for duty collection measures to be taken, after that time, with respect to entries covered by these Reviews."⁴⁸⁶

192. We recall that the United States has not appealed the Panel's finding that Reviews 4, 5, and 6 are "measures taken to comply" within the meaning of Article 21.5 of the DSU.⁴⁸⁷ Nor does the United States appeal the Panel's finding that "the exporter-specific margins of dumping and importer-specific assessment rates in Reviews 4, 5, [and] 6 ... were affected (in the sense of being inflated) by zeroing".⁴⁸⁸

193. Moreover, the United States does not allege on appeal that the exporter-specific margins of dumping and importer-specific assessment rates determined in Reviews 4, 5, and 6 with the use of zeroing have been rectified and brought into compliance with the DSB's recommendations and rulings. In other words, the United States is not claiming that it has brought itself into compliance as regards the use of zeroing in Reviews 4, 5, and 6. We stated above that the DSU requires WTO Members to comply fully with the DSB's recommendations and rulings by the end of the reasonable period of time. In this case, compliance with the DSB's recommendations and rulings required the cessation of zeroing in the application of anti-dumping duties by the end of the reasonable period of time. This has not occurred given that, as the Panel found, "the exporter-specific margins of dumping and importer-specific assessment rates in Reviews 4, 5, [and] 6 ... were affected (in the sense of being

⁴⁸⁴Panel Report, para. 7.79. (footnote omitted) This finding was made in the context of the Panel's analysis of whether Reviews 4, 5, and 6 are "measures taken to comply" within the meaning of Article 21.5 of the DSU.

⁴⁸⁵Panel Report, footnote 101 to para. 7.74, and footnote 102 to para. 7.75.

⁴⁸⁶Japan's appellee's submission, para. 484.

⁴⁸⁷Panel Report, para. 7.82.

⁴⁸⁸Panel Report, para. 7.166.

inflated) by zeroing"⁴⁸⁹; "Reviews 4, 5 and 6 continued to have legal effect long after the adoption of the DSB's recommendations and rulings"⁴⁹⁰; and some of the import entries covered by Reviews 4, 5, and 6 had not been liquidated when the reasonable period of time expired.⁴⁹¹ Furthermore, we note that pursuant to Article 3.8 of the DSU, "where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment."⁴⁹² This means that there is a presumption that a breach of the WTO agreements has an adverse impact on other Members. Thus, we disagree with the United States that there is no basis to find that the application of zeroing in Reviews 4, 5, and 6 is inconsistent with the United States' obligations under the *Anti-Dumping Agreement* and the GATT 1994. Even if liquidation of the entries covered by Reviews 4, 5, and 6 had not taken place after the expiration of the reasonable period of time, the exporter-specific margins of dumping and importer-specific assessment rates determined in these reviews remain in force and these rates continue to be inflated due to the use of zeroing. Accepting the United States' argument would mean that, once domestic litigation is completed, anti-dumping duties improperly inflated by the use of zeroing could be collected long after the end of the reasonable period of time.

194. At the oral hearing, the United States submitted that, as a result of the decision of a United States domestic court, there could be circumstances where the USDOC might have to recalculate the rates determined in Reviews 4, 5, and 6 without using zeroing. The United States, however, did not argue that its domestic courts would find the use of zeroing to be illegal, under United States law, and therefore order the USDOC to rectify it.⁴⁹³ Instead, the United States argued that there could be circumstances in which the court's decision relating to a different issue could make the use of zeroing unnecessary because, for example, all the export sales were below normal value. That this factual scenario will arise is speculative. Moreover, as explained above⁴⁹⁴, zeroing does not manifest itself in

⁴⁸⁹Panel Report, para. 7.166.

⁴⁹⁰Panel Report, para. 7.79. (footnote omitted) This finding was made in the context of the Panel's analysis of whether Reviews 4, 5, and 6 are "measures taken to comply" within the meaning of Article 21.5 of the DSU.

⁴⁹¹Panel Report, footnote 101 to para. 7.74, and footnote 102 to para. 7.75.

⁴⁹²See also Appellate Body Report, *EC – Bananas III*, paras. 252 and 253 (quoting GATT Panel Report, *US – Superfund*, paras. 5.1.9 and 5.1.10); and Appellate Body Report, *EC – Bananas III (Article 21.5 – US)*, paras. 469 and 470).

⁴⁹³The USDOC's Issues and Decision Memoranda have emphasized that the United States Court of Appeals for the Federal Circuit has upheld the use of zeroing. See, for example, the Issues and Decision Memorandum for Review 9, at pp. 8-10 ("in response to *US – Zeroing (Japan)*, the CAFC has repeatedly affirmed the permissibility of denying offsets in administrative reviews") (citing *Corus Staal BV v. United States*, 502 F.3d 1370, at 1374 (CAFC 2007); and *NSK Ltd. v. United States*, 510 F.3d 1375, at 1379-1380 (CAFC 2007); also citing *Timken Co v. United States*, 354 F.3d 1334 (CAFC 2004); and *Corus Staal BV v. United States*, 395 F.3d 1343 (CAFC 2005), cert. denied, 126 S. Ct. 1023, 163 L. ed. 2d 853 (2006)) (Panel Exhibit JPN-67.B).

⁴⁹⁴See *supra*, para. 185.

such a case in which all export prices are below normal value. In any event, the obligation of the United States was to comply with the DSB's recommendations and rulings by the end of the reasonable period of time at the latest, and not by the end of any domestic judicial proceedings.

195. Accordingly, we uphold the Panel's finding that "the application of zeroing in the context of Reviews 4, 5 [and] 6 ... is inconsistent with Articles 2.4 and 9.3 of the [*Anti-Dumping*] *Agreement*, and Article VI:2 of the GATT 1994."⁴⁹⁵

6. Review 9

196. We recall that we have upheld the Panel's finding that Review 9 was properly within its terms of reference.⁴⁹⁶ The final results of Review 9 were published after the expiration of the reasonable period of time.⁴⁹⁷ The Panel found that the exporter-specific margins of dumping and importer-specific assessment rates in Review 9 "were affected (in the sense of being inflated) by zeroing".⁴⁹⁸

197. The United States does not appeal the Panel's finding that zeroing was used in Review 9. Besides challenging the Panel's conclusion concerning the inclusion of Review 9 in the terms of reference, the only argument that the United States puts forward in relation to Review 9 is that it covered imports that entered the United States prior to the expiration of the reasonable period of time.⁴⁹⁹ We rejected this argument above.⁵⁰⁰ Thus, we uphold the Panel's finding that the application of zeroing in the context of Review 9 is inconsistent with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.⁵⁰¹

VI. Article II of the GATT 1994

A. *Introduction*

198. Finally, we turn to the United States' appeal of the Panel's findings that certain liquidation actions taken by the United States are inconsistent with Articles II:1(a) and II:1(b) of the GATT 1994.

199. The measures at issue consist of certain liquidation instructions issued by the USDOC and certain liquidation notices issued by Customs. The liquidation instructions are set forth in Panel

⁴⁹⁵Panel Report, paras. 7.168 and 8.1(b).

⁴⁹⁶See *supra*, Section IV.

⁴⁹⁷See *supra*, Section IV.

⁴⁹⁸Panel Report, para. 7.166.

⁴⁹⁹Review 9 covered imports for the period 1 May 2006 to 30 April 2007. The reasonable period of time in this case expired on 24 December 2007.

⁵⁰⁰See *supra*, para. 169.

⁵⁰¹Panel Report, paras. 7.168 and 8.1(b).

Exhibits JPN-40.A, and JPN-77 to JPN-80, and the liquidation notices are those in Panel Exhibits JPN-81 to JPN-87. As summarized in the previous Section⁵⁰², the United States has explained that liquidation instructions are issued by the USDOC after publication of the final results of a periodic review and instruct Customs to collect anti-dumping duties from importers at the rates determined in that periodic review. To effect liquidation, Customs issues a liquidation notice to importers setting out the amount of definitive duties to be paid on each entry. Depending on whether the amount to be collected exceeds the amount of the cash deposit that was paid at the time of importation, a request for additional payment or a refund cheque will also be sent to importers.

200. The liquidation actions challenged by Japan pursuant to Article II of the GATT 1994 relate to Reviews 1, 2, 7, and 8. These four Reviews (along with seven others) were found, in the original proceedings, to be inconsistent with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.⁵⁰³ Japan did not make claims pursuant to Article II of the GATT 1994 in the original proceedings.

B. *Article 21.5 Proceedings*

201. Before the Panel, Japan argued that certain liquidation actions relating to Reviews 1, 2, 7, and 8, taken by the United States after the expiration of the reasonable period of time, are inconsistent with Articles II:1(a) and II:1(b) of the GATT 1994, which require a Member to refrain from imposing duties or charges in excess of those set forth in its Schedule of Concessions. Japan explained that Article II:2(b) of the GATT 1994 permits a Member to impose anti-dumping duties in excess of these bound rates only if such duties are "applied consistently with the provisions of Article VI" of the GATT 1994, as well as the *Anti-Dumping Agreement*.⁵⁰⁴ Japan asserted that the liquidation actions relating to Reviews 1, 2, 7, and 8 are not justified under Article II:2(b) because these Reviews were found to be in violation of Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.⁵⁰⁵ Therefore, these liquidation actions are inconsistent with Articles II:1(a) and II:1(b) of the GATT 1994.

202. The United States requested that the Article 21.5 Panel exercise judicial economy, arguing that Japan's claims under Article II of the GATT 1994 were "entirely derivative" of Japan's claims that

⁵⁰²See *supra*, para. 171.

⁵⁰³Appellate Body Report, *US – Zeroing (Japan)*, para. 190(e).

⁵⁰⁴Panel Report, para. 7.195.

⁵⁰⁵Panel Report, para. 7.195.

the United States has acted inconsistently with the *Anti-Dumping Agreement* and the GATT 1994.⁵⁰⁶ The United States also asserted that Japan's claims were unfounded. According to the United States, "the liability for anti-dumping duties, that Japan claims resulted in collection of duties above the bound rate, was incurred prior to the expiry of the RPT, when the subject merchandise entered the United States and a cash deposit was paid."⁵⁰⁷ Moreover, the United States explained that "it was no longer collecting cash deposits pursuant to the administrative reviews that were subject to the DSB's recommendations and rulings."⁵⁰⁸

203. The Panel first examined whether Japan's claims pursuant to Article II of the GATT 1994 were properly within the scope of the Article 21.5 proceedings. It undertook this inquiry on its own initiative, noting that the United States had not raised a jurisdictional objection.⁵⁰⁹ The Panel considered the liquidation measures to be "sufficiently closely connected to the original dispute" and, as a consequence, found them to be "measures taken to comply" within the meaning of Article 21.5 of the DSU.⁵¹⁰ The Panel's reasoning was as follows:

... the relevant liquidation measures are the means by which the United States collects the final anti-dumping duties assessed in the administrative reviews at issue in the original proceeding. Any WTO-inconsistency in those administrative reviews regarding the calculation of the margin of dumping established in the original dispute is necessarily carried over into the subsequent liquidation measures.⁵¹¹

204. Next, the Panel considered the United States' argument that Japan's Article II claims were "entirely derivative" of Japan's claims under Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 and, therefore, that it was unnecessary for the Panel to make findings in connection with those claims. The Panel agreed with the United States that Japan's claims were "derivative" of its claims under Articles 2.4 and 9.3 of the *Anti-Dumping Agreement*, because "[o]nly if the underlying anti-dumping measure is WTO-inconsistent will the safe harbour provided for in

⁵⁰⁶Panel Report, paras. 7.196 and 7.201 (quoting United States' first written submission to the Panel, footnote 116 to para. 70).

⁵⁰⁷Panel Report, para. 7.197.

⁵⁰⁸Panel Report, para. 7.197.

⁵⁰⁹Panel Report, para. 7.199. The Panel found support for this course of action in the Appellate Body's statement in *US – 1916 Act* that "it is a widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative, and to satisfy itself that it has jurisdiction in any case that comes before it." (*Ibid.*, footnote 211 to para. 7.199 (quoting Appellate Body Report, *US – 1916 Act*, footnote 30 to para. 54))

⁵¹⁰Panel Report, para. 7.200. The Panel's finding that the liquidation actions are "measures taken to comply" within the meaning of Article 21.5 of the DSU has not been appealed by the United States.

⁵¹¹Panel Report, para. 7.200.

Article II:2(b) become unavailable."⁵¹² Nevertheless, the Panel decided that it was appropriate to rule on Japan's Article II claims, because they "raise an important point of contention between the parties regarding the right of the United States to continue liquidating entries after the expiry of the RPT on the basis of liquidation measures issued pursuant to administrative reviews that have already been found to be WTO-inconsistent."⁵¹³

205. Turning to the text of Article II of the GATT 1994, the Panel observed that, under this provision, "the United States is generally precluded from imposing on imports of ball bearings from Japan any customs duties or other charges in excess of those provided for in the United States Schedule of Concessions."⁵¹⁴ Pursuant to Article II:2(b), the United States may apply anti-dumping duties in excess of such bound rates provided that those duties are "applied consistently with the provisions of Article VI" of the GATT 1994, as implemented by the *Anti-Dumping Agreement*.⁵¹⁵ The Panel then noted that Japan had "submitted evidence demonstrating that the cumulative liquidation amounts set forth in a series of [Customs] liquidation notices, issued pursuant to particular USDOC liquidation instructions, are well in excess of the bound rates for ball-bearing products set forth in the United States' Schedule of Concessions", and that this evidence was not challenged by the United States.⁵¹⁶ The Panel proceeded to examine whether the "safe harbour" provided in Article II:2(b) applied to the liquidation actions challenged by Japan and found that it did not. The Panel stated:

In the present case, though, the safe harbour provided for in Article II:2(b) does not apply to the liquidation actions at issue in this proceeding, since those actions were taken pursuant to administrative reviews, and importer-specific assessment rates determined therein, that had been found to be WTO-inconsistent in the original proceeding. In particular, the Appellate Body found that, in determining importer-specific assessment rates in *inter alia* Reviews 1, 2, 7 and 8, USDOC disregarded the results of comparisons for transactions where the export price exceeded the contemporaneous normal value, in violation of Article[s] 2.4 and 9.3 of the [*Anti-Dumping*] *Agreement*, and Article VI:2 of the GATT 1994. We recall that, in cases where administrative reviews are conducted, the liquidation notices and instructions are based entirely on the determinations made by USDOC in such reviews. Since the underlying basis of the liquidation actions challenged by Japan was WTO-inconsistent, we conclude that anti-dumping duties collected pursuant to those liquidation actions were not "applied

⁵¹²Panel Report, para. 7.202. (footnote omitted)

⁵¹³Panel Report, para. 7.203.

⁵¹⁴Panel Report, para. 7.205.

⁵¹⁵Panel Report, para. 7.205.

⁵¹⁶Panel Report, para. 7.206. (footnotes omitted)

consistently with the provisions of Article VI" of the GATT 1994, as implemented by the [*Anti-Dumping*] *Agreement*.⁵¹⁷ (footnotes omitted)

Accordingly, the Panel found that the USDOC liquidation instructions and Customs liquidation notices challenged by Japan are inconsistent with Articles II:1(a) and II:1(b) of the GATT 1994.⁵¹⁸

C. *Claims and Arguments on Appeal*⁵¹⁹

206. The United States submits that the Panel erred in making a finding of violation of Articles II:1(a) and II:1(b) of the GATT 1994 with respect to the USDOC liquidation instructions and Customs liquidation notices. First, the United States argues that Japan's Article II claims are derivative of Japan's claims under Article 2.4 and 9.3 of the *Anti-Dumping Agreement* and, as such, that "[i]t was entirely unnecessary [for the Panel] to make any Article II findings".⁵²⁰ The United States further contends that, if the Appellate Body reverses the Panel's non-compliance findings in relation to Reviews 1, 2, 3, 7, and 8, then the Appellate Body must reverse the "derivative findings" that the United States violated Article II.⁵²¹ Secondly, the United States asserts that the relevant date by which compliance is to be assessed is the date of entry of the merchandise and, because this occurred before the expiration of the reasonable period of time, there can be no finding of non-conformity.⁵²² Thirdly, the United States submits that liquidation that occurred after the reasonable period of time cannot support a finding of non-compliance, because its delay was due entirely to domestic judicial review.⁵²³

207. Japan submits that the Panel properly found the United States to be in violation of Articles II:1(a) and II:1(b) of the GATT 1994. Japan first argues that the USDOC liquidation instructions and Customs liquidation notices are "measures taken to comply", and thus fall within the jurisdiction of the Panel.⁵²⁴ Next, Japan refutes the United States' argument that Japan's claims under Article II are "entirely derivative" of its claims under Articles 2.4 and 9.3 of the *Anti-Dumping*

⁵¹⁷Panel Report, para. 7.207.

⁵¹⁸Panel Report, paras. 7.208 and 8.1(d).

⁵¹⁹Korea is the only third participant that has addressed this aspect of the United States' appeal in its third participant's submission. It asserts that the Panel's analysis of Japan's Article II claims was "appropriate" and "necessary" to resolve the dispute, and submits that the Appellate Body should reject the United States' argument that Japan's claim is "derivative" of its other claims. (Korea's third participant's submission, paras. 42 and 44)

⁵²⁰United States' appellant's submission, para. 107. (footnote omitted)

⁵²¹United States' appellant's submission, para. 107.

⁵²²United States' appellant's submission, para. 108.

⁵²³United States' appellant's submission, para. 108.

⁵²⁴Japan's appellee's submission, paras. 498-506. Japan makes these submissions despite the United States not arguing that the liquidation actions are not measures taken to comply.

Agreement, stating that its Article II claims involve "different measures, and different claims"⁵²⁵, that is, the consistency of the USDOC liquidation instructions and Customs liquidation notices with Article II. Furthermore, Japan submits that the United States has failed to cite any provisions of the covered agreements that "shield[] measures that effect the collection or levy of import duties at WTO-inconsistent rates from scrutiny under Article II of the GATT 1994, if a related periodic review is challenged under separate WTO provisions."⁵²⁶

D. *Analysis*

208. Article II of the GATT 1994 provides, in relevant part:

Article II

Schedules of Concessions

1. (a) Each Member shall accord to the commerce of the other Members treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.
- (b) The products described in Part I of the Schedule relating to any Member, which are the products of territories of other Members, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.

...

⁵²⁵Japan's appellee's submission, paras. 517-521.

⁵²⁶Japan's appellee's submission, para. 522. Japan additionally asserts that the United States' final two arguments—that the relevant date for determining compliance is the date of entry of the merchandise, and that the duty collection measures would have occurred within the reasonable period of time but for domestic litigation—are jurisdictional in nature and are "explicitly directed towards [challenging] whether the Panel had a valid 'basis'—*i.e.*, authority—to rule upon the 'consistency' of the duty collection measures." (*Ibid.*, para. 530 (footnote omitted)) Japan argues that the Panel did have a valid legal basis to rule upon the consistency of the liquidation actions, because they are "measures taken to comply". (*Ibid.*, para. 534)

2. Nothing in this Article shall prevent any Member from imposing at any time on the importation of any product:

...

- (b) any anti-dumping or countervailing duty applied consistently with the provisions of Article VI;*

209. The United States has not challenged the Panel's interpretation of Article II and we need not engage in an extensive analysis of this provision. We note that, in *India – Additional Import Duties*, the Appellate Body examined the relationship between paragraphs 1(b) and 2 of Article II. Although that appeal focused on paragraph 2(a) of Article II, the Appellate Body's remarks provide general guidance on the relationship between paragraphs 1(b) and 2:

The chapeau of Article II:2, therefore, connects Articles II:1(b) and II:2(a) and indicates that the two provisions are inter-related. Article II:2(a), subject to the conditions stated therein, exempts a charge from the coverage of Article II:1(b). The participants agree that, if a charge satisfies the conditions of Article II:2(a), it would not result in a violation of Article II:1(b). Thus, we consider that, in the context of this case involving the application of duties that are claimed to correlate to certain internal taxes, Article II:1(b) and Article II:2(a) are closely related and must be interpreted together.⁵²⁷
(footnote omitted)

The Panel understood Article II:2(b) as providing a "safe harbour" to Article II:1 to the extent that the anti-dumping duties are applied consistently with Article VI of the GATT 1994 and the *Anti-Dumping Agreement*.⁵²⁸ Thus, the Panel's approach is coherent with the Appellate Body's interpretation of the relationship between Articles II:1(b) and II:2(a) quoted above.

210. On appeal, the United States does not contest that Japan's Article II claims were properly within the Panel's terms of reference, nor does it challenge the Panel's finding that the liquidation instructions and notices are "measures taken to comply" within the meaning of Article 21.5 of the DSU.⁵²⁹ The first ground of appeal raised by the United States is that it was "unnecessary" for the Panel to have made a finding under Article II because of the "derivative" nature of the claims.⁵³⁰ At the oral hearing, the United States clarified that it was not arguing that the Panel violated Article 11 of

⁵²⁷ Appellate Body Report, *India – Additional Import Duties*, para. 153.

⁵²⁸ Panel Report, para. 7.207.

⁵²⁹ Before the Panel, the United States did not dispute that Japan's Article II claims were within the Panel's terms of reference. (Panel Report, footnote 210 to para. 7.198) Nor did the United States raise a jurisdictional objection before the Panel to the inclusion of the relevant liquidation instructions and notices in the Article 21.5 proceedings. (*Ibid.*, para. 7.199)

⁵³⁰ United States' appellant's submission, para. 107.

the DSU or otherwise erred by not exercising judicial economy.⁵³¹ The United States explained that, instead, its argument is that the Appellate Body's reversal of the Panel's findings relating to Reviews 1, 2, 7, and 8 would necessarily require a reversal of the Panel's findings under Article II of the GATT 1994. Because we have upheld the Panel's findings relating to Reviews 1, 2, 7, and 8⁵³², the condition on which the United States' request is premised is not met.

211. The United States additionally reiterates two of the arguments that it makes in connection with the Panel's findings concerning Reviews 1 through 9, namely, that: (i) the relevant date for determining compliance is the date of entry of the subject imports⁵³³; and that (ii) liquidation would have occurred before the expiration of the reasonable period of time but for the domestic judicial proceedings.⁵³⁴ We explained above, in Section V, why we do not consider that these arguments are based on a correct interpretation of the DSU and the *Anti-Dumping Agreement*. Thus, these two arguments raised by the United States also do not provide a basis to disturb the Panel's findings concerning Article II of the GATT 1994.

212. For these reasons, we uphold the Panel's finding that the United States is in violation of Articles II:1(a) and II:1(b) of the GATT 1994 with respect to certain liquidation actions taken after the expiry of the reasonable period of time, namely, with respect to the USDOC liquidation instructions set forth in Panel Exhibits JPN-40.A, and JPN-77 to JPN-80, and the Customs liquidation notices set forth in Panel Exhibits JPN-81 to JPN-87.⁵³⁵

VII. Findings and Conclusions

213. For the reasons set out in this Report, the Appellate Body:

- (a) upholds the Panel's findings, in paragraphs 7.107, 7.114, and 7.116 of the Panel Report, that Review 9 was properly within the Panel's terms of reference;

⁵³¹We note that the Appellate Body has previously stated that, "[a]lthough the doctrine of judicial economy *allows* a panel to refrain from addressing claims beyond those necessary to resolve the dispute, it does not *compel* a panel to exercise such restraint". (Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 133 (original emphasis; footnote omitted))

⁵³²See *supra*, Section V.

⁵³³United States' appellant's submission, para. 108.

⁵³⁴United States' appellant's submission, para. 108. As noted above, the United States does not make this argument in relation to Review 9. (See *supra*, para. 197)

⁵³⁵Panel Report, paras. 7.208 and 8.1(d).

- (b) upholds the Panel's finding, in paragraphs 7.154 and 8.1(a) of the Panel Report, that the United States has failed to comply with the DSB's recommendations and rulings regarding the importer-specific assessment rates determined in Reviews 1, 2, 3, 7, and 8 that apply to entries covered by those Reviews that were, or will be, liquidated after the expiry of the reasonable period of time; and also upholds the Panel's finding, in paragraphs 7.154 and 8.1(a)(i) of the Panel Report, that the United States is in continued violation of its obligations under Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994;
- (c) upholds the Panel's finding, in paragraphs 7.168 and 8.1(b) of the Panel Report, that the United States has acted inconsistently with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 by applying zeroing in the context of Reviews 4, 5, 6, and 9; and
- (d) upholds the Panel's finding, in paragraphs 7.208 and 8.1(d) of the Panel Report, that the United States is in violation of Articles II:1(a) and II:1(b) of the GATT 1994 with respect to certain liquidation actions taken after the expiry of the reasonable period of time, namely, with respect to the USDOC liquidation instructions set forth in Panel Exhibits JPN-40.A, and JPN-77 to JPN-80, and the Customs liquidation notices set forth in Panel Exhibits JPN-81 to JPN-87.

214. To the extent that the United States has failed to comply with the recommendations and rulings of the DSB in the original dispute, the recommendations and rulings remain operative. The Appellate Body recommends that the DSB request the United States to bring into conformity with its obligations under the *Anti-Dumping Agreement* and the GATT 1994 the measures found in this Report and in the Panel Report to be inconsistent with those Agreements.

Signed in the original in Geneva this 31st day of July 2009 by:

Giorgio Sacerdoti
Presiding Member

Lilia R. Bautista
Member

Yuejiao Zhang
Member

ANNEX I

**WORLD TRADE
ORGANIZATION**

WT/DS322/32
22 May 2009

(09-2489)

Original: English

UNITED STATES – MEASURES RELATING TO ZEROING AND SUNSET REVIEWS

Recourse to Article 21.5 of the DSU by Japan

Notification of an Appeal by the United States
under Article 16.4 and Article 17 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU),
and under Rule 20(1) of the Working Procedures for Appellate Review

The following notification, dated 20 May 2009, from the Delegation of the United States, is being circulated to Members.

Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the Working Procedures for Appellate Review, the United States hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the report of the panel in *United States – Measures Relating to Zeroing and Sunset Reviews; Recourse to Article 21.5 of the DSU by Japan* (WT/DS322/RW) ("Panel Report") and certain legal interpretations developed by the panel.

1. The United States seeks review by the Appellate Body of the panel's finding that Review 9 was within the panel's terms of reference. In particular, the United States seeks review of the panel's findings that Japan's panel request identified Review 9 as a specific measure at issue as required by DSU Article 6.2 and that Review 9 was within the panel's terms of reference even though Review 9 was not in existence at the time of Japan's panel request.¹ These findings are in error and are based on erroneous findings on issues of law and related legal interpretations.

2. The United States seeks review by the Appellate Body of the panel's finding that the United States has failed to comply with the DSB's recommendations and rulings regarding importer-specific assessment rates determined in Reviews 1, 2, 3, 7, and 8 that apply to entries covered by those reviews that were, or will be, liquidated after the expiry of the reasonable period of time ("RPT").² The United States also seeks review of the panel's related legal conclusion that the United States is in continued violation of its obligations under Articles 2.4 and 9.3 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") and

¹See, e.g., Panel Report, paras. 7.100-7.116, 8.1(b).

²See, e.g., Panel Report, paras. 7.139-7.155, 8.1(a).

Article VI:2 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994").³ These conclusions are in error and are based on erroneous findings on issues of law and related legal interpretations.

3. The United States seeks review by the Appellate Body of the panel's legal conclusion that the United States is in violation of Articles II:1(a) and II:1(b) of the GATT 1994 with respect to certain liquidation actions taken after the expiry of the RPT, namely with respect to liquidation instructions of the U.S. Department of Commerce set forth in Exhibits JPN-40A and JPN-77 to JPN-80 and the U.S. Customs and Border Protection liquidation notices set forth in Exhibits JPN-81 to JPN-87.⁴ This conclusion is in error and is based on erroneous findings on issues of law and related legal interpretations.

4. The United States seeks review by the Appellate Body of the panel's legal conclusions with respect to Reviews 4, 5, and 6, as found at paras. 7.74 -7.83, 7.160-7.168, and 8.1(b) of the Panel Report. These conclusions are in error and are based on erroneous findings on issues of law and related legal interpretations.⁵

³See, e.g., Panel Report, paras. 7.154, 8.1(a)(i).

⁴See, e.g., Panel Report, paras. 7.204-7.208, 8.1(d).

⁵Aside from the fact that Review 9 is not within the terms of reference, the panel's conclusions of law in paragraphs 7.160-7.168, and 8.1(b) with respect to Review 9 are also in error and are based on erroneous findings on issues of law and related legal interpretations.

ANNEX II

**ORGANISATION MONDIALE
DU COMMERCE**

**ORGANIZACIÓN MUNDIAL
DEL COMERCIO**

WORLD TRADE ORGANIZATION

APPELLATE BODY

United States – Measures Relating to Zeroing and Sunset Reviews

Recourse to Article 21.5 of the DSU by Japan

AB-2009-2

Procedural Ruling

1. On 29 May 2009, the Appellate Body Division hearing this appeal received separate requests from Japan and the United States to allow observation by the public of the oral hearing in the above appellate proceedings. The participants argued that nothing in the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU") or the *Working Procedures for Appellate Review* (the "*Working Procedures*") precludes the Appellate Body from authorizing public observation of the oral hearing. The participants also relied on the rulings by the Appellate Body in four previous proceedings authorizing public observation of the oral hearing.¹ Both participants consider that public observation of the oral hearings in past cases has strengthened the credibility and legitimacy of the WTO dispute settlement system, and has allowed WTO Members to follow disputes more closely.

2. Japan explained that its request was being made on the understanding that any information that it has designated as confidential in the documents it has filed in the compliance proceedings would be adequately protected in the course of the hearing. The United States indicated that it did not anticipate referring to any information designated as confidential in its statements and responses to questions at the oral hearing. Both participants considered that their proposed modality² for the observation of the hearing by the public, which accords with the past practice of the Appellate Body, would allow for the protection of the information that Japan has designated as confidential.

3. On 2 June 2009, we invited the third participants to comment in writing on the requests of the participants. We received comments on 8 June 2009 from Korea, and on 9 June 2009 from China, the European Communities, Hong Kong, China, Mexico, Norway, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, and Thailand. The European Communities, Norway, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu expressed their support for the requests of the participants. China, Hong Kong, China, Mexico, and Thailand expressed the view that the provisions of the DSU do not allow public hearings at the appellate stage. According to these third participants, the oral hearing forms part of the proceedings of the Appellate Body and, therefore,

¹These proceedings are: *US – Continued Suspension* and *Canada – Continued Suspension*; *EC – Bananas III (Article 21.5 – Ecuador II)* and *EC – Bananas III (Article 21.5 – US)*; *US – Continued Zeroing*; and *US – Zeroing (EC) (Article 21.5 – EC)*.

²Japan and the United States proposed simultaneous closed-circuit television broadcasting, with the transmission being turned off if the participants find it necessary to discuss issues that involve confidential information that Japan has submitted in the course of these compliance proceedings.

is subject to the requirement of Article 17.10 of the DSU that "[t]he proceedings of the Appellate Body shall be confidential." They requested the Appellate Body to treat their oral submissions as confidential should it decide to allow public observation of the oral hearing. Although Korea did not object to the Appellate Body allowing public observation of the portions of the participants' and third participants' oral submissions that they wished to make public, it noted its view that the DSU does not contain an explicit provision allowing public observation. Korea requested the Appellate Body to treat its oral submissions as confidential.

4. Similar requests to allow public observation of the oral hearing have been made in previous appeals.³ In acceding to these requests, the Appellate Body relied on the same reasoning, which was first developed in *US – Continued Suspension* and *Canada – Continued Suspension*. We note the following main aspects of the reasoning set out in the Procedural Rulings issued in those proceedings:

- (a) Article 17.10 must be read in context, particularly in relation to Article 18.2 of the DSU. The second sentence of Article 18.2 expressly provides that "[n]othing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public". Thus, under Article 18.2, the parties may decide to forego confidentiality protection in respect of their statements of position. The third sentence of Article 18.2 states that "Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential." This provision would be redundant if Article 17.10 were interpreted to require absolute confidentiality in respect of all elements of appellate proceedings. Accordingly, Article 18.2 of the DSU provides contextual support for the view that the confidentiality rule in Article 17.10 is not absolute, and has its limits.
- (b) The confidentiality requirement in Article 17.10 operates in a relational manner. There are different sets of relationships that are implicated in appellate proceedings, including: (i) a relationship between the participants and the Appellate Body; and (ii) a relationship between the third participants and the Appellate Body. The requirement that the proceedings of the Appellate Body are confidential affords protection to these separate relationships and is intended to safeguard the interests of the participants and third participants and the adjudicative function of the Appellate Body, so as to foster the system of dispute settlement under conditions of fairness, impartiality, independence and integrity. In this case, the participants have requested authorization to forego confidentiality protection for their communications with the Appellate Body at the oral hearing. The requests of the participants do not extend to any communications, nor touch upon the relationship, between the third participants and the Appellate Body. The right to confidentiality of third participants vis-à-vis the Appellate Body is not implicated by these requests.
- (c) The DSU does not specifically provide for an oral hearing at the appellate stage. The oral hearing was instituted by the Appellate Body in its *Working Procedures*. Pursuant to Rule 27 of the *Working Procedures*, the Appellate Body has the power to exercise control over the conduct of the oral hearing, including authorizing the lifting of confidentiality at the request of the participants as long as this does not adversely affect the rights and interests of the third participants or the integrity of the appellate process. Even though Article 17.10 also applies to the relationship between third participants and the Appellate Body, the third participants cannot invoke Article 17.10 as it applies to their relationship with the Appellate Body, so as to bar

³See *supra*, footnote 1.

the lifting of confidentiality protection in the relationship between the participants and the Appellate Body. Likewise, authorizing the participants' requests to forego confidentiality, does not affect the rights of third participants to preserve the confidentiality of their communications with the Appellate Body.

- (d) Although the powers of the Appellate Body are themselves circumscribed in that certain aspects of confidentiality are incapable of derogation—even by the Appellate Body—where derogation may undermine the exercise and integrity of the Appellate Body's adjudicative function⁴ such concerns do not arise in a situation where, following requests of the participants, the Appellate Body authorizes the lifting of the confidentiality of the participants' statements at the oral hearing.
- (e) The Appellate Body has fostered the active participation of third parties in the appellate process in drawing up the *Working Procedures* and in appeal practice. However, the rights of third participants are distinct from those of the main participants to a dispute.

5. We note that public observation in these previous cases operated smoothly and that the rights of third participants who did not wish to have their oral statements made subject to public observation were fully protected.

6. The requests for public observation of the oral hearing in this dispute have been made by the two participants, Japan and the United States. As explained above, the Appellate Body has the power to authorize requests by the participants to lift confidentiality, provided that this does not affect the confidentiality in the relationship between the third participants and the Appellate Body, or impair the integrity of the appellate process.

7. Japan stated that its request for an open hearing does not and should not be deemed to forego confidentiality protection with respect to information it has designated as confidential during the compliance proceedings in this dispute. Japan noted, in this respect, that the third sentence of Article 18.2 of the DSU explicitly provides that "Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential." Japan therefore proposed that the Division hold an open hearing by means of simultaneous closed-circuit television broadcast, with the transmission being turned off should the Division or either of the participants find it necessary to address issues that involve confidential information that Japan has submitted in the course of these compliance proceedings. The United States also considered that this modality would allow for the concerns raised by Japan to be addressed adequately. We agree that this is an adequate way to protect confidential information in the context of a hearing that is open to public observation.

8. For these reasons, the Appellate Body Division hearing this appeal authorizes the public observation of the oral hearing in these proceedings on the terms set out below. Accordingly, pursuant to Rule 16(1) of the *Working Procedures*, we adopt the following additional procedures for the purposes of this appeal:

- (a) The oral hearing will be open to public observation by means of simultaneous closed-circuit television. The closed-circuit television signal will be shown in a separate

⁴For example, the situation contemplated in the second sentence of Article 17.10, which provides that "[t]he reports of the Appellate Body shall be drafted without the presence of the parties to the dispute and in the light of the information provided and the statements made".

room to which duly registered delegates of WTO Members and members of the general public will have access.

- (b) Oral statements and responses to questions by the third participants that have indicated their wish to maintain the confidentiality of their submissions, as well as information that Japan has designated as confidential, will not be subject to public observation.
- (c) An appropriate number of seats will be reserved for delegates of WTO Members in the room where the closed-circuit broadcast will be shown.
- (d) Notice of the oral hearing will be provided to the general public through the WTO website. WTO delegates and members of the general public wishing to observe the oral hearing will be required to register in advance with the WTO Secretariat.
- (e) Should practical considerations not allow simultaneous broadcast of the oral hearing, deferred showing of the video recording will be used as an alternative.

Geneva, 11 June 2009
