ANNEX E

ORAL STATEMENTS OF THE PARTIES AND THIRD PARTIES OR EXECUTIVE SUMMARIES THEREOF AT THE SUBSTANTIVE MEETING OF THE PANEL

ANNEX E-1

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF JAPAN

11 November 2008

I. THE PANEL HAS JURISDICTION OVER THE FOUR SUBSEQUENT PERIODIC REVIEWS CHALLENGED IN THESE PROCEEDINGS

1. Japan has demonstrated that four subsequent periodic reviews – reviews 4, 5, 6 and 9[1] – constitute "measures taken to comply", under Article 21.5 of the DSU.

A. THE FOUR SUBSEQUENT PERIODIC REVIEWS ARE DECLARED MEASURES TAKEN TO COMPLY

2. The United States argues that the periodic reviews at issue in the original proceedings were "withdrawn",[2] "superceded",[3] "eliminated",[4] "replaced"[5] and "removed"[6] by the subsequent periodic reviews challenged by Japan in these compliance proceedings. Significantly, the United States asserts that, with the adoption of the subsequent reviews, it "has *taken measures to comply with [the DSB's] recommendations and rulings*".[7] It adds that, with the subsequent reviews, "compliance was accomplished".[8]

3. The DSU allows the United States to assert the subsequent periodic reviews as vehicles for, and evidence of, its implementation of the DSB's recommendations and rulings. But the DSU also requires this Panel to verify the US assertions, by assessing whether those same reviews actually accomplish compliance in a WTO-consistent fashion.

B. THE UNITED STATES' INTENT TO COMPLY IS NOT DECISIVE UNDER ARTICLE 21.5 OF THE DSU

1. Subsequent periodic reviews pre-dating adoption of the DSB's recommendations and rulings can be measures "taken to comply"

4. The United States declares that the four subsequent periodic reviews are "measures taken to comply". Specifically, it asserts that the subsequent reviews secure withdrawal of the original, WTO-inconsistent reviews, accomplish compliance with the DSB's recommendations and rulings.

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[1] These reviews are the 03/04, 04/05, 05/06 and 06/07 periodic reviews for ball bearings. Japan relies on the numbering of the periodic reviews in Japan's First Written Submission, para. 53. Review 9 is the 06/07 review for ball bearings.

[2] United States' Second Written Submission, para. 28; United States' First Written Submission, paras. 39, 52, 54, 58, 65, 66, 67.

[3] United States' First Written Submission, paras. 3, 44.

[4] United States' Second Written Submission, para. 8; United States' First Written Submission, paras. 44, 54.

[5] United States' Second Written Submission, para. 18; United States' First Written Submission, para. 44.

[6] United States' Second Written Submission, paras. 18, 26.

[7] United States' First Written Submission, para. 51.

[8] United States' Second Written Submission, para. 18; United States' First Written Submission, paras. 52, 67.

5. Nonetheless, the United States argues that since the subsequent periodic reviews only accomplished compliance *accidentally*, rather than *purposefully*, they cannot be considered "measures taken to comply".

6. Although the United States argues that the *timing* of a measure constitutes an "objective" factor under Article 21.5, the words it uses show that timing is relied on to demonstrate an absence of "intent" to comply, which then excludes the measures from review by this Panel.[9] The date on which the recommendations and rulings were adopted may be an "objective" marker. However, the United States offers that marker to argue that compliance could not have been the *intended objective* of measures taken before that date.

7. The distinction drawn by the United States between incidental and purposeful compliance is without foundation in the DSU. The Appellate Body and compliance panels have insisted that, for a measure to be "taken to comply", it need not be taken for the *purpose* or *objective* of complying with the DSB's recommendations and rulings.

8. *First*, the Appellate Body has stated that a measure need not "move in the direction of . . . compliance" to be considered a measure "taken to comply".[10]

9. *Second*, the Appellate Body has stated that compliance panels are not limited to reviewing measures that "*have the objective of achieving*[] compliance".[11] Nor are compliance panels limited to review of measures that were "initiated *in order to* comply with the recommendations and rulings of the DSB".[12] Echoing this view, the compliance panel in *US – Gambling (21.5)* emphasized that it did not "exclude any potential 'measures taken to comply' due to the *purpose* for which they may have been taken".[13]

10. Accordingly, a measure that complies by accident – that is, a measure taken neither "for the purpose of" achieving compliance,[14] nor "in view"[15] or "consideration"[16] of the DSB's recommendations and rulings – can fall within the scope of Article 21.5. Equally, because intent is not decisive, the fact that the measure was taken before the DSB's recommendations and rulings is also not decisive.

11. This view is reinforced by the Appellate Body's emphasis of the need for "an examination of the *effects* of a measure" alleged to be "taken to comply".[17] This focus on the *effects* of a measure, as distinct from the implementing Member's *intent*, is confirmed by the text of Articles 3.7 and 19.1 of the DSU. The United States recognizes that the timing of a measure is only one "element" in determining whether it is "taken to comply".[18] Indeed, the United States holds out the Zeroing Notice,[19] which withdraws the zeroing procedures in W-to-W comparisons in investigations, is a "measure taken to comply", *even though it was taken before adoption of the DSB's recommendations and rulings*.

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[9] United States' Second Written Submission, para. 9.

[10] Appellate Body Report, *US – Softwood Lumber IV (21.5)*, para. 67.

[11] Appellate Body Report, *US – Softwood Lumber IV (21.5)*, para. 67.

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

[13] Panel Report, *US – Gambling (21.5)*, para. 6.24.

[14] United States' Second Written Submission, para. 10 (emphasis added). *See also Id*., para. 16. *See also* United States' First Written Submission, para. 33.

[15] United States' Second Written Submission, para. 15.

[16] United States' First Written Submission, para. 39.

[17] Appellate Body Report, *US – Softwood Lumber IV (21.5)*, para. 67 (emphasis added).

[18] United States' Second Written Submission, para. 14.

[19] Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 Fed. Reg. 77722, 77723 (Dep't of Comm., 27 December 2006) (emphasis added) (Exhibit JPN-35).

2. Subsequent periodic reviews post-dating adoption of the DSB's recommendations and rulings are measures "taken to comply" even if not proximate to the date of declared measures taken to comply or the date of DSB adoption

12. The United States' principal arguments concerning timing apply only to reviews 4 and 5, since reviews 6 and 9 were taken *after* adoption of the DSB's recommendations and rulings. Nonetheless, the United States also argues that timing disqualifies reviews 6 and 9 from consideration as "measures taken to comply", because they "did not occur around the same time as US withdrawal of" the original reviews, and "did not closely correspond to the expiration of the RPT".[20]

13. The former consideration is simply not relevant. On the second argument, nothing in Article 21.5 requires that, to be considered as "taken to comply", a measure must "closely correspond to the expiration of the RPT". The United States has itself successfully argued, in recent compliance proceedings in *EC – Bananas III*, that measures adopted nearly *seven years* after the end of the RPT are "measures taken to comply".[21] Review 6 was adopted on 12 October 2007,[22] just two-and-a-half months before the end of the RPT on 24 December 2007. The determination date for review 6 did "closely correspond to" the end of the RPT.

C. THE FOUR SUBSEQUENT PERIODIC REVIEWS ENJOY CLOSE SUBSTANTIVE CONNECTIONS TO THE RECOMMENDATIONS AND RULINGS OF THE DSB

14. Even if the Panel finds that the four subsequent periodic reviews are not effectively *declared* measures taken to comply, Japan has demonstrated that they are measures taken to comply by virtue of the *close substantive connections* they share with the DSB's recommendations and rulings.[23]

15. Specifically, Japan has noted that the subsequent reviews resulted from the *same type of USDOC anti-dumping proceedings* that were at issue in the original proceedings. Moreover, they were conducted pursuant to the *same anti-dumping order* concerning ball bearings. As such, they all concern the *same subject product*, the *same exporting country* and, additionally, concern determinations made with respect to exports by the *same companies*.[24]

16. Moreover, the United States characterizes the subsequent periodic reviews as measures that "withdraw", "supercede", "eliminate", "replace" and "remove" previous ball bearings reviews, in two senses.[25] Each subsequent review establishes a cash deposit rate that replaces the cash deposit rate from the previous review; and each subsequent review determines the importer-specific assessment rate for entries initially subjected to the cash deposit rate from previous reviews.[26]

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[20] United States' Second Written Submission, para. 23; United States' First Written Submission, para. 39.

[21] *See* WT/DS27/15 (RPT ended on 1 January 1999); Panel Report, *EC – Bananas III (Article 21.5 – US)*, para. 8.4 (Measure considered by the panel to be a measure "taken to comply" was adopted on 29 November 2005). *See also* Panel Report, *US – FSC (21.5 II)*, paras. 1.1, 7.50 (Implementation period ended on 1 November 2000, while the Jobs Act, considered by the panel and the Appellate Body to be a measure "taken to comply", was adopted nearly four years later, on 22 October 2004).

[22] Exhibit JPN-44.

[23] Appellate Body Report, *US – Softwood Lumber IV (21.5)*, para. 77 (emphasis added) (following discussion, at paras. 73-76, of the approach taken by the panels in *Australia – Salmon (21.5)* and *Australia – Leather (21.5)*). *See* Japan's First Written Submission, paras. 66-76.

[24] Japan's First Written Submission, paras. 90-93.

[25] *See* footnotes 2-6, above.

[26] Japan's First Written Submission, para. 91.

17. The subsequent periodic reviews are, therefore, part of a chain of closely-connected measures that succeed each other year after year.[27]

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

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

18. The Appellate Body concluded "that the 'zeroing procedures' under different comparison methodologies, and in different stages of anti-dumping proceedings, do not correspond to separate rules or norms, but simply reflect different manifestations of a single rule or norm".[28] To capture the WTO-inconsistency of this "single rule or norm" in its various "manifestations", the DSB made four separate rulings regarding the zeroing procedures, addressing the application of those procedures in four different settings.[29]

19. The United States narrowed the scope of application of the zeroing procedures to exclude weighted average-to-weighted average ("W-to-W") comparisons in original investigations. The United States maintains the zeroing procedures in the three other "manifestations" or situations.

20. In assessing the evidence, Japan recalls the Appellate Body's admonition that "Article 21.5 proceedings do not occur in isolation from the original proceedings, but that both proceedings form part of a continuum of events."[30] In light of this "continuum of events", the Appellate Body observed that "doubts could arise about the objective nature of an Article 21.5 panel's assessment if, on a specific issue, that panel were to deviate from the reasoning in the original panel report in the absence of any change in the underlying evidence."[31]

21. There is no relevant change to the underlying evidence to justify a conclusion that the United States has eliminated the zeroing procedures in the three remaining "manifestations" subject to the DSB's recommendations and rulings.

22. Finally, even if the Panel were to conclude that the original zeroing procedures have been withdrawn through a narrowing of their scope of application, the evidence shows that they were simultaneously replaced by new zeroing procedures, with exactly the same precise content, applying in all situations addressed by the DSB's recommendations and rulings, except W-to-W comparisons in original investigations.

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[27] The panel in *US – Zeroing II (EC)* agreed that periodic reviews in such a chain were part of "the same subject matter" and "the same dispute".(Panel Report, *US-Zeroing II(EC)*, para. 7.28.)

[28] Appellate Body Report, *US – Zeroing (Japan)*, para. 88.

[29] Japan's Second Written Submission, para. 66.

[30] Appellate Body Report, *Chile – Price Band system (21.5)*, para. 136, *citing* Appellate body Report, *Mexico Corn Syrup (21.5)*, para. 121.

[31] Appellate Body Report, *US – Softwood Lumber VI (21.5)*, para. 103.

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

1. The United States Must "Bring" the Importer-Specific Assessment Rates "Into Conformity" with its WTO Obligations

23. With respect to the five original periodic reviews, the disagreement between the Parties concerns the US failure to bring the importer-specific assessment rates into conformity with its WTO obligations. The United States argues that it need not bring these rates into conformity, because such action would impose a "retrospective" remedy given that the rates were established in the past, and relate to past entries.[32] Japan, in contrast, contends that modifying the rates involves "prospective" implementation, because it affects future US actions taken pursuant to the original reviews.

24. Neither the DSU nor the *Anti-Dumping Agreement* uses these words to describe a Member's implementation requirements. Instead, the Panel must interpret and apply the treaty words to which the Members agreed. Consistent with Articles 19.1, 22.1, 22.2 and 22.8 of the DSU, the DSB recommended that the United States "*bring* [the five periodic reviews] *into conformity*" with its WTO obligations. The DSB's recommendations and rulings apply to the importer-specific assessment rates because the Appellate Body expressly found that these rates were WTO-inconsistent.[33]

25. The ordinary meaning of the verb "bring" is "to cause to come *from, into, out of, to,* etc. a certain state or condition" and "to cause to become".[34] This verb, therefore, connotes *transformative action* by the implementing Member that changes the "state" of a measure. The immediate context of the verb in the DSU shows that the action must transform the measure into a state of "conformity" with WTO law. This meaning is confirmed by the Appellate Body's statement that an implementing Member must take transformative action "by modifying or replacing [the WTO-inconsistent measure] with a revised measure".[35]

2. The United States' Arguments that Implementation Would Be Retrospective Are Misplaced

26. The United States rejects Japan's view that implementation is "prospective" on the grounds that Japan's argument would require Commerce to "*re*calculate the final liability" in the five original reviews.[36] The United States' objections to the "*re*"-vision of WTO-inconsistent measures would, again, eviscerate WTO dispute settlement. Simply by tagging the "*re*-"vision of a measure as "retrospective" implementation, Members could: maintain and enforce WTO-inconsistent measures after the end of the RPT; continue to nullify and impair benefits; and perpetuate an imbalance in the Members' rights and obligations.

3. Implementation Action Is Required When Measures Continue to Produce Legal Effects

27. In cases where the WTO-inconsistent measure continues to produce WTO-inconsistent legal effects, panels require that the measure be brought into conformity.

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[32] *See, e.g.*, United States' First Written Submission, paras. 53 and 58.

[33] Appellate Body Report, *US – Zeroing (Japan)*, para. 175.

[34] Definition of "to bring", *The Oxford English Dictionary*, J.A. Simpson and E.S.C. Weiner (eds.) (Clarendon Press, 1989, 2nd ed.), Volume II, page 555 (1st column, numbered 8) (original italics). Exhibit JPN-69.

[35] Appellate Body Report, *US – OCTG from Argentina (21.5)*, para. 173 (footnote 367) (emphasis added).

[36] United States' Second Written Submission, para. 47.

28. Japan has already referred to *EC – Commercial Vessels*, in which the panel insisted that the EC was obliged to take action to implement the DSB's recommendations and rulings with respect to WTO-inconsistent measures "to the extent that [they] *continue to be operational*".[37] A similar conclusion was reached in *India – Autos*. [38]

29. The panel indicated that the duty to bring a WTO-inconsistent measures into conformity does *not* arise if past measures "have *ceased to have an effect*".[39] It noted, though, that the past "as applied" measures at issue "remain[ed] binding and enforceable",[40] and concluded that the measures should be brought into conformity with the relevant agreement.[41]

30. There are very close parallels between the five periodic reviews at issue in these proceedings and the measures in *India – Autos*. In both disputes, the legal conclusion is the same. In *India – Autos*, India had to bring the "as applied" measures into conformity with its WTO obligations to ensure that the future enforcement of the measures was WTO-consistent. In these proceedings, because the WTO-inconsistent importer-specific assessment rates continue to be binding, enforceable and produce legal effects, the respondent must bring them into conformity.

4. The United States Continues to Nullify or Impair Benefits Through the Collection of Excessive Anti-Dumping Duties After the End of the RPT

31. In these proceedings, the five original periodic reviews were found to be inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.

32. As the Appellate Body put it, these provisions "ensure that the total amount of anti-dumping duties *collected* on the entries of a product from a given exporter" does not exceed the exporter's margin of dumping.[42] It also said that this margin of dumping "operates as a *ceiling* for the total amount of anti-dumping duties that can be *levied* on the entries of the subject product".[43] The Appellate Body's interpretation is confirmed by the title of Article 9, "*Imposition and Collection of Anti-Dumping Duties*".

33. The United States expressly states that it agrees with this interpretation:

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[37] Panel Report, *EC – Commercial Vessels*, para. 8.4 (emphasis added).

[38] Panel Report, *India – Autos*, paras. 8.4 and 8.5.(In that dispute, India subjected the importation of automotive products to the fulfilment of certain WTO-inconsistent conditions. Among others, importation was conditioned on an agreement by importers to export a minimum amount of production. India withdrew the original measures such that *new* imports were no longer subject to the WTO-inconsistent restrictions. India argued that there was, therefore, no duty to implement, because the measures had been withdrawn, and *new* entries were not subject to restrictions.)

[39] Panel Report, *India – Autos*, para. 8.26.

[40] Panel Report, *India – Autos*, para. 7.235.

[41] Panel Report, *India – Autos*, para. 8.58("The essential issue here is that the [restrictive condition] foreseen in [the past measures], which was found to be inconsistent, continues to be binding and to produce effects …. This issue does not relate to whether any *past execution of* [the past measures] might be required to be "undone" or otherwise called into question, but merely to establishing whether the measure previously found to be in violation of two of the GATT provisions continues to have an existence today, so that the Panel would be justified in making a recommendation that this measure be brought into conformity with the relevant agreement as of today.") (underlining added).

[42] Appellate Body Report, *US – Zeroing (EC)*, para. 130, and Appellate Body Report, *US – Zeroing (Japan)*, para. 155.

[43] Appellate Body Report, *US – Zeroing (EC)*, para. 130, and Appellate Body Report, *US – Zeroing (Japan)*, para. 155 (underlining added).

> The United States does not dispute that Article 9.3 of the AD Agreement obliges Members to ensure that *the amount of antidumping duty collected not exceed the margin of dumping* established under Article 2 of the AD Agreement.[44]

34. Pursuant to this interpretation, irrespective of the date a periodic review is completed, Article 9.3 and Article VI:2 discipline a Member's actions in *collecting* duties. Moreover, the benefits that accrue to Japan under this provision concern the amount of the anti-dumping duties actually collected.

35. In these proceedings, the importer-specific assessment rates continue to be binding and enforceable, and continue to produce legal effects, after the end of the RPT. After that date, the United States will take enforcement actions to collect anti-dumping duties in excess of the margin of dumping. By collecting excessive duties, the United States violates Article 9.3 and Article VI:2, and nullifies or impairs benefits.

36. Furthermore, the US enforcement actions are distinct measures that also nullify or impair benefits under Article II of the GATT because, through these measures, the United States imposes duties at rates in excess of its tariff bindings.

5. Actions by US Courts Do Not Excuse the United States From the Requirement to Bring the Five Original Periodic Reviews into Conformity

37. The United States argues that the importer-specific assessment rates in the five original periodic reviews need not be "brought into conformity", even though they continue to produce legal effects, because enforcement was delayed until after the end of the RPT due to injunctions issued in domestic litigation.[45]

38. Japan disagrees. In fact, all Members must provide judicial review of anti-dumping determinations under Article 13 of the *Anti-Dumping Agreement*. Moreover, the *Agreement* specifically envisions the possibility that judicial proceedings required by Article 13 may delay enforcement of a periodic review.[46]

39. The status of a measure under domestic law – including the "existence of domestic litigation" affecting that measure – is a fact.[47]

40. *Brazil – Tyres* provides an illustration.[48]

41. The court injunctions do not involve acts by private enterprises. Instead, they are acts of the United States' own courts, attributable to the United States under WTO law. As noted by the Appellate Body in *US – Shrimp*, the United States "bears responsibility for acts of all its departments of government, *including its judiciary*".[49]

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[44] United States' Second Written Submission, para. 64.

[45] United States' Second Written Submission, paras. 51-56.

[46] *See Anti-Dumping Agreement*, footnote 20, which refers to the possibility of delays, as a result of domestic judicial proceedings, with respect to all the deadlines in Article 9.3.

[47] United States' Second Written Submission, para. 51.

[48] In that dispute, the enforcement of the measure at issue was partially suspended pursuant to court injunctions obtained by private parties in domestic courts. The panel and the Appellate Body held that Brazil's measure could not benefit from an exception under Article XX of the GATT 1994 *because of the court injunctions*.(Appellate Body Report, *Brazil-Tyres*, para.252.) The fact that Brazil's partial suspension of the measure "arise[s] from court rulings does not exonerate Brazil from its obligation to comply with the requirements of Article XX".(Panel Report, *Brazil-Tyres*, para.7.305.)

[49] Appellate Body Report, *US – Shrimp*, para. 173 (emphasis added). *See also* Panel Report, *Brazil – Tyres*, para. 7.305, *citing* Article 4(1) of the *ILC Articles* (Exhibit JPN-65).

42. There is nothing frivolous about such litigation[50], nor about delaying the collection of duties pending the outcome of that litigation. Interested parties incurred considerable expense in pursuing these judicial proceedings.

6. The ILC Articles on State Responsibility Confirm Japan's Position

43. Japan uses the *ILC Articles* to inform its interpretation of Article 19.1 of the DSU, which requires the United States to "bring the measure[s] into conformity" with its WTO obligations by the end of the RPT.[51]

44. The *ILC Articles* confirm that implementation action to "bring the measure[s] into conformity", with *prospective effect* from the end of the RPT, was essential to prevent *post-RPT conduct*, under the original measures, from giving rise to WTO-inconsistencies that *occurred newly or continued after the end of the RPT*. As a result, the *Articles* confirm that, absent prospective implementation action, the original reviews have ongoing legal effects after the end of the RPT, resulting in violations of WTO law at that time, with continued nullification or impairment of benefits.

45. The Appellate Body, panels and arbitrators have frequently relied on the *ILC Articles* to support the interpretation of the covered agreements. In these decisions, the *ILC Articles* have been cited as "rules of general international law",[52] and as reflective of "customary international law".[53] Arbitrators have also described the ILC's work on State responsibility as "based on relevant State practice as well as on judicial decisions and doctrinal writings, which constitute recognized sources of international law".[54]

46. Articles 13, 14 and 15 of the *ILC Articles* are, "rules of international law" under Article 31(3)(c) of the *Vienna Convention* that are "relevant" in interpreting Article 19.1 of the DSU. Articles 13, 14 and 15 of the *ILC Articles* could also be used to inform the "ordinary meaning" of Article 19.1 under Article 31(1) of the *Convention*, and may even be more pertinent than dictionaries.[55]

7. Japan's Interpretation Places All Duty Collection Systems on an Equal Footing

47. Whenever a WTO-inconsistent measure continues to produce legal effects after the end of the RPT, it must be brought into conformity with WTO law. This same obligation applies to all Members, irrespective of the duty collection system they operate.

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

[51] Japan's Second Written Submission, paras. 148-170.

[52] Appellate Body Report, *US – Cotton Yarn*, para. 120, and Panel Report, *Australia – Salmon (21.5)*, para. 7.12, footnote 146

[53] Appellate Body Report, *US – Line Pipe*, para. 259 ("Although Article 51 is part of the International Law Commission's Draft Articles, which do not constitute a binding legal instrument as such, this provision sets out a *recognized principle of customary international law*.") ; Panel Report, *US – Gambling*, para. 6.128; and Panel Report, *Canada – Dairy*, para. 7.77, footnote 427. *See also* Panel Report, *Korea – Government Procurement*, para. 7.96. ("Customary international law….applies to the extent that the WTO treaty agreements do not 'contract out' from it. …to the extent there is no conflict or inconsistency, or an expression in a covered WTO agreement that implies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO.")

[54] Award of the Arbitrator, *US – FSC (22.6)*, para. 5.59, footnote 68; Award of the Arbitrator, *Brazil – Aircraft (22.6)*, para. 3.44.

[55] *See* Appellate Body Report, *US – Shrimp*, paras. 130-131, where international law norms were used in a general way to inform ordinary meaning, with reference to the *Vienna Convention*.

8. The United States' Arguments Reduce Article 9.3 of the *Anti-Dumping Agreement* to Inutility

48. The United States contends that effective implementation under Article 9.3 is ensured because the *cash deposit rate* established in the original reviews has been withdrawn by the cash deposit rate established in subsequent periodic reviews.[56] This argument is flawed for two reasons.

49. *First*, the subsequent reviews – by which the United States says "compliance was accomplished"[57] – are WTO-inconsistent for exactly the same reasons as the original reviews.

50. *Second*, and much more importantly, the United States argues that the importer-specific assessment rates need *never* be revised because they do not apply to new entries.

51. In any event, implementation action with respect to initial cash deposit rates can *never* secure compliance with the obligations in Article 9.3 regarding *the amount of duties finally collected* (unless no periodic review occurs). Even if a WTO-consistent cash deposit rate were to apply at the time of importation, much higher duties could be subsequently collected on the basis of a WTO-inconsistent importer-specific assessment rate.

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

52. In relation to the substance of Japan's claims that four subsequent periodic reviews are inconsistent with the *Anti-Dumping Agreement* and the GATT 1994, we note only that the United States' defence rests entirely on its jurisdictional arguments.[58] That is, the United States asserts that the Panel cannot examine these reviews. However, it does not argue that any of the reviews are consistent with its WTO-obligations; nor does it dispute that the USDOC used the zeroing procedures in any of these reviews.

D. LIQUIDATION NOTICES AND INSTRUCTIONS ARE INCONSISTENT WITH ARTICLE II OF THE GATT 1994

53. Japan claims that United States' liquidation notices and instructions, issued pursuant to four original periodic reviews (numbers 1, 2, 7, and 8), are inconsistent with Article II:1(a) of the GATT 1994. The United States argues that these claims should not be addressed because Japan "failed to request findings" from the Panel under Article II, and because these claims are "entirely derivative".[59]

54. However, *first*, there is no requirement in the DSU for a Member to "request findings" in its submissions to the Panel. In any event, if such a request is necessary, Japan hereby requests a finding under Article II of the GATT 1994.

55. *Second*, like "*any* act or omission" attributable to a Member,[60] the United States' liquidation instructions and notices are "measures".

56. Notably, whereas the four original periodic reviews were all adopted before the original panel proceedings began, the liquidation measures were all adopted after the end of the RPT. This shows that the measures involve separate acts of the United States.

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[56] *See, e.g.*, United States' Second Written Submission, paras. 45 and 63.
[57] United States' Second Written Submission, para. 18.
[58] United States' Second Written Submission, para. 79.
[59] United States' Second Written Submission, para. 75.
[60] Appellate Body Report, *US – Zeroing (EC)*, para. 188.

57. Japan disagrees with the US argument that the liquidation measures do not violate Article II because liability for the duties arose at the time of importation when a cash deposit was paid.[61] Even if *provisional liability* for duties arose at the time of importation, the cash deposit rates did not establish the "treatment"[62] to which Japanese imports were ultimately subjected in connection with importation. Further, even if the periodic reviews establish the "treatment" to which imports are subsequently *liable*, the duties themselves are not *collected* or *levied* in the final results of a periodic review. Instead, the final "*treatment*" is made concrete only through the liquidation measures, which formally effect collection or levy of the import duties.

58. Accordingly, by adopting the liquidation measures, the United States acted inconsistently with its obligations under Article II:1(a) of the GATT 1994. Japan asks the Panel to make findings in that regard, independently of any findings it makes under the *Anti-Dumping Agreement* regarding the periodic reviews.

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

1. The Panel cannot reconsider the Appellate body's finding that the USDOC's likelihood-of-dumping determination is WTO-inconsistent

59. Japan claims that the United States has failed to implement the DSB's recommendations and rulings regarding the sunset review of 4 November 1999 concerning *Anti-Friction Bearings* (or "*AFBs*").[63] Although the United States accepts that findings of inconsistency "must be treated by the parties to [the] particular dispute as a final resolution to that dispute",[64] it argues that there is no resolution on the issue it raises, namely "whether the *original likelihood of dumping determination can exist on alternative grounds*".[65]

60. Japan disagrees. The Appellate Body's conclusion that the USDOC's likelihood-of-dumping is WTO-inconsistent represents a "final resolution" of the matter that is binding on the Parties, and that conclusion cannot be reassessed by this Panel.[66]

61. Japan notes that a similar finding was made in *US – OCTG from Argentina (21.5)*[67]

2. The United States has not demonstrated a WTO-consistent basis for the USDOC's likelihood-of-dumping determination

62. The Panel need go no further than to conclude that the United States has taken no implementation action to bring the 1999 *AFB* sunset review into conformity with Article 11.3 of the *Anti-Dumping Agreement*. Nonetheless, Japan wishes to comment on the US assertions that the USDOC's 1999 likelihood determination is WTO-consistent, despite the Appellate Body's ruling to the contrary.

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[61] United States' Second Written Submission, para. 76.

[62] Article II:1(a) of the GATT 1994.

[63] *See* Japan's First Written Submission, paras. 155 to 158.

[64] Appellate Body Report, *US – Shrimp (21.5)*, para. 97. *See also* Panel Report, *US – Gambling (21.5)*, para. 6.56.

[65] United States' Second Written Submission, para. 84.

[66] United States' Second Written Submission, para. 84.

[67] Appellate Body Report, *US – OCTG from Argentina (21.5)*, para. 143.("The original panel concluded that "the USDOC's likelihood determination in the instant sunset review was inconsistent with Article 11.3 of the Anti-Dumping Agreement." It is evident from this language that the original panel's finding of WTO-inconsistency is addressed to the USDOC's likelihood-of-dumping determination. Therefore, to comply with the original panel's finding, as adopted by the DSB, the United States had to bring its determination of likelihood of dumping into conformity with Article 11.3 of the *Anti-Dumping Agreement*.")

63. The United States contends that "the *majority* of the dumping margins relied on in that determination are not WTO-inconsistent".[68] However, the supporting evidence it provides concerns just 10 of the 21 margins calculated in the 1996 periodic review, which is just one of nine periodic reviews covered by the 1999 sunset determination.[69] This is very far from a "majority" of the margins relied on by the USDOC.

64. The United States' assertion that the USDOC's 1999 likelihood determination is justified by just 10 margins determined in the 1996 review using adverse facts, suffers from other serious flaws. [70]

65. The picture painted today by the United States does not conform to the terms of the 1999 likelihood determination.[71] In fact, Japan considers that the United States is engaging in the worst form of *ex post* rationalization in an attempt to justify its inaction.

66. Although the United States now presents the 10 adverse facts margins as the *centerpiece* of the USDOC's 1999 likelihood determination, that determination curiously makes no reference whatsoever to these particular margins.

67. Even if the USDOC had expressly addressed the 10 adverse facts margins in its 1999 likelihood determination, these margins would not provide "positive evidence" for a determination regarding the likelihood of a continuation or recurrence of dumping in 1999.

68. Further, an authority cannot cherry-pick the evidence on which it chooses to rely, for example, taking account of 10 adverse facts margins to the exclusion of all other relevant evidence. Instead, it must conduct a "rigorous examination" of all relevant evidence.

69. In fact, instead of explaining how the 10 margins were weighed with "positive evidence", the 1999 determination inaccurately depicts the facts, because the USDOC impermissibly relied on many margins calculated using zeroing.[72]

70. The 10 adverse facts margins do not provide a WTO-consistent basis for a likelihood determination, because they were not calculated in a WTO-consistent fashion.

71. If an investigating authority relies on margins calculated in earlier proceedings, those margins must be consistent with the requirements of the *Anti-Dumping Agreement*.[73]

72. In selecting secondary information, Annex II(7) of the *Anti-Dumping Agreement* requires an authority to use "*special circumspection*", choosing the "most appropriate" information available,[74] and verifying it against information from "independent sources".

73. In the 1996 review, the USDOC relied on the *highest alleged* margin in the 1988 petition. The choice of the *most unfavourable alleged margin* does not appear to meet the requirement to use "*special circumspection*", given that there were many more "appropriate" sources of information that could have been used in place of the petitioners out-dated allegations.

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[68] United States' First Written Submission, paras. 3 and 75.
[69] United States' Second Written Submission, para. 85.
[70] Original Appellate Body Report, para. 182.
[71] The 1999 sunset review is contained in Exhibit JPN-22.
[72] Original Panel Report, para. 7.256; Original Appellate Body Report, para. 184.
[73] Original Appellate Body Report, para. 183.
[74] Panel Report, *Mexico – Rice*, para. 7.166.

3. Conclusion on the 1999 likelihood-of-dumping determination

74. In conclusion, the Panel cannot re-open the conclusion that the USDOC's 1999 likelihood-of-dumping determination is inconsistent with the *Anti-Dumping Agreement*. And, even if it could, the United States fails in its attempts to justify the 1999 determination because its *ex post* rationalization bears no relation to, and is not supported by, the terms of that determination. The US *ex post* rationalization does not show that the 1999 determination was based on a "rigorous examination" leading to a "reasoned and adequate explanation" supported by sufficient "positive evidence".

75. Finally, the arguments surrounding the US *ex post* rationalization demonstrate that the DSB's recommendations and rulings are too complex to be resolved by an *ex post* rationalization. Instead, the United States was required to revisit its 1999 determination in light of all pertinent evidence that was available at the time, but chose not to do so.

ANNEX E-2

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF THE UNITED STATES

13 November 2008

1. On behalf of the US delegation, I would like to thank you for agreeing to serve on the Panel. As an initial matter, the United States would like to thank the Panel for agreeing to open the Panel's meeting to the public, including opening the third party session for those third parties willing to make their statements public. Opening this meeting to the public will have a positive impact on the perception of the WTO dispute settlement system, particularly with respect to transparency.

I. SCOPE OF THIS DISPUTE

2. The United States has requested a preliminary ruling concerning Japan's attempt to include three administrative reviews of *Ball Bearings from Japan* within the Panel's terms of reference. These reviews, identified by Japan as Review Nos. 4, 5, and 6, are not measures taken to comply with the DSB's recommendations and rulings, and the Panel should reject them as outside the scope of this proceeding under Article 21.5.

3. As an initial matter, it is important to recall that DSU Article 21.5 applies only when there is a disagreement as to the existence or consistency with a covered agreement of a measure taken to comply with the recommendations and rulings of the DSB. Therefore, the scope of an Article 21.5 compliance panel is inherently limited – it may only examine a claim that a measure taken to comply does not exist, or that a measure taken to comply is inconsistent with a covered agreement. In either case, the focus is on the DSB's recommendations and rulings.

4. Two of the administrative reviews of *Ball Bearings* challenged by Japan cannot be considered measures taken to comply because the final results in those reviews were adopted *prior* to the DSB's recommendations and rulings in the original proceeding. Measures taken by a Member prior to adoption of a dispute settlement report typically are not measures taken for the purpose of achieving compliance, and would not be within the scope of a proceeding under Article 21.5.

5. Here, the determinations from the 2003-04 and 2004-05 administrative reviews of *Ball Bearings* were issued in 2005 and 2006, respectively, which was well before the adoption of the DSB's recommendations and rulings at the end of January 2007. These administrative reviews have no connection with the DSB's recommendations and rulings and cannot logically be considered measures taken to comply. They therefore fall outside the scope of this proceeding.

6. Japan has urged this Panel to take an expansive and unwarranted view of Article 21.5. According to Japan's argument, any subsequent administrative review could fall within a compliance proceeding merely because it involved the same product exported from the same country by the same companies. However, as the Appellate Body noted in *US – Softwood Lumber IV (Art. 21.5)* ("*US – SWL IV*"), an approach where every subsequent administrative review was treated as a measure taken to comply "would be too sweeping."

7. Japan relies frequently on the Appellate Body report in *US – SWL IV* in an attempt to show the alleged "particularly close relationship" between the original *Ball Bearings* reviews and the three subsequent reviews. Japan's reliance is misplaced. Here, unlike in the *US – SWL IV* dispute, two of the three subsequent determinations were made well before the adoption of the DSB's recommendations and rulings. These subsequent determinations thus could not logically have taken into consideration the recommendations and rulings of the DSB in the original dispute.

8. As to the administrative review of *Ball Bearings* for 2005-06, Commerce issued the final results in this review after the adoption of the DSB's recommendations and rulings. However, this determination was made in 2007, long after the cash deposit rates from the administrative reviews subject to the DSB's recommendations and rulings had been withdrawn. In addition, the final results did not closely correspond to the expiration of the reasonable period of time ("RPT"). By contrast, in *US – SWL IV*, the determination in the first administrative review (the alleged measure taken to comply) was issued a few days after the Section 129 determination (the declared measure taken to comply), and both determinations closely corresponded to the expiration of the RPT. Finally, unlike the alleged measure taken to comply in *SWL IV*, the 2005-06 administrative review did not incorporate elements from a Section 129 determination "in view of " the DSB's recommendations and rulings.

9. None of these three subsequent measures is a measure taken to comply. Contrary to Japan's assertion, the United States has not asked this Panel to focus on the subjective intent of the United States in adopting the final results in the three administrative reviews. Rather, as we have just demonstrated, the three subsequent measures cannot *objectively* be considered measures taken to comply.

10. Japan also relies on the erroneous argument that the United States has declared that the three subsequent reviews of *Ball Bearings* are measures taken to comply. However, the United States has explained that the measures subject to the DSB's recommendations and rulings were eliminated as an *incidental consequence* of the US anti-dumping system when the cash deposit rate from one review was replaced by the cash deposit rate from the next review. This fact does not transform the subsequent reviews into "measures taken to comply" within the meaning of Article 21.5.

11. Japan worries that it will somehow be left without a remedy if the three subsequent reviews are excluded from this proceeding. However, the scope of a proceeding under Article 21.5 is limited by the text that Members have agreed to. The provisions of the DSU cannot be re-written just to take into account one Member's view of the way things ought to be. Article 21.5 is clear: measures that are not measures taken to comply – like those at issue here – do not fall within the scope of a compliance proceeding. Japan cannot distort the requirements of Article 21.5 so as to challenge any measure it deems related to the original *Ball Bearings* reviews.

12. The United States has also asked this Panel to reject any claims with respect to anti-dumping measures that were not specified in Japan's panel request because those measures were subsequent to that request. Japan would like to include any and all subsequent administrative reviews that it believes are "closely connected" to the DSB's recommendations and rulings, including the 2006-07 administrative review of *Ball Bearings from Japan*. However, under DSU Article 6.2, a panel request must identify the specific measures at issue, and under Article 7.1, the Panel's terms of reference are limited to those specific measures. Here, each determination that sets a margin of dumping for a defined period of time is separate and distinct. Under Article 6.2, Japan had to identify each such measure in its panel request. It did not and could not since the measures were not even in existence at the time of Japan's request for the establishment of this Panel. Accordingly, these subsequent administrative reviews cannot be subject to this compliance proceeding.

13. The United States reiterates that the 2006-07 administrative review of *Ball Bearings* should be rejected as outside the scope of this proceeding because it was not in existence at the time of panel

establishment. However, this administrative review is not within the Panel's terms of reference for another reason as well – it is not a measure taken to comply for the reasons provided in our 3 November submission.

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

14. In this dispute, the Appellate Body found five anti-dumping administrative reviews inconsistent with the AD Agreement and the GATT 1994. The United States fully implemented the DSB's recommendations and rulings with respect to these administrative reviews by withdrawing the anti-dumping orders covering two of the administrative reviews and withdrawing the cash deposit rates established in the remaining three administrative reviews.

15. Japan has raised one principal argument in response. Japan asserts that implementation by the United States was insufficient because it did not undo action taken with respect to imports that entered the United States prior to the end of the RPT but that remained unliquidated after the end of the RPT – that is, "prior unliquidated entries." We recall that "liquidation" refers to the ministerial process under US law whereby the United States collects anti-dumping duties from importers. It should not be confused with the determination of final liability which occurs either through an administrative review or, automatically, if no administrative review is requested.

16. With respect to the prior unliquidated entries, Japan argues that the United States must recalculate the final anti-dumping liability established in the five administrative reviews. Japan's theory of implementation fails because: 1) the theory of implementation would create fundamental inequalities between retrospective and prospective anti-dumping systems; 2) this theory of implementation is not prospective in nature; and, 3) this theory of implementation is premised on misunderstandings of the AD Agreement.

17. The United States will first address the inequality created by Japan's theory of implementation for anti-dumping administrative reviews. Under Japan's theory, *one* implementation obligation exists for Members with prospective anti-dumping systems, but, *two* implementation obligations exist for Members with retrospective systems. For prospective systems, a Member has the obligation to revise the measure as applied to imports entering after the date of implementation – that is, future entries. For a retrospective system, a Member would similarly have the obligation to revise the measure as applied to future entries. However, *in addition*, the Member would have to recalculate final liability for any prior unliquidated entries.

18. Japan has been unable to provide any basis under the WTO agreements for establishing such radically different implementation obligations for Members with prospective and retrospective anti-dumping systems because none exists. The correct interpretative approach is to provide equal implementation obligations under either anti-dumping system.

19. The US understanding of implementation obligations creates just such equality. Under either a prospective or retrospective system, a Member has one implementation obligation – to bring that measure into conformity with the WTO agreements as applied to future entries. This is exactly what the United States has done in this dispute. The determination of the final liability in the five anti-dumping administrative reviews was not applied to any future entries. In this regard, the United States has withdrawn the five administrative reviews within the meaning of Article 3.7 of the DSU. Because these measures have been withdrawn, the United States has fully complied with its WTO obligations.

20. Japan's theory of implementation does not provide for prospective relief, but instead would require the United States to implement retroactively the DSB's recommendations and rulings in this

dispute. Japan incorrectly assumes that recalculating final liability for prior unliquidated entries is not retrospective because these entries have not been liquidated. However, Japan's theory leads to an "undoing of past acts" for these prior unliquidated entries and is, thus, *retrospective*. Under Japan's theory, the United States would have to revisit the determination of the final liability calculated for these unliquidated entries. This would undo the results of the anti-dumping administrative reviews as applied to these prior entries.

21. The correct understanding of implementation, in contrast, is unquestionably prospective. A Member need not undo any past acts, but, instead, must either withdraw the measure or revise the measure as applied to future entries. This is exactly what the United States did with respect to the five administrative reviews because it withdrew each of the challenged measures. In this way, the United States *prospectively* implemented the DSB's recommendations and rulings.

22. Japan's theory of implementation must also be rejected because it is premised on incorrect interpretations of Articles 18.3 and 9.3 of the AD Agreement. First, Japan asserts that pursuant to Article 18.3 of the AD Agreement, the AD Agreement applies to the five administrative reviews because these reviews were based on applications made after 2 January 1995. As a result, Japan incorrectly concludes that there is no manner in which applying the DSB's recommendations and rulings in this dispute to prior unliquidated entries can be viewed as retroactive.

23. Japan misapprehends Article 18.3 of the AD Agreement because this article does not address the implementation obligations of Members pursuant to the dispute settlement provisions. Additionally, Japan's argument assumes what it wants to prove. That is, Japan's argument assumes that a WTO dispute challenging a determination made after 2 January 1995, could lead to a revision of entries prior to that date. However, this is precisely the question at issue – whether WTO disputes affect prior unliquidated entries. Article 18.3 of the AD Agreement in no manner answers this question.

24. Japan's interpretation of Article 18.3 also would introduce an implausible definition of "retroactive" into WTO anti-dumping disputes. As long as a WTO dispute involves an administrative review that was based on an application received on or after 2 January 1995, under Japan's theory the dispute could result in an obligation to revise that administrative review *in any manner* irrespective of how long ago the WTO Member took action pursuant to that administrative review and how final that action was. The mere fact that Article 18.3 of the AD Agreement makes the agreement applicable to administrative reviews initiated pursuant to applications made on or after 2 January 1995, cannot support such an implausible definition of "retroactive."

25. Japan also incorrectly argues that Article 9.3 of the AD Agreement requires implementation obligations with respect to the five administrative reviews to reach prior unliquidated entries because if the obligations do not exist, Article 9.3 would be rendered a nullity. The US obligations under Article 9.3 are the same as those for Members operating prospective systems – if the results of a review are found to be WTO inconsistent, those results must not be applied to future entries. Article 9.3 does not require a WTO Member to undo results of a review as to prior unliquidated entries.

26) In addition to Japan's principal argument that implementation reaches prior unliquidated entries, Japan also has argued that – with respect to the five administrative reviews – the United States has violated various additional provisions of the WTO agreements. These additional claims are fully addressed in our written submissions, which demonstrate that these claims are premised on misunderstandings of the WTO Agreements and mischaracterizations of the US response to the DSB's recommendations and rulings in this dispute.

III. THE UNITED STATES HAS COMPLIED WITH THE DSB'S RECOMMENDATIONS AND RULINGS WITH RESPECT TO THE CHALLENGED SUNSET REVIEW

27. Japan argues incorrectly that the November 1999 sunset review of *Anti-Friction Bearings* "could not, and cannot today, provide a valid legal basis under Article 11.3 for the continued maintenance of the anti-dumping order in question." To the contrary: absent a demonstration that there is no WTO-consistent basis for the likelihood of dumping determination, Japan cannot prevail upon its claim that the anti-dumping duty order should have been terminated. As the United States demonstrated in its written submissions, Japan's arguments are unfounded.

28. In the underlying dispute, both Japan's challenge and the Appellate Body's finding of WTO inconsistency were limited to the extent the United States relied on margins from previous proceedings calculated *with zeroing*. The original likelihood of dumping determination, however, did not rest exclusively upon the margins that the Appellate Body found inconsistent with Article 11.3 of the AD Agreement. The remaining margins – in fact, the *majority* of margins – cannot be characterized as inconsistent with the AD Agreement because they either *predate* the AD Agreement or did not involve the use of a zeroing methodology. Each of these two categories of margins independently supports the criterion that Commerce applied. And neither the original panel nor the Appellate Body made any adverse findings regarding these margins.

29. In response, Japan incorrectly argues that these two categories of margins cannot be relied upon to support the sunset determination. Japan's arguments are flawed procedurally. In the original proceeding, Japan did not challenge the margins that were determined *without zeroing* or the margins that predated the AD Agreement and the WTO. As such, Japan's assertions in this dispute that the United States should have presented the arguments defending its reliance upon non-zeroed margins and pre-WTO margins in the original proceeding is unfounded. The United States had no obligation to defend these aspects of the November 1999 sunset review because Japan did not challenge them at the time.

30. Second, it is incorrect to interpret the Appellate Body's findings in this dispute as prohibiting the United States from relying upon margins calculated *without zeroing*. In the fifth administrative review, for example, which covered part of the relevant sunset review period, Commerce reviewed twenty-one respondents. For ten non-cooperating respondents, Commerce applied a dumping margin based upon pricing data in the petition. This above *de minimis* rate was determined *without* zeroing. Because these respondents were not subsequently reviewed, their non-zeroed dumping margins represented their most recent dumping experience that is directly relevant to the likelihood of dumping determination for this anti-dumping duty order. This vitiates any suggestion by Japan that the anti-dumping duty order should have been terminated.

31. Third, Japan provides no textual basis for its argument that a Member cannot rely upon pre-WTO margins in making a sunset determination. This Panel should not entertain Japan's unsupported argument.

IV. THE UNITED STATES HAS COMPLIED WITH THE DSB'S RECOMMENDATIONS AND RULINGS CONCERNING THE "AS SUCH" INCONSISTENCY OF THE ZEROING PROCEDURES

32. The DSB's recommendations and rulings in the original dispute applied to the *single measure* known as the "zeroing procedures," regardless of the comparison methodology used or the type of anti-dumping proceeding. Effective 22 February 2007, the United States removed that single measure by discontinuing zeroing in weighted-average to weighted-average comparisons in original investigations. Japan, however, disregards the fact that the DSB's recommendations and rulings pertained to a single measure.

33. The panel in the original proceeding was explicit that the zeroing procedures were a single measure that applied in all contexts and when using all comparison methodologies. The Appellate Body upheld the panel's conclusion, saying that the zeroing procedures "simply reflect different manifestations of *a single rule or norm*."

34. Japan took the very same position in the original proceeding, where it argued that the zeroing procedures were a *single measure*. Thus, according to Japan's own original view, the zeroing procedures were a single measure that applied in all contexts. The original panel and the Appellate Body agreed, but Japan would now like to forget that it ever made and won this argument.

35. In view of the findings of the panel and the Appellate Body, it logically follows that if the United States stopped using zeroing in any one of these different contexts, then the single measure no longer existed. Therefore, when Commerce announced that it would no longer apply the zeroing procedures in weighted-average to weighted-average comparisons in original investigations, it eliminated the single measure that was found to be "as such" inconsistent.

ANNEX E-3

CLOSING STATEMENT OF THE UNITED STATES

5 November 2008

Mr. Chairperson, members of the Panel:

1. On behalf of the United States delegation, I would like to thank you and the members of the Secretariat for your work on this dispute. We appreciated the opportunity to provide you with preliminary thoughts on your questions and look forward to providing you with additional comments in our written responses.

2. We would like to thank the Panel again for opening this hearing to the public. We note that three third parties took the opportunity to make public statements. WTO Members and the public have had an opportunity to see the Panel's professionalism and impartiality, which can only strengthen the credibility of the WTO dispute settlement system.

Japan Misconstrues the US Argument on Measures Taken to Comply

3. Today in our closing statement we would first like to focus on a few points raised during the course of the meeting concerning the issue of "measures taken to comply." As we have explained, the United States came into compliance with the Dispute Settlement Body's ("DSB") recommendations and rulings with respect to the Ball Bearings reviews through the incidental operation of the US anti-dumping system when the WTO-inconsistent cash deposit rates were removed. The last such removal occurred in 2005, following the 2003-04 administrative review of Ball Bearings. This was long before the adoption of the DSB's recommendations and rulings. The measure bringing the United States into compliance in each instance was the act of removing the WTO-inconsistent border measure. This removal did not transform any and all subsequent administrative reviews of the same anti-dumping order of Ball Bearings into measures taken to comply just because they allegedly bear some relationship to the same anti-dumping duty order. And the Dispute Settlement Understanding ("DSU") does not provide for such a sweeping expansion of a compliance panel's terms of reference. Moreover, contrary to Japan's assertion, the United States has never maintained that subsequent reviews are measures taken to comply.[1] We have always stated that it was the act of removing the WTO-inconsistent border measure that brought the United States into compliance.

4. Japan attempts to disparage the US argument by asserting that the United States views compliance prior to the DSB's recommendations and rulings as some sort of "convenient accident."[2] However, as we explained yesterday, it is not unusual for a Member to come into compliance with the DSB's recommendations and rulings when a WTO-inconsistent measure is removed through its expiration over time, or otherwise through the operation of law.[3] (I direct the Panel to our footnote 3, which cites to DSB minutes in which Members discussed compliance occurring before adoption of the DSB's recommendations and rulings.) Nothing precludes an Article 21.5 panel from finding that a

[1] Japan Opening Statement, paras. 6-7.
[2] Japan Opening Statement, para. 18.
[3] *See, e.g.*, Minutes of the DSB Meeting on 23 May 1997, WT/DSB/M/33, Consideration of Appellate Body and Panel Reports in *US – Woven Wool Shirts and Blouses from India*, p. 11; Minutes of the DSB Meeting on 12 December 2000, WT/DSB/M/94, Implementation of the Recommendations of the DSB in *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, paras. 42-43.

Member has come into compliance in the fashion we have described, and as the United States has done in this dispute.

5. As to the administrative reviews subject to the DSB's recommendations and rulings, this Panel should find that the United States has removed the WTO-inconsistent border measures. The Panel should also reject Japan's attempt to include subsequent reviews of Ball Bearings in the scope of this proceeding.

The United States Has Eliminated the Zeroing Procedures

6. The Appellate Body and the panel in the original proceeding found the zeroing procedures to be a single measure that was applied whenever the US Department of Commerce ("Commerce") calculated margins of dumping, regardless of the comparison methodology.[4] It follows logically that when Commerce discontinued zeroing in one context – that is, in making W-to-W comparisons in investigations – the United States eliminated the single measure known as the zeroing procedures.

7. At yesterday's session, Japan relied on the existence of separate findings of inconsistency against the zeroing procedures in an attempt to show that the United States had not complied with the DSB's recommendations and rulings. However, the existence of separate rulings does not mean that there were also separate measures.[5] Rather, there was one single measure – the zeroing procedures – as Japan itself argued in the original proceeding. And the DSB's recommendations and rulings required the United States to remove that single, WTO-inconsistent measure, which it has done.

8. Japan also asserted that if the Panel finds that the single measure was withdrawn, then it should conclude that the original measure was replaced by "new zeroing procedures."[6] Japan, as the complaining Member, has the burden of proving the existence of such a replacement measure. The Panel must be satisfied that Japan has met this burden, and, as the Appellate Body has noted, "a panel must not lightly assume the existence of a 'rule or norm' constituting a measure of general and prospective application, especially when it is not expressed in the form of a written document."[7] Japan has not demonstrated the existence of a new measure, and the Panel should reject Japan's assertion of a new, WTO-inconsistent replacement measure.

The United States Has Complied With the DSB's Recommendations and Rulings With Respect to the Five Administrative Reviews

9. With respect to the five administrative reviews, the United States has explained at this panel meeting and throughout its written submissions that it has prospectively complied with the DSB's recommendations and rulings in this dispute. Prospective compliance was achieved because these administrative reviews were withdrawn and no longer serve as the basis for any anti-dumping liability on entries occurring after the conclusion of the reasonable period of time ("RPT"). Because implementation obligations do not exist with respect to entries occurring prior to the conclusion of the RPT, no further action is required.

10. In its opening statement, Japan made much of liquidation instructions that Commerce issued after the conclusion of the RPT.[8] These liquidation instructions applied to prior entries – that is, entries occurring prior to the conclusion of the RPT. Because implementation obligations do not exist with respect to prior entries, these liquidation instructions are irrelevant to compliance with the DSB's recommendations and rulings in this dispute.

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[4] *US – Zeroing (Japan) (Panel)*, para. 7.58; *US – Zeroing (Japan) (AB)*, para. 88.
[5] Japan Opening Statement, paras. 37-40.
[6] Japan Opening Statement, para. 45.
[7] *US – Zeroing (EC) (AB)*, para. 196.
[8] *See, e.g., Japan Opening Statement*, para 46.

11. The importance of implementation obligations with respect to the five administrative reviews only applying to post RPT-entries is paramount. In prospective systems implementation obligations are necessarily limited to post-RPT entries. The same must be true for retrospective systems, otherwise, retrospective systems would be unfairly obligated to implement in two manners, with respect to both prior and post-RPT entries. There is no basis in the covered agreements for adding to the implementation obligations of Members operating retrospective systems. To the contrary, the Appellate Body stated in this dispute that the AD Agreement is neutral as between retrospective and prospective systems, and the AD Agreement does not favour one system or place one system at a disadvantage.[9]

This Panel Should Reject Japan's Claims Concerning the Sunset Review of Anti-Friction Bearings

12. With respect to the challenged sunset review of Anti-Friction Bearings, Japan has raised several new arguments before this Panel. Japan argues that Commerce cannot rely on certain pre-WTO margins of dumping and margins of dumping applied to Japanese respondents that refused to cooperate in certain assessment proceedings.[10] These arguments could have been made in the original proceeding, but were not, and in raising them now, Japan has not met its burden of establishing the WTO-inconsistency as to the new arguments.

13. It is clear from the original sunset determination that Commerce considered all dumping margins from prior reviews which were conducted after the imposition of the anti-dumping duty order.[11] The margins, the majority of which were calculated without zeroing, demonstrate that Japanese respondents continued to dump at above de minimis levels after the imposition of the anti-dumping order. Because Japanese respondents continued to dump, even when the anti-dumping duties were in effect, Commerce made a reasoned and adequate conclusion that dumping would continue if the anti-dumping order was revoked.

14. Mr. Chairman and members of the Panel, we appreciate this opportunity to present these closing comments and look forward to continuing to work with you on these important issues.

[9] *US – Zeroing (Japan) (AB)*, para. 163.
[10] Japan Second Written Submission, paras. 194-95; Japan Opening Statement, paras. 118-30.
[11] Exh. US-A24 at n. 3.

ANNEX E-4

THIRD PARTY ORAL STATEMENT OF CHINA

1. Thank you, Mr. Chairman, and distinguished members of the Panel. China appreciates this opportunity to present its views on the following issues raised in this Panel proceeding.

2. **The first issue is that** the United States has not fully complied with the DSB's recommendations and rulings regarding the zeroing procedures.

3. China recalls that the DSB has ruled that "as such" measures challenged by Japan that maintaining zeroing procedure in original investigation by W-to-W, T-to-T comparison method and maintaining zeroing procedure in periodic reviews and new shipper reviews by any comparison method are inconsistent with Articles 2.4.2, 2.4, 9.3 and 9.5 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

4. To the best information available, China understands that at the end of reasonable period of time ("RPT"), the United States only abandoned zeroing procedure in original investigation by W-to-W comparison method. Thus, China agrees with Japan that the United States' omission to take action to implement the DSB's recommendations and rulings that the zeroing procedures are WTO-inconsistent in the following situations: (i) in T-to-T comparisons in original investigations; (ii) under any comparison methodology in periodic reviews; and (iii) under any comparison methodology in new shipper reviews.

5. **The second issue is that** the United States has not taken any action to comply with the DSB's recommendations and rulings regarding the five periodic reviews.

6. China recalls that the DSB has ruled that "as applied" measures challenged by Japan that by applying zeroing procedures in the 11 periodic reviews identified in Japan's Request for the Establishment of a Panel, 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.

7. However, the United States argued that in each periodic review case, a prior periodic review determination is superseded by a subsequent review, and that since the periodic reviews challenged in the original dispute do not exist any more with new cash deposit rates, the United States is not required to do anything to implement.

8. China disagrees with the United States. Such interpretation of subsequent review would undermine the objective and purpose of the WTO dispute settlement system and would make it impossible for a Member to get remedy.

9. Further, China agrees with Japan that since after the end of the RPT, the United States would collect definitive anti-dumping duties at importer-specific assessment rates determined with zeroing in these reviews. Even the challenged measures which were WTO-inconsistent were superseded by the subsequent reviews, they continue to produce legal effects after the end of the RPT.

10. China hereby supports Japan's views that the Panel should find that the United States has not taken any action to comply with the DSB's recommendations and rulings regarding the five periodic reviews.

11. **The third issue is that** the three subsequent administrative reviews of ball bearings from Japan are within the scope of this proceeding.

12. China believes that the Panel should find that the three subsequent administrative reviews constitute "measures taken to comply" for purposes of Article 21.5 of the DSU.

13. China notes that the United States argued that the three subsequent administrative reviews are not "measures taken to comply". However, as the Appellate Body held in US-Soft Lumber IV (21.5) that "*An implementing Member cannot decide for itself whether or not a measure is "taken to comply"; instead, a compliance panel must objectively assess whether a challenged measure meets the requirements of Article 21.5*".

14. China agrees with Japan that the three subsequent administrative reviews have "sufficiently close links" to the recommendations and rulings of the DSB and shall be subject to review by an Article 21.5 panel, and that "A*rticle 21.5 must be interpreted to prevent the implementing Member from undermining the substantive disciplines in the covered agreements and also the dispute settlement mechanism in the DSU*".

15. Once again, China thanks the Panel for this opportunity and hopes that these comments will prove to be useful.

ANNEX E-5

EXECUTIVE SUMMARY OF THE THIRD PARTY ORAL STATEMENT OF THE EUROPEAN COMMUNITIES

5 November 2008

I. INTRODUCTION

1. The European Communities generally agrees with the claims and arguments raised by Japan in this case and regrets the position adopted by the United States, which still today continues taking positive acts to collect anti-dumping duties based on zeroing, despite the thousand of pages of adopted DSB reports ruling against the United States on this matter.

II. THE UNITED STATES HAS FAILED TO COMPLY WITH THE "AS SUCH" FINDINGS AGAINST ZEROING IN THE ADOPTED DSB REPORTS

2. With respect to the "as such" findings against the use of zeroing contained in the adopted DSB reports in the original dispute, the European Communities fails to understand the US entrenched position in this compliance proceeding. The single rule or norm subject to the original proceeding – and that the United States was obliged to bring into conformity – was the use of zeroing in *any* anti-dumping proceeding. Since the United States has merely eliminated zeroing in *one* type of anti-dumping proceedings (*i.e.*, original investigations) and with respect to *one* comparison methodology (*i.e.*, W-to-W), the European Communities agrees with Japan that the United States has failed to *fully* comply with the DSB's recommendations and rulings in the original dispute.

III. THE US THEORY ON IMPLEMENTATION BASED ON DATE OF ENTRY SHOULD BE REJECTED

3. In the European Communities' view, in light of the circumstances of this case, the *date of entry* for the purpose of assessing compliance by the United States with the DSB's recommendations and rulings in the original dispute is *irrelevant*. The European Communities agrees with Japan that *prompt compliance* as mandated by Article 21.1 of the DSU at least requires the United States to stop taking any positive acts providing for the final payment of duties or retention of cash deposits based on zeroing with respect to those entries not finally liquidated before the end of the reasonable period. In other words, it requires the United States, in a simple accounting exercise, to collect the proper (and WTO-consistent) amount of duties on entries pending for final liquidation *after* the end of the reasonable period of time (*i.e.*, 24 December 2007).

A. THE UNITED STATES MISUNDERSTANDS THE ANTI-DUMPING AGREEMENT

4. The European Communities considers that the arguments brought by the United States to support its implementation theory based on the date of entry fundamentally show its misunderstanding of the basic principles set out by the *Anti-Dumping Agreement*. Indeed, the *Anti-Dumping Agreement* disciplines *actions* taken by WTO Members against dumping. The set of *actions* which fall under the disciplines of the *Anti-Dumping Agreement* certainly include the moment when the anti-dumping duty is collected. In this respect, the European Communities observes that the *Anti-Dumping Agreement* employs different terminology in its provisions when referring to the obligations contained therein. For instance, Article 1 of the *Anti-Dumping Agreement* states that "an anti-dumping measure shall be

applied only under the circumstances provided in Article VI of the GATT 1994". The term "applied" can be understood in a broad sense, including any *actions* taken by WTO Members in the application of anti-dumping measures. Similarly, Articles 8.1, 9.1, 10.4, 11.2, 11.3, 12.2.1, 12.2.2 and 18.3 of the *Anti-Dumping Agreement* refer to general terms like "impose" or "imposition" of anti-dumping duties. When looking at the GATT 1994, Article VI:2 uses a more specific language when stating that "in order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty no greater in amount than the margin of dumping in respect of such a product". The term "levy" is defined in Footnote 12 of the *Anti-Dumping Agreement* as "the definitive or final legal assessment or collection of a duty or tax". Thus, levying anti-dumping duties includes legal assessments and collection of duties. A more specific language is also found in Article 9 of the *Anti-Dumping Agreement*. As mentioned in its title, Article 9 of the *Anti-Dumping Agreement* deals with the "*Imposition* and *Collection* of Anti-Dumping Duties" (*emphasis added*). Indeed, while Article 9.1 deals with the imposition of anti-dumping duties in general terms, Article 9.2 contains a more specific obligation when stating that "[w]hen an anti-dumping duty is *imposed* in respect of any product, such anti-dumping duty shall be *collected* in the appropriate amounts in each case" (*emphasis added*). It results from the language of Article 9 of the *Anti-Dumping Agreement* (and in particular its paragraphs 1 and 2) that there is a difference between imposition and collection of anti-dumping duties. In other words, the fact that the *Anti-Dumping Agreement* uses different terms implies in this particular context that each of them must have a particular meaning. Indeed, according to their *textual* meaning, "impose" means "to establish or apply by authority" whereas "collect" is "to claim as due and receive payment for".

5. More importantly, Article 9.2 of the *Anti-Dumping Agreement* establishes an obligation that any anti-dumping duty imposed on any product must "be collected in the appropriate amounts in each case". In other words, the *Anti-Dumping Agreement* clearly regulates the *actions of collection* of anti-dumping duties, specifying that in each case such collection of duties must be made in the appropriate amounts. Thus, in light of Articles 9.2 and 9.3 of the *Anti-Dumping Agreement*, any *action* of collection of anti-dumping duties (as any *decision* to assess duties at a particular amount) must not exceed the margin of dumping as established under Article 2 of the *Anti-Dumping Agreement*. The Appellate Body has also acknowledged the relevance of the term "collection" of anti-dumping duties when stating that "pursuant to Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, investigating authorities are required to ensure that the total amount of anti-dumping duties *collected* on the entries of a product from a given exporter shall not exceed the margin of dumping established for that exporter" (*emphasis added*).

6. Therefore, in the European Communities' view, the US implementation theory based on the date of entry essentially ignores that the *Anti-Dumping Agreement* comprehensively regulates how WTO Members can apply anti-dumping measures, including *actions* for collecting duties. Logically, those actions are relevant for assessing compliance with the DSB's recommendations and rulings as well as the covered agreements.

B. MEMBERS' IMPLEMENTATION OBLIGATIONS IN LIGHT OF THE EXISTENCE OF DOMESTIC LITIGATION

7. In this case, the US obligation resulting from the DSB's recommendations and rulings in the original dispute was to stop using zeroing by the end of the reasonable period of time *at the latest*. Neither this obligation nor the WTO rights have changed as a result of domestic litigation. The fact that the United States in accordance with its municipal law could not collect those duties *before* the end of the reasonable period of time because importers have exercised their legal rights for judicial review does not imply that those actions of collection of duties based on zeroing *after* the end of the reasonable period of time can escape from the obligation to comply with the adopted DSB reports in this dispute. Otherwise, those actions disciplined by the *Anti-Dumping Agreement* would not be subject to WTO-scrutiny.

8. More fundamentally, if domestic litigation would not have any effect on the Member's implementation obligations – as the United States suggests – the obligation to provide for adequate judicial review of anti-dumping determinations pursuant to Article 13 of the *Anti-Dumping Agreement* would be meaningless. Thus, the US approach leads to absurd results and would allow Members to circumvent compliance with adopted DSB reports. Nowhere in the covered agreements it is mentioned or intended that certain "acts" of WTO Members are not subject to scrutiny under the WTO Agreements. Therefore, *regardless of the existence of domestic litigation*, the acts of collection of duties based on zeroing after the end of the reasonable period of time (as well as the US omissions in this respect) must be in conformity with the US obligations as derived from the DSB's recommendations and rulings in the original dispute and, in particular, with the *Anti-Dumping Agreement*.

C. COMPLIANCE AS REQUESTED BY JAPAN WOULD BE PROSPECTIVE IN NATURE

9. The European Communities agrees with Japan that the United States would comply with the DSB's recommendations and rulings in a *prospective manner* in this case if it stops taking any positive acts providing for the final payment of duties or retention of cash deposits based on zeroing with respect to those entries not finally liquidated before the end of the reasonable period.

10. The United States is not required in this case to "undo" past acts as to prior unliquidated entries, simply because the final anti-dumping liability in accordance with the US retrospective system of duty assessment is determined *at a later stage* than the time of importation. Consequently, since with respect to unliquidated entries after the end of the reasonable period of time the final amount of anti-dumping liability has not yet been established (*i.e.*, the USCBP has not liquidated the duties or such liquidation has not become final and conclusive pending the outcome of domestic litigation), the United States must in a *simple accounting exercise* make its calculations so as to properly reflect the degree of dumping that occurred *at least* with effect from the end of the reasonable period of time. Otherwise, insofar as the United States continues collecting duties based on zeroing with respect to those entries, the measure challenged in the original dispute continues *effectively* in place.

11. Finally, the European Communities would also like to add that the Panel can examine Japan's arguments relating to the *ILC Articles* in light of Article 31.3(c) of the *Vienna Convention on the Law of Treaties*.

D. PROSPECTIVE AND RETROSPECTIVE ANTI-DUMPING SYSTEMS LEAD TO IDENTICAL RESULTS

12. The European Communities disagrees with the unfounded statements made by the United States as regards the EC's alleged "practice" and requests the Panel to disregard them. Under both systems equality is achieved since they are subject to the obligation contained in Article 9.3 of the *Anti-Dumping Agreement* that the amount of anti-dumping duty must not exceed the margin of dumping established under Article 2. Like the United States, the European Communities is not prevented from applying the WTO-consistent methodology to previous entries pursuant to an act or decision taken *after* the end of the reasonable period of time, thereby complying with the DSB's recommendations and rulings in a prospective manner. This is precisely what the United States is refusing to do in the present case.

E. CONCLUSION

13. In sum, in light of the circumstances of this case, the European Communities considers that the US theory of compliance based on the date of entry must be rejected. *Immediate compliance* as mandated by Article 21.1 of the DSU implies that the United States must have stopped using zeroing

after the end of the reasonable period of time, including *actions* for collection of duties based on zeroing with respect to prior unliquidated entries.

IV. THE UNITED STATES HAS FAILED TO COMPLY WITH THE DSB'S RECOMMENDATIONS AND RULINGS AS REGARDS THE SUNSET REVIEW AT ISSUE

14. In the European Communities' view, in order to comply with the DSB's recommendations and rulings in the original dispute, the United States *at least* should have carried out a new determination of likelihood of recurrence of dumping in order to justify its conclusion that the sunset review at hand should remain in place. However, the United States has failed to do so. Thus, the United States cannot use this proceeding to provide the basis for the maintenance of the sunset review at hand; nor the United States can have a "second chance" in this compliance proceeding to defend a measure which was found to be inconsistent with the *Anti-Dumping Agreement*. Consequently, the European Communities considers that the original determination of recurrence of dumping still relies on the same dumping margins based on zeroing which were found to be WTO-inconsistent and, thus, the original violation of Article 11.3 of the *Anti-Dumping Agreement* also continues in light of the US omissions in the present case.

V. THE SUBSEQUENT REVIEWS FALL UNDER THE SCOPE OF THIS COMPLIANCE PANEL

15. The European Communities considers that the subsequent reviews brought by Japan in this proceeding fall under the scope of this compliance Panel. In the European Communities' view, as illustrated by the Appellate Body in *US – Softwood Lumber IV (21.5)*, when examining whether a measure can be considered as "measure taken to comply" falling under the jurisdiction of a compliance panel, the fact that such a measure was issued *before* the adoption of the DSB reports is only *one* of the elements which should be considered. However, in any case, the *effects* of the measure concerned is the relevant factor to determine whether or not that measure may be examined in proceedings under Article 21.5 of the DSU. In this respect, the *timing*, *direction* or *intention* of the measure as taken by the Member concerned cannot limit the scope of an Article 21.5 panel. Therefore, in the European Communities' view, the US position concerning the relevance of the *timing* of the subsequent reviews to actually break the close connexion with the DSB's recommendations and rulings in the original dispute should be rejected; more so when as in this case, the United States has admitted in its submissions the close relationship between the subsequent reviews and the original measures.

16. Even if the timing of the subsequent reviews were to be a relevant factor in determining whether or not those measures may be examined in this compliance proceeding, the European Communities considers that the US *omissions* in this case (*i.e.*, the fact that it has not stopped collecting duties based on zeroing resulting from the determinations made pursuant to those subsequent reviews) also fall under the scope of this compliance proceeding. Those are actions (and omissions) in connection with the subsequent reviews that took place *after* the end of the reasonable period of time.

17. Moreover, the Appellate Body in *US – Upland Cotton (21.5)* observed that where *a violation was found to exist* (in particular, a violation of the *SCM Agreement* arising from a subsidy which had caused serious prejudice) and the Member in question *continues violating the same relevant provisions* of the covered agreements (in that case, the same subsidy under the same conditions and criteria), then there is a particularly *close relationship* between the new measure and the DSB's recommendations and rulings in the original dispute. Otherwise, the Member concerned would not be able to obtain *adequate relief* as a result of the dispute settlement procedures, contrary to the objective of prompt settlement and prompt compliance set out in Articles 3.3 and 21.1 of the DSU. In the present case, there was a violation (*i.e.*, use of zeroing in the original measures) and the violation has

continued (since the United States has continued applying zeroing in the subsequent reviews). Therefore, it follows that those subsequent reviews (as well as US omissions) fall under the scope of this compliance Panel.

18. Finally, as regards Japan's supplemental submission, the European Communities considers that the results of a periodic review concerning ball bearings entering the United States during the period 1 May 2006 – 30 April 2007 fall under the terms of reference of this Panel. The requirement to "identify the specific measure at issue" contained in Article 6.2 of the DSU does not have a temporal scope; rather, it implies that the description of the measures at issue in the panel request must allow the Member concerned to know the precise content of those measures on a substantive basis. Since Japan identified the administrative reviews concerned in its Panel Request and the US municipal law provides for limited means to amend those measures (namely, pursuant to a new administrative review), the United States cannot argue that it fails to know the specific measures falling under the scope of this proceeding.

ANNEX E-6

THIRD PARTY ORAL STATEMENT OF HONG KONG, CHINA

5 November 2008

Mr. Chairman, members of the Panel:

1. Hong Kong, China welcomes this opportunity to present its views as a third party before the Panel. We have provided a written submission on certain issues regarding this dispute on 8 August 2008. It is our intention to make a brief statement today in addition to our written submission.

2. The practice of zeroing is one of the most contentious issues in anti-dumping. Hong Kong, China's position on this methodology is long standing and persistent. *Zeroing is WTO-inconsistent* and should not be used in any anti-dumping determination.

3. Yet, the present proceedings are not to consider the question of its illegality, for that has already been answered conclusively by the original Panel and the Appellate Body.

4. The focus of this Panel is on whether the recommendations and rulings of the DSB have been fully complied with. More specifically, it is to answer a basic and fundamental question: *do the WTO-inconsistent procedures of zeroing continue to be used after the end of the reasonable period of time and do they continue to produce legal effects*. With reference to our third party written submission, Hong Kong, China submits that the answer to the question is in the affirmative.

5. It is recalled that in our written submission, implementation obligations for respectively unliquidated entries and cash deposit rates have been highlighted and discussed in detail. We are not going to repeat today the arguments in our written submission. Suffice it to point out that after the reasonable period of time, the US has continued to liquidate entries and apply cash deposit rates on the basis of the zeroing procedures. In this regard, the WTO-inconsistent procedures have continued to produce legal effects on the imports concerned.

6. We would also like to take this opportunity to respond briefly to the specific contention of the US regarding the alleged "inequalities" between the implementation obligations for "retrospective" and "prospective" anti-dumping systems. Hong Kong, China submits that under both duty assessment systems, a WTO Member's fundamental obligations pertaining to implementation are the same i.e. the Member, under whatever system, is required to ensure that the actions it takes as of the end of the reasonable period of time are WTO-consistent. The question of "inequalities" does not arise. While a Member has full discretion to adopt its own duty assessment system provided that it is not inconsistent with the Member's WTO obligations, specific features of that system, for instance periodic reviews, unliquidated entries and cash deposit rates under the US' system, should not become justifications for differentiated implementation obligations after the reasonable period of time for the Member concerned. In the premises, a WTO Member should not take any actions which are contrary to the DSB's recommendations and rulings and should cease the WTO-inconsistent practice under the prospective implementation system.

7. Hong Kong, China agrees with Japan that subsequent periodic reviews should be regarded as "measures taken to comply" under Article 21.5 of the DSU. Accepting the US' argument that they are merely "incidental" under the US retrospective duty assessment system would result in an absurd situation whereby a Member could continue to use the WTO-inconsistent zeroing practice perpetually without any meaningful remedy to the complainants under the DSU.

8. Hong Kong, China therefore submits that the Panel should find that the US fails to comply with the DSB's recommendations and rulings in the original dispute and would respectfully request the Panel to take into consideration our views and arguments as set out in our written submission and this oral statement during their deliberations.

9. Thank you for your attention.

ANNEX E-7

THIRD PARTY ORAL STATEMENT OF THE REPUBLIC OF KOREA

5 November 2008

Mr. Chairman and members of the Panel:

1. The Republic of Korea ("Korea") appreciates this opportunity to present its views to the Panel as a third party in this important dispute. Through this statement, Korea provides an overview of the key issues included in Korea's third party submission dated August 8, 2008.

2. In Korea's view, although the Dispute Settlement Body ("DSB") unambiguously held that the application of "zeroing" by the United States Department of Commerce ("USDOC") in the original investigations, periodic reviews and sunset reviews constitutes violation of various provisions of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Anti-Dumping Agreement"), and although the United States had the benefit of an 11-month long reasonable period of time ("RPT") for the implementation of the DSB recommendations and rulings, the United States has simply failed to implement them.

3. In Korea's view, to comply with the recommendations and rulings of the DSB in this dispute, the United States would have to "withdraw" or "eliminate" the challenged measure, or take otherwise comparable action, *before* the expiration of the RPT. In this case, however, the record evidence proves that the USDOC has continued to apply the WTO-inconsistent zeroing practice in the original investigations, periodic reviews and sunset reviews even *after* 24 December 2007 when the 11-month RPT ended. Korea therefore submits that the United States has failed to implement the DSB recommendations and rulings in due course.

4. The DSB ruled that the zeroing practice is WTO-inconsistent in both W-to-W comparison methodology and T-to-T comparison methodology in original investigations. In its final notice of 27 December 2006, however, the USDOC declared that it would no longer apply the zeroing practice only in W-to-W comparisons in original investigations. Korea is not aware of any other subsequent statement of the USDOC in this regard. The statement of 27 December 2006 and the absence of subsequent statements (or action) relating to the issue should lead the Panel to find that the United States has failed to implement the decisions of the DSB with respect to the T-to-T comparison methodology in original investigations.

5. In the parties' substantive meeting held yesterday, the United States appeared to maintain the position that since the zeroing is allegedly a single measure, withdrawing the practice in W-W comparison methodology alone should be regarded as full compliance of the DSB decisions. Korea submits that this argument is illogical. In fact, the Appellate Body in the original proceeding specifically stated that:

> We also consider that the Panel had sufficient evidence before it to conclude that the "zeroing procedures" under different comparison methodologies, and in different stages of anti-

> dumping proceedings, do not correspond to separate rules or norms, but simply reflect different manifestations of a single rule or norm.[1]

The zeroing practice as a whole may be a single measure, but this does not mean that a remedial action in one aspect exonerates the implementing Member from taking all necessary actions to bring the challenged measure into full compliance. Korea submits that the DSB in the original dispute explicitly held that, to bring the measure into full compliance with the covered agreements, not only the W-W comparison methodology but also T-T comparison methodology must be addressed by the United States.

6. In addition, the United States has also failed to implement the recommendations and rulings of the DSB concerning the administrative reviews challenged by Japan in the current proceedings. In Korea's view, the United States appears to rely on unique traits of its administrative review mechanism so as to circumvent the decisions of the DSB. We are concerned that the US position would effectively insulate administrative reviews from any meaningful oversight by a panel or the Appellate Body: under that approach there would be no viable remedy available for a Member who successfully challenged an administrative review by another Member in an original panel procedure.

7. To the extent the USDOC continues to apply zeroing, after the RPT, in its administrative reviews in the course of finally liquidating the entries, Korea submits that the United States has failed to implement the recommendations and rulings of the DSB. Korea also submits that, unlike other instances where a Member's measure is officially terminated, an administrative review does not simply disappear simply because a new, subsequent review is under way or completed. The results of the previous review may still affect interested parties and subsequent, equally critical procedures. Accepting the argument that an administrative review has been terminated, hence no further action is required, simply because of the existence of a new administrative review would basically open the door for the situation where a Member revokes a WTO-inconsistent measure during the RPT and promptly introduces a new, equally inconsistent measure the whole purpose of which is to circumvent a good faith implementation obligation.

8. Therefore, by all accounts, a challenged administrative review has not been terminated yet simply because there is a new administrative review going on or completed if the new review, though technically separate, is a virtual extension of the originally challenged measure. An administrative review found to be WTO-inconsistent thus equally requires adequate implementation by the implementing Member irrespective of existence or completion of a subsequent review or reviews. Korea thus requests the Panel to hold that the United States has failed to implement the DSB recommendations and rulings in this respect.

9. Also, in the original dispute the DSB ruled that by relying on margins of dumping calculated in previous proceedings using the zeroing procedures in the two sunset reviews, the United States acted inconsistently with Article 11.3 of the Anti-Dumping Agreement. Korea understands that despite the DSB recommendations and rulings the United States has failed to take any particular action to bring its WTO-inconsistent sunset review into conformity with the Anti-Dumping Agreement and that as a result of the failure the anti-dumping order against antifriction bearings still remains in effect.

10. In Korea's view, given the way sunset reviews are conducted by the USDOC, they cannot be separated from previous anti-dumping proceedings. As the United States has not implemented the decisions of the DSB in original investigations (T-T comparisons) and periodic reviews, and continues to apply the zeroing practice in these procedures, one could reasonably argue that the subsequent sunset reviews stand to be tainted by the previous investigations and periodic reviews

[1] *United States-Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R (9 January 2007), para. 88.

unless and until the zeroing practice is fully eliminated in these prior proceedings. As such, Korea submits that the United States has also failed to implement the decisions of the DSB with respect to the sunset reviews.

11. Korea respectfully submits that for the reasons stated above the Panel should hold that the United States has failed to comply with the recommendations and rulings of the DSB in the original dispute.

12. Korea appreciates this opportunity to present its views to the Panel.

ANNEX E-8

THIRD PARTY ORAL STATEMENT OF MEXICO

I. INTRODUCTION

1. Thank you, Mr Chairman and members of the Panel. I appreciate the opportunity to appear before you today to present the views of Mexico in these proceedings. The purpose of this oral statement is to offer a few brief points concerning the arguments put forward by Japan and the United States that have particular significance to Mexico as a Member likewise seeking US compliance with the reports concerning zeroing.

Failure to Comply with an "As Such" Ruling

2. Firstly, Mexico is troubled by the United States' continuing failure to comply with its obligations stemming from the DSB's "as such" findings in relation to zeroing in administrative reviews. Mexico recalls that the DSB found that zeroing is inconsistent "as such" with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 when applied in periodic reviews, regardless of the comparison methodology that is employed.[1] The United States, as it must, has unconditionally accepted that determination and expressly agreed with Japan to comply with its obligation to bring the inconsistent zeroing measures into compliance with its WTO obligations by 24 December 2007.

3. Clearly the only action that the United States has taken at all to comply with the DSB's rulings on an "as such" measure in this dispute has been to stop the use of zeroing in original investigations and, even then, only where comparisons are made on an average-to-average basis. In taking this inadequate action, the United States made it clear that it was taking no action to eliminate zeroing in any other context, including in the context of periodic reviews.[2] In fact, as Japan has indicated, notwithstanding the DSB's recommendations in this case, the United States continues to apply zeroing without exception in periodic reviews conducted after the expiration of the reasonable period of time (RPT) for compliance.[3]

4. The United States does not deny any of these facts but argues instead that, given that it has complied by eliminating zeroing in original investigations where comparisons are made on an average-to-average basis, the United States has "eliminated the single measure that was subject to the DSB's recommendations and rulings by the end of the RPT, and has therefore fully implemented the DSB's recommendations and rulings with respect to the zeroing procedures".[4] This argument is transparently false and cannot excuse the United States' failure to comply with its obligations.

5. To start with, the United States has not accurately described the DSB's recommendations on this matter. Paragraph 190(c) of the Appellate Body report, in which the relevant recommendations adopted are summarized, states as follows:

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[1] Appellate Body Report, *United States – Zeroing (Japan)*, para. 190(c).

[2] *See, e.g.*, Second Written Submission of Japan, para. 85 (citing *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Duty Investigation*, 71 Fed. Reg. 77722, 77724 (Department of Commerce, 27 December 2006)(Exhibit JPN-35)).

[3] *Id.*, paras. 92-102.

[4] US First Written Submission, para. 77.

> [The Appellate Body] finds ... 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 periodic reviews.

This language clearly indicates that the DSB found that zeroing in administrative reviews is "as such" contrary to the United States' obligations under Articles 4.2 and 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994. Compliance with this recommendation logically requires that the United States eliminate zeroing from periodic reviews, regardless of the comparison methodology employed.

6. The fact that the DSB found that zeroing constitutes a "single measure" does not believe the United States from the consequences of the DSB's recommendations quoted above. Even if the United States' obligations in this matter were viewed as relating to a single measure, the action taken by the United States has not **fully** eliminated the offending measure, as it is obligated to do. To comply with this obligation, the United States must eliminate zeroing in all four procedural settings on which the DSB made recommendations.

7. The United States has also misinterpreted the DSB's recommendations with respect to the substantive content of the "single measure." As Japan correctly notes[5], the precise substantive content of the measure is the disregard of negative intermediate comparison results in the aggregation of an overall weighted-average dumping margin and this substantive rule is applied in the same way in different procedural settings. The United States does not, and cannot, claim that it has changed or eliminated this substantive content of the rule.

8. In this dispute, the limited action taken by the United States to restrict the scope of the measure in a single procedural context falls far short of its obligation to eliminate the measure in its entirety and has left the measure unchanged in three of the four areas in which the DSB made its rulings: (i) original investigations using transaction-to-transaction comparisons; (ii) periodic reviews; and (iii) new shipper reviews. This Panel must therefore find that the United States has failed to comply with the DSB's "as such" recommendations and rulings within the RPT.

Subsequent Reviews as Measures Taken to Comply

9. With respect to the three administrative reviews completed subsequent to the establishment of the original panel, Mexico agrees with Japan that such reviews qualify as "measures taken to comply" and are necessarily within the scope of this Article 21.5 proceeding because of the substantive connections between those proceedings and the measures covered by the original proceeding. The DSB jurisprudence in this area is very clear that subsequent measures are "inextricably linked," "clearly connected," or with "sufficiently close links" to the original measures as to fall within the scope of subsequent Article 21.5 proceedings.[6]

10. Mexico also agrees with Japan that the United States has already effectively declared these determinations to be "measures taken to comply" by repeatedly asserting that these subsequent measures "supersede" or "withdraw" the original measures.

11. Mexico rejects the United States' claim that these reviews should not be considered "measures taken to comply" because they were issued before the adoption of the DSB recommendations and rulings in this case. As outlined in Japan's written submissions, the subjective intent or purpose of the Member required to comply is not dispositive. What is dispositive is the identification of the

[5] Second Written Submission of Japan, para. 72.

[6] *See, e.g., Australia – Leather (21.5)*, para. 6.5; *Australia – Salmon (21.5)*, para. 7.10; and *US – Softwood Lumber IV (21.5)*, paras. 77-79.

measures through which compliance has or has not been achieved and whether these measures achieve compliance or are as such consistent with the Member's obligations to comply. Even if one accepts the United States' assertion that compliance was achieved only as an "incidental consequence" of these measures, the United States has placed these measures squarely within the scope of this Article 21.5 proceeding. The Panel must therefore examine these reviews to determine whether they are consistent with the DSB rulings and whether they have resulted in compliance. The United States cannot have it both ways.

12. Furthermore, Mexico agrees with Japan that the periodic reviews completed after the establishment of this Article 21.5 Panel come within the Panel's jurisdiction because they share the same substantive connections with the original proceedings and were identified with sufficient precision in Japan's request for establishment of this Panel. Mexico also agrees with Japan that post-establishment measures can, and must have been[7] accepted as properly within the scope of an Article 21.5 proceeding.

Periodic Reviews That Have Continuing Legal Effects

13. The United States has also taken no action to implement the DSB's rulings and recommendations with respect to five administrative reviews found to be WTO-inconsistent on an "as applied" basis, even though those periodic reviews continue to produce legal effects after the end of the RPT.

14. Mexico agrees with Japan that recalculating the margins of dumping in those prior reviews is necessary in order to implement the DSB's rulings in this case and to bring those measures into conformity with the United States' obligations under the covered agreements.

15. While the United States asserts that these reviews have been "superseded" or "revoked" by subsequently completed administrative reviews, under the US legal system these reviews continue to have significant legal effects after the RPT. Without a recalculation by the United States, such continuing legal effects would include not only the potential application of the assessment of importer-specific duties to entries that remain unliquidated after the RPT, as identified by Japan, but also other continuing legal effects such as the use of the miscalculated exporter-specific margins of dumping in the context of subsequent five-yearly reviews and other domestic revocation proceedings. Mexico notes, for example, that under the US Department of Commerce ("USDOC") regulations, exporters may seek revocation of an anti-dumping duty order on the basis, *inter alia*, of the absence of dumping in three consecutive reviews. USDOC has taken the position that it cannot reconsider prior dumping-margin results in subsequent review determinations.[8] Therefore, the original review determination results have a direct continuing *prospective* legal impact on subsequent review proceedings, at least to the extent that the correctly calculated dumping margins would be zero or *de minimis*. In this respect, the exporter-specific margins of dumping at issue for Japan continue to exist and are legally operable indefinitely unless and until recalculated.

16. Mexico also agrees with Japan that the obligation to recalculate the margins of dumping in these prior administrative reviews does not constitute a "retrospective" remedy. As Japan correctly notes, the measure that the United States is obliged to implement does not require repayment of duties that have already been assessed and collected on entries finally liquidated. Instead, the compliance obligation focuses on **future** (i.e., post-RPT) actions to collect anti-dumping duties or to render revocation or future five-yearly review decisions on the basis of the margins erroneously calculated in those subsequent reviews.

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[7] *See, e.g., Australia – Salmon (21.5)*, para. 23 (finding that "future measures" were within the scope of panel review and that the complying Member knew that such measures could be subject to review).

[8] *See Stainless Steel from Mexico.*

17. Mexico agrees with Japan that the DSB cannot be reasonably interpreted to allow a Member to deliberately, and perpetually, evade its substantive obligations under the agreements. Such a result would render the substantive provisions of the agreements *inoperative*, contrary to the established principles of treaty interpretation. Moreover, such an outcome is not appropriate inasmuch as the legal effects of the five-yearly periodic reviews survive subsequent review determinations.

18. Lastly, the position adopted by Japan does not create inequality between prospective and retrospective systems. Under both systems, the obligation to remove inconsistent measures in the calculation of anti-dumping margins would be enforced. In contrast, the interpretation offered by the United States would allow Members with retrospective systems to perpetually evade their obligations to calculate margins in administrative reviews without zeroing, whereas Members with prospective systems would be required to comply with their obligations by recalculating either the original investigation margins or the margins determined in a subsequent review proceeding requested by the importers.

Conclusion

Mr Chairman, members of the Panel, this concludes Mexico's oral statement. Thank you for your attention.

ANNEX E-9

THIRD PARTY ORAL STATEMENT OF NORWAY

5 November 2008

1. Norway would like to thank the members of the Panel for the opportunity to make a statement at this meeting, and for opening up this part of the third party session to a public viewing.

Mr. Chairman, Members of the Panel,

2. This dispute raises a myriad of interesting and important questions. As a third party, Norway does not take upon itself to address all these questions. We have already in our written submission discussed in some detail the scope of the Panel's jurisdiction. We will not repeat those arguments here today, just add that we support the claim made by Japan in its supplemental submission regarding the periodic review issued after the establishment of the Panel. It is Norway's view – for the reasons set out by Japan – that also this measure must be within the scope of the Panel's jurisdiction and therefore part of these proceedings.

3. Today we will confine ourselves to some comments on what we see to be the core of this case. Even if it raises several questions, the key issue of the case is really quite simple: It is about compliance with WTO obligations.

4. All WTO Members have agreed to a dispute settlement system where "prompt compliance with recommendations and rulings of the DSB" is viewed as "essential in order to ensure effective resolution of disputes to the benefit of all members". Under the DSU each and every Member is obliged to comply with rulings and recommendations of the DSB immediately, unless such immediate compliance is impracticable, in which case one will be allowed a reasonable period of time (RPT) for compliance. However, from the expiry of the RPT, any WTO-inconsistent measure must be withdrawn, modified or replaced so as to ensure compliance with WTO obligations.

5. The United States did not in this case ensure compliance by the end of the RPT. In Norway's view, this follows clearly from the facts and evidence presented. The only implementing action that has been put in place by the United States is the elimination of the use of zeroing procedures in weighted average-to-weighted average comparisons in original investigations. The United States has not, however, stopped using zeroing procedures in any of the other situations covered by the DSB ruling in the original dispute.

6. Specifically, Japan challenges nine periodic reviews. Five of the reviews were found to be WTO-inconsistent in the original proceedings. These five reviews still provide the basis for collecting definitive anti-dumping duties after the end of the RPT, and thereby continue to have legal effects. The United States should – as an implementing measure – have recalculated the dumping determination in those reviews without the use of zeroing methodologies. The United States did not do so, and has therefore omitted to bring about compliance with the recommendations and rulings of the DSB in a timely fashion. The omission to recalculate also means that the Unites States still violates Articles 2.4 and 9.3 of the Anti-Dumping Agreement as well as Article VI:2 of GATT 1994.

7. The United States claims that Japan when challenging the five periodic reviews, is requesting "retrospective" relief. In Norway's view, this is not the case. No one has requested the United States to withdraw, modify or replace anything during the RPT. However, as just submitted, from the end

point of the RPT the United States should have ensured WTO-conformity with regard to all measures that were found to be WTO-inconsistent in the original dispute. What Japan is asking, is compliance with the DSB recommendations and rulings from the end point of the RPT. The United States is requested to respect its WTO obligations and make sure that the anti-dumping duties collected after the RPT are based on WTO-consistent importer-specific assessment rates. This cannot be characterized as anything but "prospective" relief.

8. Turning now to the remaining four periodic reviews. These were issued subsequent to the original dispute, but must, nevertheless, be considered as "measures taken to comply" as they relate to the same anti-dumping orders and continue the contested anti-dumping measures. When calculating the dumping margin in the four reviews, the United States used zeroing methodologies in defiance of previous rulings by the Appellate Body. On this basis, there should be no doubt that the periodic reviews at issue are inconsistent with Articles 2.4 and 9.3 of the Anti-Dumping Agreement, as well as GATT Articles VI:1 and VI:2.

Mr. Chairman,

9. As stated in the beginning, this case is about compliance. In the original dispute the DSB ruled that the United States should bring the measures at issue into conformity with its WTO obligations. The United States has not done so – except with regard to one single situation.

10. The lack of real and good faith implementation by the United States is regrettable. It has turned dispute settlement with regard to zeroing into a never-ending story. Norway respectfully requests the Panel to make the necessary findings so as to not allow this to continue.

Thank you.

ANNEX E-10

THIRD PARTY ORAL STATEMENT OF THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU

5 November 2008

1. Thank you, Mr. Chairman and distinguished members of the Panel, for giving us this opportunity to present our views as a third party in this proceeding.

2. Pursuant to our systemic interest in the proper interpretation of, and practice under, Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), we are presenting a brief oral statement, which we consider would help making the correct interpretation of the term "measures taken to comply" that fall within the terms of reference of this Panel. We will address this concern by examining the term in the following two contexts: first, subsequent periodic reviews and, second, review conducted in 2006/2007 (06/07 review).

3. To analyze the term "measures taken to comply" under Article 21.5 of the DSU, we would need to first ascertain whether particular measures are within the scope of review by the Panel and Appellate Body.

4. With respect to the subsequent periodic reviews, we note that the US argued that "two of the administrative review determinations identified by Japan in its Article 21.5 panel request - Review No. 4 and No 5 - can not be considered measures taken to comply because they pre-date the adoption of the DSB's recommendations and rulings on 23 January 2007."[1]

5. While timing could be one of the factors Panel may consider here, we would like to draw the Panel's attention to Appellate Body's report in *US - Softwood Lumber IV (21.5)* where the AB pointed out that compliance panels are not limited to reviewing measures that "have the objective of achieving compliance."[2] Further, measures can not be excluded from compliance proceedings "due to the *purpose* for which they have been taken."[3]

6. The Appellate Body has recognized that "Article 21.5 proceedings involve, in principle, not the original measure, but a new and different measure that was not before the original panel."[4] Where such new measures have "a particularly close relationship to the declared 'measures taken to comply,' and to the recommendations and rulings of the DSB," or where there are "sufficiently close links" among them, the Appellate Body has concluded that those new measures are subject to review by an Article 21.5 panel.[5]

7. With respect to the reviews conducted in 2006 and 2007, the parties have debated in their supplementary submissions whether the 06/07 review conducted after the adoption of the Appellate Body report of the current dispute are measures included in the scope of the current proceedings.

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[1] First Written Submission of the United States, para. 33.
[2] Appellate Body Report, *US - Softwood Lumber IV (21.5)*, para. 67 (italics removed).
[3] Panel Report, *US - Gambling (21.5)*, para. 6.24 (emphasis in original).
[4] Appellate Body Report, *US - Shrimp (21.5--Malaysia)*, paras. 85-87.
[5] Appellate Body Report, *US - Softwood Lumber IV (21.5)*, paras. 77-79.

8. We are of the view that the 06/07 review, though happened after the panel establishment, has close relationship with the reviews challenged in the original proceedings and the steps taken to comply with the DSB rulings and recommendations that should thus be included in the scope of the current proceeding. This view can be further evidenced by the following facts:

9. First, the 06/07 review and the original reviews were all resulted from anti-dumping proceedings conducted by the same authority, the United States Department of Commerce ("USDOC"), which is endowed with the power to issue orders based on the same set of laws and regulations.[6] In addition, they are all in the same type of proceeding, i.e., the periodic review.

10. Secondly, those reviews were all conducted pursuant to anti-dumping order concerning "Ball Bearing and Parts Thereof from Japan."[7] In other words, they are the same subject product from the same exporting member. Furthermore, those reviews all concern dumping determinations made with respect to exports from the same companies.[8]

11. We note that Japan submitted that the Panel in *United States – Continued Existence and Application of Zeroing Methodology ("US – Zeroing II (EC)")* also examined a chain of successive periodic reviews, and reached a conclusion that relied upon the notion of the "same subject matter" and the "same dispute."[9] While we found that the 06/07 review in the present dispute refers to "the same subject matter" and "the same dispute" with respect to the periodic reviews for the purpose of this proceeding, that particular ruling of the US-Zeroing II (EC) Panel may not be easily applied in the current proceeding. In that dispute, the Panel was addressing the issue of whether the measures included in the panel request but not included in the consultations request fell within the scope of the panel proceeding. The issues before the Panel in the current proceeding differ in a certain degree from that context and would render an analogy difficult between that dispute and the current proceeding.

12. The United States disagrees with the inclusion of the 06/07 reviews as a "measure taken to comply" mainly for two reasons: first, the 06/07 review is not properly within the Panel's terms of reference because they were not identified in Japan's panel request with sufficient specificity, and second, the 06/07 reviews did not exist at the time of panel establishment.

13. With regard to the first reason, we note that Japan in its request for Panel establishment already identified: (i) five reviews at issue in the original proceedings; (ii) three closely connected reviews that the United States argued to have "superseded," and secured "withdrawal" of, certain measures at issue in the original proceedings; and, (iii) "any subsequent closely connected measure."[10] We consider the 06/07 review as a "subsequent closely connected measure" to the declared "measure taken to comply" and to the recommendations and rulings of the DSB that may be susceptible to review by an Article 21.5 panel.

14. With regard to the second reason, were the United States' claim to sustain, the DSB will require numerous panels to be established for one continuous WTO inconsistent measure. In *US – Zeroing II (EC)*, the panel recognized that, in appropriate circumstance, future measures identified in a panel request can be included within a panel's terms of reference, as long as they "constitute a measure" within the meaning of Article 6.2 of the DSU and "come into existence during the panel proceedings."[11] While this ruling has not been adopted, we consider the interpretation presented in this ruling the proper interpretation which can ensure that "the dispute settlement system of the WTO

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[6] Executive Summary of Japan's Supplemental Submission (WT/DS322(21.5)), para. 4.
[7] *Id.*
[8] *Id*.
[9] Executive Summary of Japan's Supplemental Submission (WT/DS322(21.5)), para. 7.
[10] WT/DS322/27, para.12.
[11] Panel Report, *US—Zeroing II (EC)*, para. 7.59.

is a central element in providing security and predictability to the multilateral trading system" as stipulated by Article 3 of the DSU.

15. Mr. Chairman, distinguished Members of the Panel, in our view, the mandate of a compliance panel is not limited to examining whether the implementing measure fully complies with the recommendations and rulings adopted by the DSB.[12] For a panel "to fulfil its mandate under Article 21.5, [it] must be able to take full account of the factual and legal background against which relevant measures are taken, so as to determine the existence, or consistency with the covered agreements, of measures taken to comply."[13] While noting that "not…every assessment review will necessarily fall within the jurisdiction of an Article 21.5 panel,"[14] we would urge the Panel to consider the 06/07 measure in its totality, taking into account the factual and legal background against which a declared "measure taken to comply" is adopted, in determining whether the 06/07 review falls within its terms of reference.

16. We hope that our submissions will be helpful for the Panel's analysis of the relevant issues in this dispute, and we thank you for your attention.

[12] Appellate Body Report, *Canada – Aircraft (21.5- Brazil)*, paras. 40-41; also, "panel proceedings pursuant to Article 21.5 of the DSU involve, in principle, not the original measure, but a new and different measure that was not before the original panel. Therefore, "in carrying out its review under Article 21.5 of the DSU, a panel is not confined to examining the 'measure[] taken to comply' from the perspective of the claims, arguments and factual circumstances that related to the measure that was the subject of the original proceedings." Appellate Body Report, *US - Shrimp (21.5--Malaysia)*, paras. 85-87.

[13] Appellate Body Report, *US - Softwood Lumber IV (Art. 21.5)*, para. 69.

[14] *US - Softwood Lumber IV (21.5)*(AB), para. 93 (footnote omitted).

ANNEX E-11

THIRD PARTY ORAL STATEMENT OF THAILAND

5 November 2008

I. INTRODUCTION

1. Mr. Chairman and Members of the Panel: Thailand appreciates the opportunity to present its views to the Panel today. Thailand generally supports the arguments made by Japan in its written submissions[1] and will present just a few additional points this morning.

II. JURISDICTION OF THE PANEL

2. Firstly, regarding the jurisdiction of the Panel, in the circumstances of this case Thailand considers that all the measures brought by Japan in this proceeding, including the four subsequent reviews superseding the periodic reviews that the Dispute Settlement Body (DSB) found to be WTO-inconsistent (reviews 4, 5, 6 and the 06/07 review),[2] fall within the scope of this Panel's jurisdiction.

3. In this regard, Thailand agrees with the arguments put forth by Japan and Norway that it is not up to the implementing Member to decide whether a measure is "taken to comply."[3] The Appellate Body, in *United States – Softwood Lumber IV (21.5)*, clearly stated that: "Panels and the Appellate Body alike have found that what is a 'measure taken to comply' in a given case is not determined exclusively by the implementing Member."[4]

4. In addition, past compliance panels such as *Australia – Leather II (21.5)* and *Australia – Salmon (21.5)*, have also considered measures that are "inextricably linked" or "clearly connected," regardless of whether the implementing member designated such measures as having been taken to comply, to be within each panel's terms of reference.[5] In this connection, we find particularly persuasive Japan's arguments demonstrating that an undeniably strong link between the subsequent reviews and the original measures exists in the specific component of all these measures, i.e., the zeroing methodology used to make dumping determinations.[6] We think this component is sufficiently precise and would not be "too sweeping."[7]

5. Thailand fully supports the views of Japan and the European Communities that if the subsequent reviews were excluded, concerned Members would be forced into a "Groundhog Day"

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[1] First Written Submission of Japan, 30 June 2008 ("FWS") and Second Written Submission, 27 August 2008 ("SWS").

[2] Japan's FWS para. 53 and Japan's supplemental submission, 10 October 2008, para. 1.

[3] Japan's FWS para. 63 and Norway's Third Party Submission, 8 August 2008, para. 12.

[4] Appellate Body Report, *US –SWL IV (21.5)*, para. 73. See also Panel Report, *US – Gambling (21.5)* para. 6.24, wherein the Panel refuted the exclusion of "any potential 'measures taken to comply' due to the *purpose* for which they may have been taken."

[5] Panel Report, *Australia – Automotive Leather II (21.5)*, para. 6.5 and Panel Report, *Australia – Salmon (21.5)*, para. 7.10.

[6] Japan's SWS para. 42 and supplemental submission, para. 7.

[7] Appellate Body Report, *US –SWL IV (21.5)*, para. 87.

scenario of never-ending litigation.[8] As a developing country with a limited amount of resources, Thailand cannot afford to participate in never-ending litigation cycles. In this instance, we recall that Article 21.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes provides that "Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement."

6. For the foregoing reasons, we urge the Panel to consider all measures brought by Japan in this proceeding to be within its jurisdiction.

III. ZEROING PROCEDURES

7. Regarding the "as such" findings against zeroing, the United States claims that it has eliminated the zeroing procedures because "zeroing is no longer used in W-to-W comparisons in anti-dumping investigations."[9] The United States thus views that it has complied with the recommendations and rulings on zeroing procedures in this dispute. Thailand has the opposite view. The DSB made four rulings regarding the inconsistency of zeroing procedures in the present dispute: it ruled against the use of zeroing in W-to-W and T-to-T comparisons in original investigations, and in any comparison methodology in periodic and new shipper reviews.[10] Like Japan, we do not agree that implementing only one of these recommendations and rulings amounts to implementing all four of them.[11] In addition, Japan has shown that throughout the year 2008 the United States has used zeroing procedures in more than 10 proceedings other than W-to-W comparisons.[12]

IV. PERIODIC AND SUNSET REVIEWS

8. On the issue of periodic and sunset reviews, we generally agree with Japan's arguments and will not repeat them here. However, we would like to express our strong reservations about the "Catch-22" condition which would surely arise if the Panel accepts the argument of the United States that implementation applies only to new entries that enter the United States on or after the end of the reasonable period of time. This condition would allow implementing authorities to escape the requirements of Article 9.3 of the Anti-Dumping Agreement, and as a result, unduly leave other Members without recourse to relief when zeroing is used in administrative reviews. If this argument is accepted, there would be no effective remedy with respect to Article 9.3 review determinations taken by any Member – under either a prospective or retrospective system – with respect to any issue, not just zeroing.

V. CONCLUSION

9. Thailand trusts that these views will assist the Panel in its consideration of these issues. We will be happy to respond to any questions the Panel may have, and we thank you again for this opportunity to present our views.

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[8] Japan's FWS para. 100 and the European Communities' Third Party Submission, 8 August 2008, para. 18.

[9] First Written Submission of the United States, 28 July 2008, para. 80.

[10] Panel Report, *US – Measures Relating to Zeroing and Sunset Reviews*, para. 7.258(a) and Appellate Body Report, paras. 190 (b) – (d).

[11] Japan's SWS, para. 74.

[12] Japan's SWS, para. 100 (exhibit JPN-46) and supplemental submission, para. 32 (exhibit JPN-68).