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UNITED STATES – MEASURES RELATING TO ZEROING AND SUNSET REVIEWS

RECOURSE TO ARTICLE 21.5 OF THE DSU BY JAPAN

AB-2009-2

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US – Stainless Steel (Mexico)	Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008
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US – Upland Cotton	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, 3
US – Upland Cotton	Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, Corr.1, and Add.1 to Add.3, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R, DSR 2005:II, 299
US – Zeroing (EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, 417
US – Zeroing (EC)	Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/R, adopted 9 May 2006, as modified by Appellate Body Report WT/DS294/AB/R, DSR 2006:II, 521
US – Zeroing (EC) (Article 21.5 – EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/AB/RW and Corr.1, adopted 11 June 2009
US – Zeroing (EC) (Article 21.5 – EC)	Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/RW, adopted 11 June 2009, as modified by Appellate Body Report WT/DS294/AB/RW
US – Zeroing (Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted 23 January 2007, DSR 2007:I, 3

Short Title	Full case title and citation
US – Zeroing (Japan)	Panel Report,

WORLD TRADE ORGANIZATION
APPELLATE BODY

United States – Measures Relating to Zeroing and Sunset Reviews

Recourse to Article 21.5 of the DSU by Japan

United States, *Appellant*
Japan, *Appellee*

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

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

(a) the United States acts inconsistently with Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement* by maintaining zeroing procedures when calculating margins of dumping on the basis of transaction-to-transaction comparisons in original investigations[6];

(b) the United States acts inconsistently with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement*

be WTO-inconsistent in the original proceedings—Reviews 1, 2, 3, 7, and 8[24]—the United States had failed to implement the DSB's recommendations

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

12. The United States contended that the zeroing procedures challenged "as such" by Japan in the original proceedings no longer existed because the United States had ceased to apply the zeroing procedures in weighted average-to-weighted average comparisons in original investigations.[30] The United States requested a preliminary ruling that "subsequent closely connected measures", including Review 9, were not within the Panel's terms of reference.[31] Furthermore, the United States requested a preliminary ruling that Reviews 4, 5, 6, and 9 were not "measures taken to comply" within the meaning of Article 21.5 of the DSU, and therefore fell outside the scope of the compliance proceedings.[32] The United States also argued that it did not have any implementation obligations in relation to Reviews 1 through 9 because they covere

(i) Accordingly, ... the United States is in continued violation of its obligations under Articles 2.4 and 9.3 of the [*Anti-Dumping*] *Agreement* and Article VI:2 of the GATT 1994[36];

...

(b) ... the United States has acted inconsistently with Articles 2.4 and 9.3 of the [*Anti-Dumping*] *Agreement* and Article VI:2 of the GATT 1994 by applying zeroing in the context of Reviews 4, 5, 6 and 9[37];

...

(d) ... the United States is in violation of Articles II:1(a) and II:1(b) of the GATT 1994 with respect to certain liquidation actions taken after the expiry of the RPT, namely with respect to the USDOC liquidation instructions set forth in [Panel] Exhibits JPN-40.A and JPN-77 to JPN-80 and the [Customs] liquidation notices set forth in [Panel] Exhibits JPN-81 to JPN-87.[38]

14. In addition, the Panel found that:

(c) ... the United States has failed to comply with the recommendations and rulings of the DSB regarding the United States' maintenance of zeroing procedures challenged "as such" in the original proceedings. In particular, ... the United States has failed to implement the DSB's recommendations and rulings in the context of [transaction-to-transaction] comparisons in original investigations and under any comparison methodology in periodic and new shipper reviews[39];

(i) Accordingly, ... the United States remains in violation of Articles 2.4, 2.4.2, 9.3 and 9.5 of the [*Anti-Dumping*] *Agreement* and Article VI:2 of the GATT 1994[40];

...

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

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

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

...

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

15. The Panel concluded that, to the extent that the United States has failed to comply with the DSB's recommendations and rulings in the original proceedings, these recommendations and rulings remain operative.[42] The Panel also recommended that the DSB request the United States to bring Reviews 4, 5, 6, and 9, and the relevant liquidation actions, into conformity with the *Anti-Dumping Agreement* and the GATT 1994.[43]

16. On 20 May 2009, the United States notified the DSB, pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law and legal interpretations covered in the Panel Report and filed a Notice of Appeal[44], pursuant to Rule 20 of the *Working Procedures for Appellate Review*[45] (the "*Working Procedures*"). On 27 May 2009, the United States filed an appellant's submission.[46] On 15 June 2009, Japan filed an appellee's submission.[47] On the same day, the European Communities, Korea, Mexico, and Norway each filed a third participant's submission[48]; and China, Hong Kong, China, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, and Thailand each notified its intention to appear at the oral hearing.[49]

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

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[41]Panel Report, paras. 8.1 and 8.1(e)(i). The Panel again declined to rule on Japan's claim that this

confidential would be adequately protected in the course of the hearing. Both participants relied on the reasoning provided by the Appellate Body in previous appeals[50] where public observation of the oral hearing had been authorized, and expressed a preference for simultaneous closed-circuit television broadcast to a separate room. On 2 June 2009, the Division invited the third parties to comment in writing on the requests of Japan and th

II. Arguments of the Participants and Third Participants

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

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

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

21. Japan's panel request identified five periodic reviews that had been the subject of the DSB's

in Article 6.2.[59] The United States considers it "irrelevant"[60] that Review 9 had already been initiated by the time of the panel request[61], because Review 9 was still ongoing at the time of the panel request, and therefore any challenge to it would have been "premature".[62]

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

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

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

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[59]Unib.0444 T5iBses2'l0uthab.0444s'm ses2'lbes2'lmrb.044ss(b.044son,)6[(pram)8.1.,onot93.8(not93.8e 5es2'l6h)-1.6 ab.

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

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

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

[68] 4.1(e)2.J6.6(S)21n..o654.374prov1 Tf1id1.5(rt,8798)-58at8ortd1.5(rtm)9 9pi6.29()1.5(rti6.29(roingiv1.5(rt,8 68)5.1.

27. Finally, the United States submits that systemic considerations militate against the Panel's approach. In particular, the Panel's approach would allow parties to make new legal claims on new or amended measures midway through compliance pane

paragraphs 2 and 3 of Articl

systems be identical[84] contradicts "the Appellate Body's recognition that all systems of duty assessment must be afforded analogous treatment"[85] under the *Anti-Dumping Agreement*.

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

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

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

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[84]United States' appellant's submission, para. 79 (referring to Panel Report, para. 7.152).
[85]United States' appellant's submission, para. 83.
[86]United States' appellant's submission, para. 84.
[87]United States' appellant's submission, para. 84.
[88]United States' appellant's submission, para. 87. (original emphasis)
[89]United States' appellant's submission, para. 92.
[90]United States' appellant's submission, para. 94 (referring to Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 314).
[91]United States' appellant's submission, para. 94.

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

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

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

37. The United States submits that the WTO dispute settlement system requires only prospective implementation of the DSB's recommendations and rulings. In support of this proposition, the United States asserts that Article 21.5 proceedings focus only on the consistency of those measures in existence at the time of panel establishment and, as such, a Member's compliance with the DSB's recommendations and rulings is "determined on a prospective basis".[99]

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

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

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

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

40. The United States recalls that, in *US – Zeroing (EC) (Article 21.5 – EC)*, the Appellate Body examined, *inter alia*, whether a number of periodic reviews and resultant assessment instructions that were not part of the original dispute demonstrated a failure to comply with the DSB's recommendations and rulings.[103] According to the United States, the Appellate Body's analysis of those reviews and resultant assessment instructions suggests that, where the review determination was published and the assessment instructions were issued prior to the end of the reasonable period of time, these reviews and assessment instructions were not a basis for finding a failure to comply[104]; however, where a measure was put in place or had "cognizable effects" after the conclusion of the reasonable period of time, that measure could provide a basis for finding that a Member failed to comply with the DSB's recommendations and rulings, to the extent that such effects after the

[101]United States' appellant's submission, para. 65.
[102]United States' appellant's submission, para. 100.
[103]United States' appellant's submission, para. 103 (referring to Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, paras. 326, 337, 338, and 345).
[104]United States' appellant's submission, para. 104 (referring to Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 313 and footnote 423 thereto).

expiration of the reasonable period of time reflected the inconsistency found in the original determination. By contrast, if the measure was not put in place or did not have any "cognizable effects" after the expiration of the reasonable period

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

45. In addition, the United States recalls its previ

specific to satisfy Article 6.2.[116] In this regard, Japan refers to *Australia – Salmon (Article 21.5 – Canada)* and *EC – Bananas III*, which, in its view, illustrate that panels and the Appellate Body have accepted a reference to a category of measures in a panel request as being sufficiently specific to satisfy Article 6.2.[117] Furthermore, Japan argues that the category of "any subsequent closely connected measures" was broad enough to cover Review 9, as compared to panel requests in other disputes that were drafted too narrowly to justify the inclusion of certain measures.[118]

48. Japan also supports the Panel's reliance on the fact that the United States anticipated the inclusion of subsequent periodic reviews like Review 9 in its first written submission to the Panel.[119] Japan rejects the United States' argument that its statement "was a lucky 'guess' or 'speculation' [that] proved to be accurate"[120], because, as the Panel noted, under the United States' retrospective anti-dumping duty system, periodic reviews are highly predictable. Moreover, at the time of Japan's panel request, the USDOC had already initiated Review 9 and was scheduled to issue its final determination in mid-August 2008, which was shortly thereafter extended to 4 September 2008.[121]

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

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

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

[118]Japan's appellee's submission, paras. 403-407 (referring to Panel Report, *EC – Chicken Cuts (Thailand)*

process is "ongoing or continuous", as each of Reviews 4, 5, 6, and 9 serves as a "replacement" measure that "supersedes" the previous periodic review relating to entries of ball bearings.[124] Review 9 was the "latest link in the chain"[125]

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

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

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

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

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

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

58. Japan disagrees with the United States' argument that the Panel's interpretation treats retrospective and prospective duty collection systems unequally and "'[u]nfairly disadvantages Members with retrospective systems".[146] Japan asserts that both systems are subject to the disciplines of Article 9.3 of the *Anti-Dumping Agreement*[147], which requires the importing Member "to 'refund' some or all of the duties 'paid' on importation".[148] Moreover, Japan asserts that, under either system, a review could continue to produce legal effects after the end of the reasonable period of time as a result of, for example, domestic litigation concerning that review.[149] Japan submits that Articles 13, 14, and 15 of the International Law Commission Draft Articles on Responsibility of States for internationally wrongful acts[150] (the "ILC Draft Articles") confirm that the United States is required by the DSU to bring its measures into conformity with its WTO obligations "when they continue to produce legal effects after the end of the RPT, regardless of the dates of entry" of imports.[151]

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

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

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

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

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

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

[158]

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

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

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66. Japan rejects the United States' argument that

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

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

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

4. Article II of the GATT 1994

71. Japan submits that the Panel correctly found that the United States is in violation of Articles II:1(a) and II:1(b) of the GATT 1994 with respect to certain USDOC liquidation instructions and Customs liquidation notices issued after the expiration of the reasonable period of time. Japan argues that the Panel had a proper basis to exam

mutually exclusive remedies in United States law. Furthermore, Japan submits that measures

measures challenged, because Japan had identified the periodic reviews in Annex 1 of its panel request, the procedures under United States municipal law to modify periodic reviews are limited, and Review 9 had been initiated before Japan's request.[189] Moreover, the European Communities distinguishes the facts before the panel in

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

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

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

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[193]European Communities' third participant's submission, para. 28.
[194]European Communities' third participant's submission, paras. 30 and 33.
[195]European Communities' third participant's submission, para. 31.
[196]

the Appellate Body Report in

delay in assessment or liquidation due to judicial proceedings would sever the "mechanical" link, because this issue was not addressed by the Appellate Body in that report.[200] The European Communities explains that the Appellate Body was not positing an *a contrario* rule, that, if an action is not "mechanistic", late compliance is justified.[201] Furthermore, the European Communities asserts that liquidation actions (incorporating the results of the judicial review proceedings) are positive acts that must be in conformity with the covered

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

83. Korea considers that the Panel's approach treats retrospective and prospective anti-dumping systems "equally".[217] Korea explains that the "obligation to cease" the inconsistent measures after the reasonable period of time is "identical" for all

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

86. Mexico asserts that the Panel correctly found that Review 9 fell within its terms of reference and that the phrase "subsequent closely connected measures" in Japan's panel request includes Review 9. Mexico endorses the view of the Panel that Review 9 is "a measure taken to comply" and emphasizes that "once finalised [Review 9] would become the next administrative review in the continuum of administrative reviews related to the 1989 Anti-Dumping Order."[225] Mexico considers

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

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

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[231]Mexico's third participant's submission, para. 37.
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III. Issues Raised in This Appeal

93. The following issues are raised in this appeal:

(a) Whether the Panel erred in finding that Review 9 fell within its terms of reference because:

(i) it was not properly identified in Japan's panel request, as required by Article 6.2 of the DSU; and

(ii) it had not been completed when Japan requested the establishment of the Panel.

(b) Whether the Panel erred in finding that the United States has failed to comply with the DSB's recommendations and rulings regarding the importer-specific assessment rates determined in Reviews 1, 2, 3, 7, and 8 that apply to imports covered by those Reviews that were, or will be, collected after the expiry of the reasonable period of time, because:

(i) the United States' compliance obligations must be determined based on the date of importation and not on the basis of the date of collection of the anti-dumping duties; and

(ii) collection was delayed beyond the reasonable period of time due to the periodic reviews being subjected to domestic judicial proceedings.

(c) Whether the Panel erred in finding that the United States has acted inconsistently with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 by applying zeroing in the context of Reviews 4, 5, 6, and 9, because:

(i) the United States' compliance obligations must be determined based on the date of importation and not on the basis of the date of collection of the anti-dumping duties;

(ii) collection was delayed beyond the reasonable period of time due to the periodic reviews being subjected to domestic judicial proceedings; and

(iii) Reviews 4, 5, and 6 had not had effects after the reasonable period of time, given that collection had been suspended as a result of court injunctions.

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

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

A. *Article 21.5 Proceedings*

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

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

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

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

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

[255]WT/DS322/27, para. 12.

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

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

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

initiated at the time of Japan's panel request[266]; was "identical in nature and effect" to Reviews 4, 5, and 6, which the Panel had found to be within the scope of the Article 21.5 proceedings[267]; and applied the zeroing methodology.[268] The Panel concluded that, like Reviews 4, 5, and 6, Review 9 was sufficiently closely connected to the original dispute to constitute a "measure taken to comply", within the meaning of Article 21.5.[269]

102. Thirdly, the Panel examined the United States' argument that a measure not yet in existence at the time of the panel request, such as Review 9, could not be the subject of WTO dispute settlement. The Panel observed that "although Review 9 did not exist at the time of the panel request, a chain of measures or a continuum existed, in which each new review superseded the previous one. Review 9 eventually came into existence as a part of this chain."[270] The Panel found that "[i]n these particular circumstances, where the measure in issue eventually came into existence as part of a continuum that existed at the time of the panel request, and where the process for bringing about the measure's existence was already underway, ... Review 9 is within the panel's terms of reference."[271] The Panel subsequently found that the evidence submitted by Japan—including computer program excerpts, as well as USDOC Issues and Decision Memoranda—demonstrated that zeroing had been used in Review 9 and that, therefore, Review 9 was inconsistent with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.[272]

B. *Claims and Arguments on Appeal*

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

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[266] Panel Report, para. 7.110.

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

[268] Panel Report, para. 7.114.

[269] Panel Report, para. 7.114.

[270] Panel Report, para. 7.116.

[271] Panel Report, para. 7.116.

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

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

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

104. Japan agrees with the Panel's findings with respect to Review 9, and submits that the language of its panel request was specific enough to satisfy the requirements of Article 6.2.[278] Moreover, Japan points out that previous panels and the Appellate Body have found that referring to a "category of measure" is sufficiently specific to satisfy the requirements of Article 6.2 of the DSU.[279] Japan agrees with the Panel's emphasis on the fact that the United States had anticipated the inclusion of Review 9 in its first written submission to the Panel[280], and that, under the United States' retrospective anti-dumping system, periodic reviews are predictable.[281] Further, Japan notes that Review 9 had been initiated by the USDOC over nine months before Japan's panel request, and was due to be completed during the course of the Panel proceedings.[282] Japan also finds support in the panel's reasoning in *Australia – Salmon (Article 21.5 – Canada)* that the "ongoing" and "continuous" nature of compliance under the WTO dispute settlement system warrants the inclusion of measures that come into existence during Article 21.5 panel proceedings.[283] Japan considers that the inclusion of Review 9 is consistent with the due process objectives of Article 6.2 of the DSU. Moreover, it disagrees that the inclusion of

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

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

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

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

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

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

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

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

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

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

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

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

C. *Analysis*

106. The United States' appeal focuses on two aspects of the Panel's analysis.[286] First, the United States argues that the phrase "subsequent closely connected measures" in Japan's panel request does not meet the requirement of Article 6.2 of the DSU to "identify the specific measures at issue". Secondly, the United States submits that the Panel erred in finding that Review 9 was properly within the Panel's terms of reference because Review 9 had not been completed when Japan submitted its panel request to the DSB. The United States considers that Review 9 was a "future measure" that "cannot form part of a [p]anel's terms of reference".[287] We recall that the notice of initiation of Review 9 was published on 29 June 2007. Japan requested that the matter be referred to a panel under Article 21.5 of the DSU on 7 April 2008, and the matter was referred to the Panel on 18 April 2008.[288] The preliminary and final results of Review 9[289] were published on 7 May .0004Tj7 (ma0 TD08.4372f2.364246 0 T

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

108. The Appellate Body has stated that, pursuant to Article 6.2, a panel request must be "sufficiently precise" for two reasons.[291]

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

> ... cite the recommendations and rulings that the DSB made in the original dispute as well as in any preceding Article 21.5 proceedings,

entitled "Periodic Reviews".[302] Paragraph 12 begins by

periodic reviews.[311] In addition to this "as such" finding, the Appellate Body found that the United States acted inconsistently with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 by applying zeroing procedures in the 11 periodic reviews at issue in that appeal.[312] If zeroing were used in Review 9, it would mean that the United States has not ceased using zeroing procedures in periodic reviews, contrary to the DSB's recommendations and rulings. Thus, Review 9 is a measure that has "a bearing on compliance with the recommendations and rulings of the DSB" and this must be taken into account in assessing whether Japan's panel request meets the requirements of Article 6.2, read in the light of Article 21.5.[313]

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

116. We do not believe that the Appellate Body's prior reference to subsequent periodic reviews as "separate and distinct" contradicts the notion that a periodic review can be identified for purposes of Article 6.2 of the DSU through the use of the phrase "subsequent closely connected measures". Although recognizing that each periodic review is a "separate and distinct" measure (in the sense that it is not an "amendment" of the previous periodic review[316]), the Appellate Body in *US – Zeroing (EC) (Article 21.5 – EC)* nonetheless underscored the link between subsequent periodic reviews by stating that "subsequent reviews ... issued under the same respective anti-dumping duty order as the measures challenged in the original proceedings, ... constitute[] 'connected stages ... involving the imposition, assessment and collection of duties under the same anti-dumping order'."[317] The periodic reviews, moreover, involved the same products, from the same countries, and formed part of a

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

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

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

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

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

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

[317]Appellate Body Report,

continuum of events.[318] It is precisely because it has similar connections that Review 9 can be properly described as a "subsequent closely connected measure". Further, the text of Article 6.2 of the DSU does not require that a measure be referred to individually in order to be properly identified for purposes of that Article. The Appellate Body has stated that the measures at issue must be identified with sufficient precision in order that the matter referred to a panel may be discerned from the panel request.[319] Whereas a more precise way to identify a measure would be to indicate its name and title in the panel request[320], there may be circumstances in which a party describes a measure in a more generic way, which nonetheless allows the measure to be discerned. In this case, the phrase "subsequent closely connected measures" is sufficiently precise to identify Review 9, given that it is a periodic review of the same anti-dumping duty order on imports of ball bearings from Japan and

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

119. Further, we do not believe that the inclusion of Review 9 in the Panel's terms of reference adversely affected the United States' due process rights. In addition to the factors taken into account by the Panel, which are noted above, we observe that, once the final results of Review 9 were published, and Japan had filed its supplemental submission, the United States was given an opportunity to respond in writing to the arguments raised in that submission. Moreover, Japan's arguments concerning Review 9 were similar to those raised with regard to Reviews 4, 5, and 6, in that they also challenged the use of zeroing in a "chain of assessment incorporating those measures".[329] The United States had further opportunities to make arguments at the Panel meeting with the parties and in response to the Panel's questions. In our view, the above suggests that the United States had ample opportunities, during the course of the Panel proceedings and prior to the Panel's deliberations, to make arguments, answer questions, and respond to Japan's submission with respect to Review 9.[330] Potential third parties were sufficiently put on notice by Japan's panel request, given the inclusion of the reference to "subsequent closely connected measures", the connections

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

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

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

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

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[332]Panel Report, para. 7.105.

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

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

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

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

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

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

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

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

125. As a further argument to support its view that Review 9 could not fall within the Panel's terms of reference, the United States relies on the Appellate Body's statement in *EC – Chicken Cuts* that "[t]he term 'specific measures at issue' in Article 6.2 suggests that, as a general rule, the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel", and that only in "certain limited circumstances" will measures enacted subsequent to a panel's establishment fall within the Panel's terms of reference.[340] According to the United States, the circumstances of this case, including the fact that it is a compliance proceeding, do not justify the inclusion of Review 9 in the Panel's terms of reference. As the United States itself recognizes, however, in *EC – Chicken Cuts*, the Appellate Body did not rule that Article 6.2 categorically prohibits the inclusion, within a panel's terms of reference, of measures that come into existence or are completed after the panel is requested. Rather, the Appellate Body noted explicitly that, in certain circumstances, such measures could be included in a panel's terms of reference. Moreover, whereas the statement in *EC – Chicken Cuts* to which the United States refers was made in the context of original WTO proceedings, we are dealing here with Article 21.5 proceedings. As we explained earlier[341], the requirements of Article 6.2 must be adapted to a panel request under Article 21.5, and the scope and function of Article 21.5 proceedings necessarily inform the interpretation of the Article 6.2 requirements in such proceedings. The proceedings before us present circumstances in which the inclusion of Review 9 was necessary for the Panel to assess whether compliance had been achieved, and thereby resolve the "disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings".

[340]United States' appellant's submission, para. 51 (quoting Appellate Body Report, *EC – Chicken Cuts*, para. 156).
[341]See *supra*, paras. 109 and 122.

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

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

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

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

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

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

[344]Panel Report, para. 7.116.

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

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

Japan requested the establishment of a panel. Accordingly, we uphold

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

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

134. Section B provides a brief summary of the Panel's analysis of these issues. The arguments raised on appeal by the participants and third particip

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

137. Next, the Panel reviewed the United States' argument that it had met its compliance obligations by eliminating the cash deposit rates established by the periodic reviews that were found to be WTO-inconsistent in the original proceedings and that there was nothing else that it needed to do to come into compliance.[366] The Panel rejected this argument, noting that the United States had not explained how it had complied with the DSB's recommendations and rulings regarding the relevant importer-specific assessment rates. The Panel observed, in this regard, that the United States considered that "it was not required to implement in respect of the importer-specific assessment rates because they relate to import entries occurring before the expiry of the RPT."there was nothing e95P.93( )548.ing be

that these provisions, taken collectively, prescribe that the relevant date for implementation is the date

when a Member would need to implement the DSB's recommendations and rulings. The United States argued that this is saliently different from retrospective systems where liquidation of anti-dumping duties can occur after the expiry of the reasonable period of time. This makes it possible for implementation obligations to affect the liquidation of such duties. According to the United States, such unequal treatment of retrospective anti-dumping systems, as compared to the treatment of prospective anti-dumping systems, is contrary to the Appellate Body's view that "[t]he *Anti-Dumping Agreement*

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

144. The Panel concluded that the United States has failed to comply with the recommendations and rulings of the DSB regarding the importer-specific assessment rates determined in Reviews 1, 2, 3, 7, and 8 that apply to entries covered by those Reviews that were, or will be, liquidated after the expiry of the reasonable period of time and, consequently, remains in violation of Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.[383]

2. Reviews 4, 5, 6, and 9

5, 6, and 9.[388] The Panel also considered the USDOC Issues and Decision Memoranda for Reviews 4, 5, 6, and 9.[389] On the basis of this evidence, the Panel found that Japan had established a *prima facie* case that the United States applied zeroing in Reviews 4, 5, 6, and 9.[390] It further noted that the United States did not deny that it applied zeroing in those determinations.[391] The Panel disagreed with the United States that there was a need to provide evidence demonstrating that individual importer-specific assessment rates were affected by zeroing. The Panel noted that the Appellate Body's findings in the original proceedings were not based on evidence that particular importers had sales with negative margins or that individual impor

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

C. *Claims and Arguments on Appeal*

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

149. The United States also challenges the Panel's finding that the United States acted inconsistently with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 by applying zeroing in the context of Reviews 4, 5, 6, and 9.[400] The United States appeals this finding on the same two grounds that it appeals the findings relating to Reviews 1, 2, 3, 7, and 8. In addition, the United States challenges the finding concerning Reviews 4, 5, and 6, on the grounds that these reviews had not had effects after the expiration of the reasonable period of time because "assessment of duties calculated in these reviews was enjoined prior to the conclusion of the RPT and continues to be enjoined".[401]

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

[396] Panel Report, para. 7.168.
[397] United States' appellant's submission, para. 87.
[398] United States' appellant's submission, paras. 91-100.
[399] United States' appellant's submission, para. 97.
[400] United States' appellant's submission, para. 101.
[401] United States' appellant's submission, para. 105.
[402] Japan's appellee's submission, para. 238.

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

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

152. The European Communities considers that the Appellate Body should uphold the Panel's findings concerning Reviews 1, 2, 3, 7, and 8 and Reviews 4, 5, 6, and 9.[407] Mexico and Korea agree with the Panel that any measure taken after th

D. *Analysis*

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

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

154. The obligation to comply with the DSB's recommendations and rulings arises once the DSB has adopted a panel or Appellate Body report[411] that has concluded that a measure is inconsistent with a covered agreement. In accordance with Article 19.1, implementation requires that the Member concerned bring the WTO-inconsistent measure into conformity with the relevant covered agreement(s). Article 3.7 of the DSU states that, "[i]n the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements." Although the "withdrawal" of the WTO-inconsistent measure could be understood as requiring abrogation of the measure, it has been accepted that "alternative means of implementation may exist and that the choice belongs, in principle, to the Member".[412] As the Appellate Body has explained, "the inconsistent measure to be withdrawn can be brought into compliance by modifying or replacing it with a revised measure."[413]

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

[411]Pursuant to Articles 16.4 and 17.14 of the DSU.
[412]Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*,

substantive compliance is required".[415] This, in turn, requires that the implementing Member rectify the inconsistencies found in the original proceedin

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

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

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

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

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

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

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

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

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

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

not apply to imports entered before the violation of the undertaking".[423] Article 10.1 establishes that

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

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

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

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

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

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

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

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

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

by Japan and the European Communities.[432] Like Article 9.3.1, which concerns retrospective anti-dumping systems, Article 9.3.2 provides for strict time-limits on the duration of a refund procedure. Footnote 20, on which the United States relies for its arguments on judicial delay[433], and which applies to both Articles 9.3.1 and 9.3.2, recognizes that the observance of these time-limits "may not be possible where the product in question is subject to judicial review proceedings." Therefore, where actions or omissions relating to a refund procedure are challenged both domestically and in WTO dispute settlement, delays in the completion of a refund procedure until after the end of the reasonable period of time cannot be excluded. Should such a refund procedure not be completed before the end of the reasonable period of time, a WTO Member with a prospective anti-dumping system would have compliance obligations in respect of that refund procedure concerning past imports. Such a Member would thus find itself in a situation similar to that of an implementing Member applying a retrospective anti-dumping system. This confirms that, under both retrospective and prospective anti-dumping systems, entries made prior to the expiration of the reasonable period of time also may be affected by compliance obligations. As a consequence, we disagree with the United States that disregarding the date of entry of the merchandise for purposes of determining compliance would result in retrospective anti-dumping systems being treated less favourably than prospective anti-dumping systems.

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

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

regardless of the date of importation. There is no "retroactive relief" involved when a WTO Member's conduct is examined as of the end of the reasonable period of time, which is the proper

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

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

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

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

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

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

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

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

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

[440]The United States itself framed the issue as follows: "a key question in this appeal is wheth-3.4(ce of Arstir)-4.1(e

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

173. Tribunals or procedures for the independent re

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

Article 21.5 proceedings is to assess whether an implementing Member has fully complied with the DSB's recommendations and rulings, and not to modify the reasonable period of time. Moreover, the very text of Article 21.3 indicates that the "reasonable period of time" is an exception to immediate compliance, thus implying that further delays would not be justified, whatever the circumstances. In

181. As the European Communities observes[460], the United States is reasoning *a contrario* on the

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

183. The United States argues further that liquidation is a "ministerial" act because Customs "collects the antidumping duties based on [USDOC's] determination" and Customs "does not have the authority to recalculate or otherwise revise these duties".[464] We note that the Panel record indicates that what occurred after the expiry of the reasonable period of time was not just the action of

Thus, we are not persuaded that the initiation by pr

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

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

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

188. Reviews 1, 2, 3, 7, and 8 were challenged by Japan in the original proceedings. The Appellate Body found that the United States acted inconsistently with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 by applying zeroing procedures in those Reviews.[476]

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

189. The United States does not appeal any of these findings. Instead, the United States argues, first, that it had no compliance obligations in respect of Reviews 1, 2, 3, 7, and 8, because they cover

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

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

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

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

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

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

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

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

[487]Panel Report, para. 7.82.

[488]Panel Report, para. 7.166.

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

195. Accordingly, we uphold

the United States has acted inconsistently with the *Anti-Dumping Agreement* and the GATT 1994.[506] The United States also asserted that Japan's claims were unfounded. According to the United States, "the liability for anti-dumping duties, that Japan claims resulted in collection of duties above the bound rate, was incurred prior to the expiry of the RPT, when the subject merchandise entered the United States and a cash deposit was paid."[507] Moreover, the United States explained that "it was no longer collecting cash deposits pursuant to the administrative reviews that were subject to the DSB's recommendations and rulings."[508]

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

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

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

[506]Panel Report, paras. 7.196 and 7.201 (quoting United States' first written submission to the Panel, footnote 116 to para. 70).
[507]Panel Report, para. 7.197.
[508]Panel Report, para. 7.197.
[509]

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

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

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

Accordingly, the Panel found that the USDOC liquidation instructions and Customs liquidation notices challenged by Japan are inconsistent with Articles II:1(a) and II:1(b) of the GATT 1994.[518]

C. *Claims and Arguments on Appeal*[519]

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

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

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[517]Panel Report, para. 7.207.

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

[519]Korea is the only third participant that has addressed this aspect of the United States' appeal in its third participant's submission. It asserts that the Panel'

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

D. *Analysis*

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

Article II

Schedules of Concessions

> 2. Nothing in this Article shall prevent any Member from imposing at any time on the importation of any product:
>
> ...
>
> (b) any anti-dumping or countervailing duty applied consistently with the provisions of Article VI;*

209. The United States has not challenged the Panel's interpretation of Article II and we need not engage in an extensive analysis of this provision. We note that, in *India – Additional Import Duties*, the Appellate Body examined the relationship between

the DSU or otherwise erred by not exercising judicial economy.[531] The United States explained that, instead, its argument is that the Appellate Body's reversal of the Panel's findings relating to Reviews 1, 2, 7, and 8 would necessarily require a reversal of the Panel's findings under Article II of the GATT 1994. Because we have upheld the Panel's findings relating to Reviews 1, 2, 7, and 8[532], the condition on which the United States' request is premised is not met.

211. The United States additionally reiterates two of the arguments that it makes in connection with the Panel's findings concerning Reviews 1 through 9, namely, that: (i) the relevant date for determining compliance is the date of entry of the subject imports[533]; and that (ii) liquidation would have occurred before the expiration of the reasonable period of time but for the domestic judicial proceedings.[534] We explained above, in Section V, why we do not consider that these arguments are based on a correct interpretation of the DSU and the *Anti-Dumping Agreement*. Thus, these two arguments raised by the United States also do not provide a basis to disturb the Panel's findings concerning Article II of the GATT 1994.

212. For these reasons, we uphold the Panel's finding that the United States is in violation of Articles II:1(a) and II:1(b) of the GATT 1994 with respect to certain liquidation actions taken after the expiry of the reasonable period of time, namely, with respect to the USDOC liquidation instructions set forth in Panel Exhibits JPN-40.A, and JPN-77 to JPN-80, and the Customs liquidation notices set forth in Panel Exhibits JPN-81 to JPN-87.[535]

VII. Findings and Conclusions

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

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

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

[532] See *supra*, Section V.

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

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

[535] Panel Report, paras. 7.208 and 8.1(d).

(b) upholds the Panel's finding, in paragraphs 7.154 and 8.1(a) of the Panel Report, that the United States has failed to comply with the DSB's recommendations and rulings regarding the importer-specific assessment ra

Signed in the original in Geneva this 31st day of July 2009 by:

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Giorgio Sacerdoti
Presiding Member

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Lilia R. Bautista	Yuejiao Zhang
Member	Member

ANNEX I

WORLD TRADE ORGANIZATION

WT/DS322/32
22 May 2009

(09-2489)

Original: English

UNITED STATES – MEASURES RELATING TO ZEROING AND SUNSET REVIEWS

Recourse to Article 21.5 of the DSU by Japan

Notification of an Appeal by the United States
under Article 16.4 and Article 17 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU),
and under Rule 20(1) of the *Working Procedures for Appellate Review*

The following notification, dated 20 May 2009, from the Delegation of the United States, is being circulated to Members.

Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the Working Procedures for Appellate Review, the United States hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the report of the panel in *United States – Measures Relating to Zeroing and Sunset Reviews; Recourse to Article 21.5 of the DSU by Japan* (WT/DS322/RW) ("Panel Report") and certain legal interpretations developed by the panel.

1. The United States seeks review by the Appellate Body of the panel's finding that Review 9 was within the panel's terms of reference. In particular, the United States seeks review of the panel's findings that Japan's panel request identified Review

Article VI:2 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994").[3] These conclusions are in error and are based on erroneous findings on issues of law and related legal interpretations.

3. The United States seeks review by the Appellate Body of the panel's legal conclusion that the United States is in violation of Articles II:1(a) and II:1(b) of the GATT 1994 with respect to certain liquidation actions taken after the expiry of the RPT, namely with respect to liquidation instructions of the U.S. Department of Commerce set forth in Exhibits JPN-40A and JPN-77 to JPN-80 and the U.S. Customs and Border Protection liquidation notices set forth in Exhibits JPN-81 to JPN-87.[4] This conclusion is in error and is based on erroneous findings on issues of law and related legal interpretations.

4. The United States seeks review by the Appellate Body of the panel's legal conclusions with respect to Reviews 4, 5, and 6, as found at paras. 7.74 -7.83, 7.160-7.168, and 8.1(b) of the Panel Report. These conclusions are in error and are based on erroneous findings on issues of law and related legal interpretations.[5]

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[3] *See, e.g.*, Panel Report, paras. 7.154, 8.1(a)(i).

[4] *See, e.g.*, Panel Report, paras. 7.204-7.208, 8.1(d).

[5] Aside from the fact that Review 9 is not within the terms of reference, the panel's conclusions of law in paragraphs 7.160-7.168, and 8.1(b) with respect to Review 9 are also in error and are based on erroneous findings on issues of law and related legal interpretations.

ANNEX II

**ORGANISATION MONDIALE
DU COMMERCE**

**ORGANIZACIÓN MUNDIAL
DEL COMERCIO**

WORLD TRADE ORGANIZATION

APPELLATE BODY

is subject to the requirement of Article 17.10 of the DSU that "[t]he proceedings of the Appellate Body shall be confidential." They requested the Appellate Body to treat their oral submissions as confidential should it decide to allow public observation of the oral hearing. Although Korea did not object to the Appellate Body allowing public observation of the portions of the participants' and third participants' oral submissions that they wished to make public, it noted its view that the DSU does not contain an explicit provision allowing public observation. Korea requested the Appellate Body to treat its oral submissions as confidential.

4. Similar requests to allow public observation of the oral hearing have been made in previous appeals.[3] In acceding to these requests, the Appellate Body relied on the same reasoning, which was first developed in *US – Continued Suspension* and *Canada – Continued Suspension*. We note the following main aspects of the reasoning set out in the Procedural Rulings issued in those proceedings:

(a) Article 17.10 must be read in context, particularly in relation to Article 18.2 of the DSU. The second sentence of Article 18.2 expressly provides that "[n]othing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public". Thus, under Article 18.2, the parties may decide to forego confidentiality protection in respect of their statements of position. The third sentence of Article 18.2 states that "Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential." This provision would be redundant if Article 17.10 were interpreted to require absolute confidentiality in respect of all elements of appellate proceedings. Accordingly, Article 18.2 of the DSU provides contextual support for the view that the confidentiality rule in Article 17.10 is not absolute, and has its limits.

(b) The confidentiality requirement in Article 17.10 operates in a relational manner. There are different sets of relationships that are implicated in appellate proceedings, including: (i) a relationship between the participants and the Appellate Body; and (ii) a relationship between the third participants and the Appellate Body. The requirement that the proceedings of the Appellate Body are confidential affords protection to these separate relationships and is intended to safeguard the interests of the participants and third participants and the adjudicative function of the Appellate Body, so as to foster the system of dispute settlement under conditions of fairness, impartiality, independence and integrity. In this case, the participants have requested authorization to forego confidentiality protection for their communications with the Appellate Body at the oral hearing. The requests of the participants do not extend to any communications, nor touch upon the relationship, between the third participants and the Appellate Body. The right to confidentiality of third participants vis-à-vis the Appellate Body is not implicated by these requests.

(c) The DSU does not specifically provide for an oral hearing at the appellate stage. The oral hearing was instituted by the Appellate Body in its *Working Procedures*. Pursuant to Rule 27 of the *Working Procedures*, the Appellate Body has the power to exercise control over the conduct of the oral hearing, including authorizing the lifting of confidentiality at the request of the participants as long as this does not adversely affect the rights and interests of the third participants or the integrity of the appellate process. Even though Article 17.10 also applies to the relationship between third participants and the Appellate Body, the third participants cannot invoke Article 17.10 as it applies to their relationship with the Appellate Body, so as to bar

[3] See *supra*, footnote 1.

the lifting of confidentiality protection in the relationship between the participants and the Appellate Body. Likewise, authorizing the participants' requests to forego confidentiality, does not affect the rights of third participants to preserve the confidentiality of their communications with the Appellate Body.

(d) Although the powers of the Appellate Body are themselves circumscribed in that certain aspects of confidentiality are incapable of derogation—even by the Appellate Body—where derogation may undermine the ex

room to which duly registered delegates of WTO Members and members of the general public will have access.

(b) Oral statements and responses to questions by the third participants that have indicated their wish to maintain the confidentiality of their submissions, as well as information that Japan has designated as confidential, will not be subject to public observation.

(c) An appropriate number of seats will be reserved for delegates of WTO Members in the room where the closed-circuit broadcast will be shown.

(d) Notice of the oral hearing will be provided to the general public through the WTO website. WTO delegates and members of the general public wishing to observe the oral hearing will be required to register in advance with the WTO Secretariat.

(e) Should practical considerations not allow simultaneous broadcast of the oral hearing, deferred showing of the video recording will be used as an alternative.

Geneva, 11 June 2009

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