United States – Measures Relating to Zeroing and Sunset Reviews

(AB-2009-2/DS322)

Recourse to Article 21.5 of the DSU by Japan

Appellant Submission of the United States of America

May 27, 2009

United States – Measures Relating to Zeroing and Sunset Reviews

Recourse to Article 21.5 of the DSU by Japan

(AB-2009-2/DS322)

SERVICE LIST

APPELLEE

H.E. Mr. Shinichi Kitajima, Permanent Mission of Japan

THIRD PARTIES

H.E. Mr. Sun Zhenyu, Permanent Mission of the People's Republic of China
H.E. Mr. Eckart Guth, Permanent Delegation of the European Commission
Mr. Martin Glass, Hong Kong Economic and Trade Office
H.E. Mr. Lee Sung-joo, Permanent Mission of Korea
H.E. Mr. Fernando de Mateo, Permanent Mission of Mexico
H.E. Ms. Elin Østebø Johansen, Permanent Mission of Norway
Mr. Yi-Fu Lin, Permanent Mission of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu
H.E. Mr. Thawatchai Sophastienphong, Permanent Mission of Thailand

Table of Contents

Table of Reports

Short Form	Full Citation
Brazil – Desiccated Coconut (AB)	Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted 20 March 1997
Chile – Price Band System (AB)	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002
EC – Bananas III (Panel)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R, adopted 25 September 1997, as modified by the Appellate Body Report, WT/DS27/AB/R
EC – Chicken Cuts (AB)	Appellate Body Report, *European Communities - Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005
EC – Salmon (Panel)	Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008
India – Autos (Panel)	Panel Report, *India – Measures Affecting the Automotive Sector*, WT/DS/146/R, WT/DS175/R, adopted 5 April 2002
Indonesia – Autos	Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry,* WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, adopted 23 July 1998
US – Section 129 (Panel)	Panel Report, *United States – Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS221/R, adopted 30 August 2002
US – OCTG from Argentina (Article 21.5) (Panel)	Panel Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS268/RW, adopted 11 May 2007, as modified by the Appellate Body Report, WT/DS268/AB/RW
US – OCTG from Argentina (Article 21.5) (AB)	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS268/AB/RW, adopted 11 May 2007

US – Upland Cotton (Panel)	Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, adopted 21 March 2005, as modified by the Appellate Body Report, WT/DS267/AB/R
US – Upland Cotton (Article 21.5) (AB)	Appellate Body Report, *United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267/AB/RW, adopted 20 June 2008
US – Zeroing I (EC) (Article 21.5) (Panel)	Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/RW, circulated 17 December 2008
US – Zeroing I (EC) (Article 21.5) (AB)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/AB/RW, circulated 14 May 2009
US – Zeroing (Japan) (Panel)	Panel Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/R, adopted 23 January 2007, as modified by the Appellate Body Report, WT/DS322/AB/R
US – Zeroing (Japan) (AB)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted 23 January 2007
US – Zeroing II (EC) (AB)	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009

I. INTRODUCTION AND EXECUTIVE SUMMARY

A. Introduction

1. This appeal presents two core issues that are not about "zeroing" in antidumping proceedings but rather about the scope of compliance proceedings under the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"). This introduction will briefly highlight these two issues and will then note some important systemic concerns associated with these issues.

2. With respect to the issue of "zeroing," we acknowledge that the Appellate Body has addressed the consistency of "zeroing" in antidumping proceedings in a series of disputes. The United States continues to take a different view of the commitments that WTO Members negotiated, and did not negotiate, with respect to "zeroing." Nonetheless, the United States has heard the views of the Appellate Body on this issue and has publicly stated its intention to comply with the recommendations and rulings of the DSB in all of these disputes. The United States is working actively to implement these recommendations and rulings, including those made in other disputes for which the reasonable period of time ("RPT") is still ongoing.

Liquidation Suspended by Judicial Action

3. Turning to the subject matter of this appeal, the first key issue concerns the "liquidation" of antidumping duties assessed on entries made long before there were any Dispute Settlement Body ("DSB") recommendations and rulings concerning the use of zeroing in administrative reviews. This appeal builds on issues addressed in the appeal in *US – Zeroing I (EC) (Article 21.5).*

4. The compliance Panel found that a Member must affirmatively re-visit the duties assessed (and consequently the underlying assessment determinations) when liquidation will occur after the end of the reasonable period of time ("RPT"), even when:

(a) the assessment determination was made years prior to any DSB recommendations and rulings, and

(b) the liquidation would have occurred long before any such recommendations and rulings, except that liquidation had been suspended by court order during domestic court proceedings.

To take just one example, the compliance Panel found that the United States would fail to comply with DSB recommendations and rulings adopted in January 2007 if it did not revisit antidumping duty assessment rates determined in 2001 - over five years prior to the DSB recommendations and rulings - applying to entries that occurred between May 1999 and April 2000 – between six and seven years prior to any DSB recommendations and rulings. But for domestic court proceedings, these liquidations would have all taken place long before the DSB recommendations and rulings. As the compliance panel in the *US – Zeroing I (EC) (Article 21.5)* dispute explained, such an approach:

> would require the United States authorities to revisit the final assessment of duties previously performed in the context of the administrative review, for the sole reason that implementation of the US determination (via actual liquidation) was delayed, in some cases because of legal challenges having nothing to do with the issue of zeroing.[1]

[1] *US – Zeroing I (EC) (Article 21.5) (Panel)*, para. 8.193.

5. In this dispute, the compliance Panel's approach would have a Member reach back in time to determinations made over five years before the end of the RPT. And yet the compliance Panel did not find this to be retroactive or otherwise at odds with the prospective nature of compliance under the WTO dispute settlement system. Moreover, the compliance Panel's approach takes no account of the fact that the court orders in question were issued in judicial review proceedings called for by Article 13 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement"), which provides for WTO Members to "maintain judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review of administrative actions relating to final determinations and reviews of determinations" and that "[s]uch tribunals or procedures shall be independent of the authorities responsible for the determination or review in question."

Measure Non-Existent at Panel Establishment

6. Second, this appeal concerns a measure that did not exist as of the date of establishment of the compliance Panel and could not have been identified in the request for the establishment of a panel. The compliance Panel nonetheless found that this measure was within its terms of reference, based on the assertion that one element of the measure was "predictable" and the measure was part of a "continuum." The compliance Panel's approach would invite a complaining party to seek advisory opinions on any measure where the party could claim to be able to predict at least one element of the measure and could claim that the measure was part of a continuum of other measures. This is at odds with the DSU and, contrary to the express language in Article 6.2 of the DSU, would deny responding parties and potential third parties the ability to know the matter at issue in a dispute based on the panel request.

7. In light of these two key issues, we note that this appeal is not about the consistency of "zeroing." As we discussed at the outset, the Appellate Body has already addressed this issue, and although we do not share the same view of the obligations contained in the AD Agreement, the United States has nevertheless indicated its intention to comply with the DSB recommendations and rulings in those disputes.

Systemic Implications

8. The issues that are on appeal, however, present important systemic implications, in particular with respect to the implications for retrospective systems compared to prospective systems. These issues arise even aside from the points on liquidation above. As the Appellate Body recently stressed, when the DSB makes recommendations and rulings with respect to a measure found to be WTO-inconsistent, "the WTO-inconsistency has to cease by the end of the reasonable period of time with prospective effect."[2]

9. The compliance Panel impermissibly gave retroactive effect to the DSB recommendations and rulings when it concluded that the United States cannot be found to have complied unless it also revises the assessment of antidumping duties on entries made *prior* to the end of the RPT. The fact that the U.S. maintains a retrospective antidumping duty assessment system, in which final duty assessments are not made until some time after entry, should not require the United States to do more than a Member using a prospective duty assessment system to comply. However, under a prospective system, the duty is assessed at the time of entry – one would expect there to be no delayed determination of the duty and no delayed liquidation of entries.

---

[2] *US – Zeroing I (EC) (Article 21.5) (AB)*, para. 299.

Accordingly, a prospective system would not be expected to present the same situation of actions to collect the duty being taken after the end of the RPT.

10. Both systems are permitted under the AD Agreement, and the AD Agreement is effectively neutral between them. Each system has its own advantages and disadvantages. For example, under the U.S. retrospective system, interested parties are provided with a regular opportunity to seek the assessment of duties based on the margin of dumping that actually occurred, rather than an estimated margin of dumping or estimated normal value based on past observations. In this way, antidumping duties can be adjusted to more closely correspond to the actual pricing behavior of exporters and producers, and in turn exporters and producers see the duties respond to changes in their pricing behavior.

11. The scope of DSB recommendations and rulings should not differ depending on whether the system of the Member concerned is retrospective or prospective. Nor should the scope of compliance depend on whether interested parties have chosen to avail themselves of the opportunity to request a review as provided under the U.S. retrospective system. The compliance Panel's approach effectively disadvantages Members such as the United States that operate a retrospective duty system, because such Members would have to give retroactive effect to any findings of WTO-inconsistency regarding particular measures.

12. It is for this reason that the United States has suggested that the proper way to comply with DSB recommendations and rulings pertaining "as applied" to individual administrative review determinations is with respect to entries made after the end of the reasonable period of time. This is the only approach that is consistent with the prospective nature of relief in WTO

dispute settlement and the neutrality of the AD Agreement between prospective and retrospective antidumping duty systems.

B. Executive Summary

1. The Panel Erred in Finding That Review 9 Fell Within the Panel's Terms of Reference

13. After Japan submitted its second written submission, Japan asked the compliance Panel for permission to file a supplemental submission concerning Review 9, an alleged additional "measure taken to comply" by the United States. We objected that this subsequent measure could not fall within the compliance Panel's terms of reference, but the compliance Panel erroneously found that Review 9 was within its terms of reference.

14. The compliance Panel's finding has no basis in the text of the DSU. Under Article 6.2 of the DSU, a panel request must identify the *specific* measures at issue, and under Article 7.1, a panel's terms of reference are limited to those specific measures. As recognized recently by the Appellate Body in *US – Zeroing I (EC) (Article 21.5)*, each administrative review is separate and distinct. As such, Japan had to identify each such measure in its panel request.

15. Japan's identification of "subsequent closely connected measures" in its panel request was inadequate to meet the requirement under Article 6.2. It is uncertain what other measures Japan intended to bring within the scope of the compliance proceeding by including this term. The compliance Panel also placed importance on the fact that Review 9 had already been initiated by the time of the panel request. However, Japan's challenge was to the determination made as a result of Review 9, not to the fact that it was being conducted. Since Review 9 was

still on-going at that time, any challenge would have been premature, even if the measure had been properly identified.

16. Future administrative reviews, like Review 9, also fall outside the scope of this proceeding because under the DSU, measures not yet in existence at the time of a panel request cannot be subject to dispute settlement. We cited to the panel report in *US – Upland Cotton* in support of our argument. The compliance Panel agreed with the *Upland Cotton* panel's reliance on DSU Article 3.3, which calls for the "prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member." Here, the compliance Panel, failed to apply the exact same reasoning that it considered so persuasive in *US – Upland Cotton*. Review 9 could not have been impairing any benefits accruing to Japan because it was not in existence at the time of Japan's panel request.

17. The compliance Panel attempted to distinguish *US – Upland Cotton* from the present dispute by asserting that, unlike Brazil's challenge in that dispute, Japan's claim against Review 9 was "entirely predictable" because Review 9 was part of a chain of measures – in which each new review superseded the previous one – and the review had been initiated at the time of the panel request. The compliance Panel's own reasoning, however, overlooks the fact that the final results of Review 9 were entirely unknown at the time of the panel request. Moreover, the compliance Panel's approach is inconsistent with other reports' approaches to the question of including future measures.

18. The compliance Panel once again departed from the text of the DSU when it examined whether allowing Japan's challenge to "subsequently closely connected measures" would violate

any due process objective of the DSU. But neither Article 6.2 nor any other provision of the DSU or the covered agreements imposes a requirement to show that a responding party was somehow deprived of due process or notice because of the lack of specificity in a panel request.

19. The United States also believes that systemic considerations militate against reading the DSU in the manner that the compliance Panel did. A compliance panel examines whether a Member has complied with the DSB's recommendations and rulings at the time of the panel request. The WTO dispute settlement system does not contemplate that parties would make new legal claims on new or amended measures midway through a compliance panel proceeding.

2. The Appellate Body Should Reverse the Panel's Findings With Respect to Reviews 1 Through 9

20. The compliance Panel's findings with respect to Reviews 1 through 9 constitute legal error and should be reversed. Specifically, the Panel erred in finding that the United States failed to comply with the DSB's recommendations and rulings with respect to importer-specific assessment rates determined in Reviews 1, 2, 3, 7, and 8 applied to entries that were, or will be, liquidated after the expiry of the RPT. The compliance Panel also found that Reviews 4, 5, 6, and 9 were measures taken to comply, and that the United States acted inconsistently with Articles 2.4 and 9.3 of the AD Agreement and Article VI:2 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") by applying zeroing in those reviews. This finding of inconsistency also constitutes legal error.

21. A Member must comply with the DSB's recommendations and rulings only in a *prospective* manner. As demonstrated by various provisions of the AD Agreement and the GATT 1994, date of entry is determinative for evaluating compliance in antidumping disputes.

Accordingly, any post-RPT collection (or "liquidation") of duties with respect to Reviews 1, 2, 3, 7 and 8 cannot constitute a failure to comply with the DSB's recommendations and rulings in this dispute because these liquidations pertain to merchandise which entered the United States long before the end of the RPT. Moreover, with respect to Reviews 4, 5, 6, and 9, the compliance Panel erred in finding that these reviews are inconsistent with Articles 2.4 and 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 because all entries examined in these reviews also occurred before the end of the RPT. As a result, these reviews cannot serve as a basis for the finding that the United States acted inconsistently with the AD Agreement and the GATT 1994.

22. The compliance Panel's findings are also in error because they create inequality between prospective and retrospective assessment systems where there should be none. A defining feature of the retrospective system is that assessment and collection of duties occur at some time after entry. Accordingly, it is only in retrospective systems that assessment and collection of duties may occur after the end of an RPT. By allowing compliance obligations to reach goods that remain unliquidated at the end of the RPT, without regard to date of entry, the Panel's finding exploits this difference, resulting in much greater compliance obligations for Members operating retrospective antidumping systems. By contrast, recognizing that it is date of entry that determines the scope of compliance obligations maintains neutrality between prospective and retrospective systems.

23. The Appellate Body's recent report in *US – Zeroing I (EC) (Article 21.5)* supports finding the Panel's findings with Respect to Reviews 1, 2, 3, 7 and 8 are in error. In that report, the Appellate Body distinguished liquidation that is delayed as a result of judicial review. This is

exactly the case for Reviews 1, 2, 3, 7, and 8, where the post-RPT liquidations occurred after the end of the RPT only because of judicial review. Rather than recognize this important distinction, the Panel found that the reason for the delays in liquidation was immaterial. However, consistent with the provision of the AD Agreement which suspends deadlines for the assessment of antidumping duties where there is judicial review, a delay in liquidation due to judicial review should not serve as a basis for finding a Member failed to comply. Moreover, compliance obligations should not be affected by the existence of judicial review because to do so would permit private litigants to manufacture domestic litigation in order to control the scope of a Member's compliance obligations.

24. Finally, the Panel's findings with respect to the zeroing employed in Reviews 4, 5, and 6 were in error. These reviews were concluded long before the end of the RPT and, as a result of judicial review, assessment of duties calculated in these reviews was enjoined prior to the expiry of the RPT and remained enjoined throughout this compliance dispute. Accordingly, these reviews did not result in any post-RPT effects which could form the basis for finding the United States failed to comply with the DSB's recommendations and rulings in this dispute.

3. The Panel's Findings With Respect to Articles II:1(a) and (b) of the GATT 1994 Constitute Legal Error

25. The compliance Panel erred in finding that the United States is in violation of Article II of the GATT 1994 with respect to Commerce's liquidation instructions and U.S. Customs and Border Protection ("Customs") liquidation notices. Japan asserted that the United States acted inconsistently with its obligations under Articles II:1(a) and (b) of the GATT 1994 because after the reasonable period of time, it collected antidumping duties on the subject merchandise in

excess of the bound tariffs in the U.S. Schedule of Concessions and in a manner inconsistent with Article VI of the AD Agreement. The compliance Panel agreed.

26. Japan's Article II claims are entirely derivative of Japan's claims under Articles 2.4 and 9.3 of the AD Agreement. If the Appellate Body reverses the compliance Panel's findings that the United States failed to comply with the DSB's recommendations and rulings concerning Reviews 1, 2, 3, 7, and 8, the derivative findings that the United States violated Articles II:1(a) and (b) cannot stand and should likewise be reversed.

27. In any event, the compliance Panel erred by concluding that the liquidation instructions and liquidation notices constitute a breach of Article II of the GATT 1994. Here, the liability for antidumping duties that Japan claims resulted in collection of duties above the bound rate was incurred prior to the expiration of the RPT, when the subject merchandise entered the United States. In addition, any liquidation that occurred after the RPT resulted from a delay due to domestic judicial review. Just as such liquidation cannot serve as a basis for a failure to comply, it cannot support a corollary finding that the United States acted inconsistently with Articles II:1(a) and (b) of the GATT 1994.

II. FACTUAL BACKGROUND

A. The U.S. Antidumping System

28. The United States provided a detailed explanation of its antidumping system in its first written submission before the compliance Panel,[3] and the United States will not repeat the full

[3] U.S. First Written Submission, paras. 5-8.

explanation in this submission. However, the United States highlights below those aspects of its antidumping system relevant to the issues in this appeal.

29. The United States maintains a retrospective antidumping duty system. Pursuant to this system, an antidumping duty is owed as of the time of the entry of the product subject to an antidumping duty order, but the actual amount of the antidumping duty owed is calculated "retrospectively" (i.e., after the entry has occurred). In particular, while the amount of security required in the form of a cash deposit is calculated during the original investigation, importers of products subject to an antidumping duty may request a review of the duties due with respect to entries during a specific period. As a result of the possibility of a review, importers are not required to pay the antidumping duty at the time of importation. Instead each importer deposits cash as a security to ensure payment of the later determined antidumping duty. The amount of the cash deposit is the estimated amount of antidumping duties at the time of importation.[4] Where the importer requests a review, the duty assessed may or may not correspond to the amount of the security deposited.

1. The Investigation

30. In an antidumping duty investigation, Commerce determines an individual margin of dumping for each exporter or producer of the subject merchandise that it investigates

[4] U.S.C. § 1673e(a)(3) (Exhibit US-A1).

individually.[5] Commerce also determines an "all others" rate which applies to imports from those exporters or producers that were not investigated individually.[6]

31. If the margins of dumping determined by Commerce are above *de minimis*, and the U.S. International Trade Commission ("ITC") determines that the domestic industry is being materially injured, or is threatened with material injury, because of the dumped imports, Commerce will publish an antidumping duty order.[7] The order provides the United States with the authority to collect cash deposits of estimated antidumping duties at the time of importation, and to assess final antidumping duties.[8]

2. Administrative Reviews

32. Interested parties may request an administrative review of the antidumping duty order each year in the anniversary month of the publication of the order.[9] Through these administrative reviews, for each of the exporters or producers for whom a review has been requested, Commerce reexamines whether that exporter or producer was dumping during the relevant period.[10] The administrative review normally covers sales of the subject merchandise during the twelve months preceding the most recent anniversary month.[11]

---

[5] 19 U.S.C. § 1677f-1(c)(1) (Exhibit US-A4). Where the number of exporters or producers is so large so as to render the determination of margins of dumping for each impractical, Commerce may either limit its examination to a sample of exporters or producers, or to those exporters or produces who account for the largest volume of subject merchandise that can be reasonably examined. 19 U.S.C. § 1677f-1(c)(2) (Exhibit US-A4).

[6] 19 U.S.C. § 1673d(c)(5)(A) (Exhibit US-A5).

[7] 19 U.S.C. § 1673e (Exhibit US-A1).

[8] 19 U.S.C. § 1673e(a) (Exhibit US-A1).

[9] 19 C.F.R. § 351.213(b)(1) (Exhibit US-A2).

[10] 19 C.F.R. § 351.213(b)(1) (Exhibit US-A2).

[11] 19 C.F.R. § 351.213(e)(1)(i) (Exhibit US-A2).

33. The results of the review serve as the basis for the calculation of the assessment rate for each importer of the subject merchandise covered by the review.[12] The results also establish new estimated antidumping duties on imports going forward (and thereby establish new cash deposit rates), replacing the estimate of antidumping duties (and the corresponding cash deposit rate) already in effect for the exporters or producers reviewed.[13] If no review is requested, the estimated duties for which security has been received in the form of cash deposits are finally assessed.[14] Commerce communicates the results of its determinations to Customs by issuing what are referred to as "instructions." In turn, Customs collects the antidumping duties determined by Commerce in antidumping administrative reviews.[15] This collection of antidumping duties is referred to as "liquidation" of antidumping duties. Customs's responsibility in the collection of antidumping duties is solely ministerial.[16] It is Commerce that determines the final assessment rates.[17]

3. Judicial Review of Antidumping Determinations

34. Consistent with Article 13 of the AD Agreement, the United States provides for independent judicial review of antidumping determinations.[18] In the United States, collection of final antidumping duties (or "liquidation," as explained above) is routinely enjoined during the pendency of judicial review. When the domestic court responsible for initial review of

---

[12] 19 U.S.C. § 1675(a)(2)(C) (Exhibit US-A3); 19 C.F.R. § 351.212(b)(1) (Exhibit US-A6).

[13] 19 U.S.C. § 1675(a)(2)(C) (Exhibit US-A3).

[14] 19 C.F.R. § 351.212(c)(1) (Exhibit US-A6).

[15] *See, e.g.,* U.S. Second Written Submission, para. 50.

[16] U.S. Second Written Submission, para. 50.

[17] U.S. Second Written Submission, para. 50.

[18] 19 U.S.C. § 1516a (Exhibit US-A27).

antidumping determinations, the U.S. Court of International Trade, issues an injunction, Commerce issues instructions to Customs requiring Customs to cease liquidation of the entries.[19] In the alternative, if the injunction is issued prior to Commerce issuing liquidation instructions, Commerce sends Customs instructions notifying Customs of the injunction and ordering Customs not to liquidate the entries until the conclusion of the litigation and the resulting dissolution of the injunction.[20]

35. After the conclusion of the domestic litigation, Commerce instructs Customs to liquidate the entries based on the results of the litigation.[21] When judicial review is complete, liquidation must be made in accordance with the final court decision,[22] which could result in different assessment rates from the rates in the administering authority's original determination. If an injunction is in effect, an importer may benefit from not having to pay the amount of actual antidumping duties until the conclusion of judicial process that in some cases could last for years.[23]

B. The *US – Zeroing (Japan)* Dispute

1. The Original Dispute

36. Japan challenged the use of "zeroing" as applied in one antidumping investigation and eleven administrative reviews, as well as the reliance on margins calculated using "zeroing" in two sunset reviews.[24] Japan also challenged the U.S. use of "zeroing" as being inconsistent "as

---

[19] U.S. Answer to Panel Questions 17.
[20] U.S. Answer to Panel Question 17.
[21] *See, e.g.*, Exhibit JPN-77.
[22] 19 U.S.C. § 1516a (e) (Exhibit US-A27).
[23] *See, e.g.*, Exhibit JPN-77.
[24] *US – Zeroing (Japan) (Panel)*, para. 3.2.

such" with the AD Agreement, the GATT 1994 and the Marrakesh Agreement Establishing the World Trade Organization ("WTO Agreement") when employed in original investigations, administrative reviews, new shipper reviews, sunset reviews and changed circumstances reviews.[25]

37. The original panel circulated its report on September 20, 2006. Both the United States and Japan appealed, and the Appellate Body circulated its report on January 9, 2007.[26]

38. On January 23, 2007, the DSB adopted its recommendations and rulings. The DSB ruled:

> (1) that by maintaining zeroing in the context of original investigations, administrative reviews, and new shipper reviews, the United States acted "as such" inconsistently with Articles 2.4, 2.4.2, 9.3, and 9.5 of the AD Agreement and Article VI:2 of the GATT 1994;[27]
>
> (2) that by applying zeroing in one antidumping investigation, the United States acted inconsistently with Article 2.4.2 of the AD Agreement;[28]
>
> (3) that the United States acted inconsistently with Articles 2.4 and 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 by applying zeroing in eleven administrative reviews;[29] and
>
> (4) that the United States acted inconsistently with Article 11.3 of the AD Agreement when in two sunset review determinations it relied on margins of dumping calculated in administrative reviews through the use of zeroing.[30]

39. Japan and the United States agreed to an RPT, ending on December 24, 2007, for the United States to implement the recommendations and rulings of the DSB.[31]

---

[25] *US – Zeroing (Japan) (Panel)*, para 3.1.
[26] *US – Zeroing (Japan) (AB)*, para. 190(f).
[27] *US – Zeroing (Japan) (Panel)*, para. 7.258(a); *US – Zeroing (Japan) (AB)*, paras. 190(b), (c), and (d).
[28] *US – Zeroing (Japan) (Panel)*, para. 7.258(b).
[29] *US – Zeroing (Japan) (AB)*, para. 190(e).
[30] *US – Zeroing (Japan) (AB)*, para. 190(f).
[31] Panel Report, para. 2.2.

2. Japan's Claims Before the Compliance Panel

40. Pursuant to Article 21.5 of the DSU, Japan requested the establishment of a compliance panel on April 7, 2008. Japan argued before the compliance Panel that the United States had failed to comply with several of the DSB's recommendations and rulings including: the "as such" ruling with respect to zeroing in administrative reviews, new shipper reviews, and in transaction-to-transaction comparisons in investigations,[32] and the "as applied" ruling with respect to the one sunset review[33] and five of the eleven originally challenged administrative reviews.[34] Japan identified the five originally challenged administrative reviews as "Reviews 1, 2, 3, 7, and 8."[35] In addition, Japan claimed that three additional administrative reviews not challenged in the original proceeding constituted measures taken to comply and were inconsistent with the covered agreements. Japan identified these newly challenged reviews as "Reviews 4, 5 and 6."[36] Further, Japan's challenge to U.S. compliance included any "subsequent closely connected measures."[37] Japan eventually identified as "Review 9" one such measure, for which the United States made the determination only after the terms of reference for the compliance

---

[32] Panel Report, para. 3.1(a).

[33] Panel Report, para. 3.1(c).

[34] Panel Report, para. 3.1(b)(i).

[35] Panel Report, para. 3.1(b)(i).

[36] Panel Report, para. 3.1(b)(ii). The United States objected that these measures were not measures taken to comply within the meaning of Article 21.5 of the DSU. *See* U.S. First Written Submission, paras. 28-49.

[37] Request for the Establishment of a Panel, *United States – Measures Relating to Zeroing and Sunset Reviews, Recourse to Article 21.5 of the DSU by Japan*, WT/DS322/27, para. 12 (Apr. 8, 2008) ("the [panel] request concerns . . . any subsequent closely connected measures").

panel had been established.[38] Japan alleged that Review 9 was a measure taken to comply which was inconsistent with the covered agreements. The United States objected to the inclusion of Review 9, and any other "subsequent closely connected measures."[39] Finally, Japan challenged certain collections of antidumping duties (or "liquidation" of entries on which antidumping duties were owed) occurring after the expiry of the RPT as a breach of Article II of the GATT 1994.[40]

3. The Compliance Panel's Findings

41. The compliance Panel found that the United States failed to comply with the DSB's "as such" recommendations and rulings in administrative reviews, new shipper reviews, and in transaction-to-transaction comparisons in investigations.[41] Additionally, the compliance Panel found that the United States had failed to implement the DSB's "as applied" recommendations and rulings with respect to one sunset review[42] and the originally challenged Reviews 1, 2, 3, 7 and 8.[43] The compliance Panel also found that Reviews 4, 5, 6, and 9 constituted measures taken to comply that were inconsistent with the covered agreements.[44] Finally, the compliance Panel found that certain liquidation of entries on which antidumping duties were owed were inconsistent with Article II:1(a) and II:1(b) of the GATT 1994.[45] This appeal relates only to the

---

[38] Supplemental Submission of Japan, para. 10 ("The 06/07 review is such a 'subsequent closely connected measure', and for that reason, is part of these proceedings.").
[39] *See, e.g.*, U.S. Second Written Submission, para. 36, *see also* Part III, *infra*.
[40] Panel Report, para. 3.1(d).
[41] Panel Report, para. 8.1(c).
[42] Panel Report, para. 8.1(e).
[43] Panel Report, para. 8.1(a).
[44] Panel Report, paras. 8.1(b), 7.82, 7.114.
[45] Panel Report, para. 8.1(d).

compliance Panel's findings with respect to Reviews 1-9 and the compliance Panel's finding under Article II of the GATT 1994.

III. THE PANEL ERRED IN FINDING THAT REVIEW 9 FELL WITHIN THE PANEL'S TERMS OF REFERENCE

A. The U.S. Preliminary Objection

42. On September 15, 2008, after Japan submitted its second written submission, Japan asked the compliance Panel for permission to file a supplemental submission concerning an alleged additional "measure taken to comply" by the United States – the final results of the 2006-07 administrative review of *Ball Bearings from Japan*, identified as Review 9.[46] Japan claimed that this was a "subsequent closely connected measure" that was identified in its panel request.[47] The United States objected that this subsequent measure could not fall within the compliance Panel's terms of reference because it was not specifically identified in Japan's panel request as required by Article 6.2 of the DSU.[48] In addition, the United States objected that under the DSU, Review 9 could not fall within the scope of the compliance proceeding because it was not in existence at the time of the panel request.[49]

---

[46] *Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews and Rescission of Reviews in Part*, 73 Fed. Reg. 52,823 (September 11, 2008).

[47] The United States previously objected to Japan's failure to specifically identify the "subsequent closely connected measures" as required by Article 6.2 of the DSU. *See* U.S. First Written Submission, para. 50.

[48] U.S. Second Written Submission, para. 36; *see also* U.S. Response to Japan's Supplemental Submission, para. 10. The United States also objected that Review 9 was not a measure taken to comply, and was therefore outside the compliance Panel's terms of reference for that reason as well. *See* U.S. Response to Japan's Supplemental Submission, paras. 2-8.

[49] U.S. Second Written Submission, para. 36; U.S. Response to Japan's Supplemental Submission, para. 11.

B. The Compliance Panel's Legal Error

43. The compliance Panel erroneously found that Review 9 fell within its terms of reference.[50] According to the compliance Panel, the phrase "subsequent closely connected measures" in Japan's request for establishment of the panel was "sufficiently specific" to cover subsequent reviews.[51] The compliance Panel placed considerable significance on the fact that Review 9 had already been initiated at the time of Japan's panel request and that "once finalised would become the next administrative review in the continuum of administrative reviews related to the 1989 Anti-Dumping Order."[52] Moreover, the compliance Panel rejected the U.S. argument that it was impossible to identify specifically a measure not in existence at the time of the panel request because under the U.S. antidumping system there is a "high degree of predictability regarding future reviews", particularly when the review was already initiated at the time of the panel request.[53] The United States respectfully requests that the Appellate Body reverse the compliance Panel's finding that Review 9 was within the compliance Panel's terms of reference.

44. The compliance Panel's reasoning has no basis in the text of the DSU. Articles 6.2 and 7.1 of the DSU do not permit a panel to examine measures that were not identified in a panel request simply because they may be part of a so-called "continuum" of similar measures that were identified. Nor does the DSU allow for the inclusion of future measures within a panel's

---

[50] Panel Report, paras. 7.114, 7.116.
[51] Panel Report, para. 7.110.
[52] Panel Report, para. 7.110.
[53] Panel Report, para. 7.111. The compliance Panel applied the same rationale in connection with its ruling on the U.S. objection that under the DSU, Review 9 could not fall within the compliance Panel's terms of reference because it was a future measure not in existence at the time of the panel request. *See* Panel Report, paras. 7.115-7.116.

terms of reference merely because there is an allegedly "high degree of predictability" under the U.S. antidumping system that such measures will come into existence after the panel request. Rather, under Article 6.2 of the DSU, a panel request must *identify* the *specific* measures at issue, and under Article 7.1, a panel's terms of reference are limited to those specific measures. Here, the final results of each individual administrative review serve as the basis for the calculation of the assessment rate for each importer of the specific entries of subject merchandise covered by the review. Each administrative review is separate and distinct, and under Article 6.2, Japan had to identify each such measure in its panel request.[54] Indeed, Japan also recognized the distinctiveness of separate reviews – its own panel request listed each administrative review as a separate and distinct measure.[55]

45. Japan's identification of "subsequent closely connected measures" in its panel request was inadequate to meet the requirement under Article 6.2. It is uncertain what other measures Japan intended to bring within the scope of the compliance proceeding by including this term. "Subsequent closely connected measures" is broad enough and vague enough to encompass a variety of measures, such as subsequent administrative determinations, ministerial corrections, or

[54] In *US – Zeroing I (EC) (Article 21.5)*, the Appellate Body considered that successive administrative review determinations (as well as successive changed circumstances and sunset review determinations) are "separate and distinct measures," and that for that reason, they cannot be considered as mere amendments to reviews identified in a panel request, even if such subsequent reviews are "connected stages" under the same antidumping duty order. *See US – Zeroing I (EC) (Article 21.5) (AB)*, paras. 192-93 (citing to *Chile – Price Band System (AB)*).

[55] *See* Japan Panel Request, Annex I (Case Nos. 1-8).

remand determinations in court proceedings.[56] Such imprecision is insufficient to meet the specificity requirement.

46. The compliance Panel placed importance on the fact that Review 9 had already been initiated by the time of the panel request.[57] This fact, however, is irrelevant. The panel request included no specific reference to this review, as required by Article 6.2, and even if it could have been properly identified – as the compliance Panel seems to think it was – Review 9 was still on-going at the time of the panel request, so any challenge would have been premature.[58]

47. As we argued before the compliance Panel,[59] future administrative reviews, like Review 9, fall outside the scope of this proceeding because under the DSU, measures not yet in existence at the time of a panel request cannot be subject to dispute settlement. We cited to the panel

---

[56] The compliance Panel noted that in its first written submission, "the United States clearly anticipates [the inclusion of future reviews] by expressing concern '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'." *See* Panel Report, para. 7.105 (quoting U.S. First Written Submission, para. 50). While this speculation proved to be accurate, the fact is that the United States ventured a guess about Japan's motivation; and the fact that the United States guessed right does not excuse Japan from identifying the *specific* measure at issue, as required by Article 6.2 of the DSU.

[57] Panel Report, para. 7.110, 7.116.

[58] As the Appellate Body found recently in *US – Zeroing I (EC) (Article 21.5)*, a challenge to a review prior to the issuance of a final determination is premature. *See US – Zeroing I (EC) (Article 21.5) (AB)*, paras. 374-75 (relying on *US – Zeroing II (EC) (AB)*). In *US – Zeroing I (EC) (Article 21.5)*, the EC had challenged a preliminary review determination. Here, even the preliminary results for Review 9 were not in existence at the time of the panel request. *See Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews and Rescission of Reviews in Part,* 73 Fed. Reg. 52823 (September 11, 2008), *available at* http://edocket.access.gpo.gov/2008/pdf/E8-21137.pdf (cited at Panel Report, para. 7.108 n.133).

[59] *See, e.g.*, U.S. Second Written Submission, para. 30; U.S. Response to Japan's Supplemental Submission, para. 11.

report in *US – Upland Cotton* to demonstrate that other panels have found measures not yet in existence at the time of the panel request to be outside the panel's terms of reference.[60]

48. The compliance Panel accepted that future measures may fall outside a panel's terms of reference.[61] The compliance Panel also agreed with the *Upland Cotton* panel's reliance on DSU Article 3.3 to reject Brazil's claim against legislation that was not in existence at the time of the panel request.[62] Article 3.3 provides that:

> [t]he 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.[63]

As the *Upland Cotton* panel found, the challenged "legislation could not have been impairing any benefits accruing to the complainant because it was not in existence at the time of the request for the establishment of a panel."[64] Here, the compliance Panel failed to apply the exact same reasoning that it considered so persuasive in *US – Upland Cotton*. Review 9, which is separate and distinct from the reviews identified in the panel request,[65] could not have been impairing any benefits accruing to Japan because it was not in existence at the time of Japan's panel request.

49. The compliance Panel, ignoring the relevance of DSU Article 3.3, attempted to distinguish *US – Upland Cotton* from the present dispute. According to the compliance Panel,

---

[60] *US – Upland Cotton (Panel)*, paras. 7.158-7.160 (rejecting inclusion of the Agricultural Adjustment Act of 2003 in the panel's terms of reference because that law did not come into existence until after the panel request).

[61] Panel Report, para. 7.116; *see also* para. 7.106.

[62] Panel Report, paras. 7.115-7.116.

[63] Emphasis added.

[64] Panel Report, para. 7.115 (citing *US – Upland Cotton (Panel)*, para. 7.160).

[65] *US – Zeroing I (EC) (Article 21.5) (AB)*, paras. 192-93.

"this situation" was "different".[66] The compliance Panel asserted that unlike Brazil's challenge to legislation that "did not exist, had never existed and might not subsequently have come into existence", Japan's claim against Review 9 was not "entirely speculative".[67] Instead, the compliance Panel, recalling its earlier reasoning, concluded:

> . . .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. Indeed, at the time of the panel request, although the Review 9 determination had not yet been made, Review 9 had been initiated. In this way, the claim in relation to Review 9 was entirely predictable, rather than "entirely speculative". . . . we find that Review 9 is within the panel's terms of reference.[68]

50. The compliance Panel's own reasoning overlooks the fact that the final results of Review 9 were entirely unknown at the time of the panel request. Japan's challenge to the final determination in Review 9 was based on the alleged use of zeroing in that review.[69] However, at the time of the panel request, Japan had no way of knowing whether the United States would apply zeroing in that review,[70] or whether that review would be rescinded after initiation.[71] It was only after the final results were issued and became known that Japan sought to challenge Review

---

[66] Panel Report, para. 7.116.

[67] Panel Report, para. 7.116 (quoting *US – Upland Cotton (Panel)*, para. 7.158).

[68] Panel Report, para. 7.116.

[69] *See, e.g.*, Japan Supplemental Submission, paras. 7, 33-34.

[70] Commerce could exercise its discretion and decline to apply zeroing. Alternatively, all export prices for the subject merchandise could be lower than normal value, which mathematically would not result in the application of zeroing.

[71] For example, Commerce's regulations provide that an administrative review will be rescinded if all the parties requesting a review withdraw their request for a review within 90 days of the date of publication of notice of initiation for that review. This regulation also provides that it is within Commerce's discretion to extend this time limit at the parties' request. *See* 19 C.F.R. § 351.213(d) (Exhibit US-A2).

9 before the compliance Panel. Contrary to the compliance Panel's assertion, Japan's claim against Review 9 was not "entirely predictable."

51. Furthermore, Japan's attempt to include Review 9, and the compliance Panel's acquiescence in that attempt, are inconsistent with other reports' approaches to the question of including future measures. The compliance Panel noted the statement of the Appellate Body 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. However, measures enacted subsequent to the establishment of the panel may, *in certain limited circumstances*, fall within a panel's terms of reference'."[72] The compliance Panel did not properly recognize, however, that the situation in this dispute does not fall within any of those limited circumstances.

52. Indeed, the compliance Panel went far beyond what has been accepted in previous disputes. In *Chile – Price Band System*, the Appellate Body accepted that a panel request referring to subsequent amendments could bring post-establishment modifications to the measure at issue within the scope of the panel request – but the Appellate Body reached that conclusion because those subsequent modifications did not change the essence of the measure before the panel.[73] The situation in this dispute is entirely different: each administrative review is a "separate and distinct" measure.[74] And the fact that Japan identified "subsequent closely

---

[72] Panel Report, para. 7.116 n.142 (quoting *EC – Chicken Cuts (AB)*, para. 156) (emphasis added).

[73] *Chile – Price Band System (AB)*, para. 139; *see also US – Zeroing I (EC) (Article 21.5) (AB)*, para. 190.

[74] *US – Zeroing I (EC) (Article 21.5) (AB)*, para. 192.

connected measures" (as well as "amendments") in its panel request does not change this analysis. First, the Appellate Body in *US – Zeroing I (EC) (Article 21.5)* recognized that although those subsequent administrative reviews are connected, they are nonetheless successive and distinct.[75] Second, it was important to the Appellate Body in *Chile – Price Band System* that "the Amendment does not change the price band system into a measure *different* from the price band system that was in force before the Amendment."[76] If an amendment that changes the original measure at issue would raise concerns, *a fortiori* a subsequent determination that is separate and distinct from any of the original measures at issue – such as Review 9 in this dispute – would raise concerns that are at least as serious.

53. Each administrative review is distinctly different from the one before it. The exporters who participate may vary from one review to another. In addition, each review involves different shipments and different data from different time periods. The antidumping duty rate may change, and in some cases, may fall to a *de minimis* level. Thus, a subsequent review involves more than just the possible use of zeroing, and the use of zeroing alone is not enough to identify the specific measure.

54. The compliance Panel also considered that:

> . . . whether or not an Article 6.2 panel request adequately puts the responding party on notice regarding the case against it is a relevant consideration when determining whether the specific measures at issue are identified under Article 6.2. In the circumstances of this case, given the terms of the panel request and the nature of the United States anti-dumping system, in particular the regularity and predictability associated with administrative reviews under an anti-dumping order, the United States should reasonably

---

[75] *US – Zeroing I (EC) (Article 21.5) (AB)*, para. 192.
[76] *Chile – Price Band System (AB)*, para. 137.

have expected that future administrative reviews may fall within the panel's jurisdiction.[77]

55. The compliance Panel once again departed from the text of the DSU when it examined whether allowing Japan's challenge to "subsequent closely connected measures" would "violate any due process objective of the DSU."[78] The DSU does not say that a panel's terms of reference include any measure or claim as long as the inclusion would not be contrary to some articulated list of "due process objectives."[79] Indeed, Article 6.2 imposes no requirement to show that a responding party was somehow deprived of due process or notice because of the lack of specificity in a panel request. And no such requirement is found in any other provision of the DSU, or anywhere else in the covered agreements. The requirements of Article 6.2 of the DSU are explicit and clear – the panel request must "*identify* the *specific* measures at issue."[80] Measures not so identified do not fall within the panel's terms of reference. A panel is not free to override the clearly negotiated text of the DSU based on the panel's own views of due process. Japan never specifically identified Review 9 in its panel request, nor could it have, since that review was not yet in existence at the time of the request for establishment. This is all that the United States was required to show in order to prevail on its preliminary objection under Article 6.2 of the DSU.

---

[77] Panel Report, para. 7.105.

[78] Panel Report, para. 7.105.

[79] Perhaps ironically, the compliance Panel failed to pay any attention to one value that panels and the Appellate Body have considered important in relation to Article 6.2 – the impact on potential third parties in deciding whether they have a substantial interest in the matter and whether to reserve their third party rights. *See, e.g., Brazil – Desiccated Coconut (AB)*, p. 22; *EC – Bananas III (Panel)*, para. 7.35. The compliance Panel's analysis appears to assume that it does not matter whether other Members would have noticed that Review 9 would be at issue.

[80] Emphasis added.

56. In addition, the United States believes that systemic considerations militate against reading the DSU in the manner that the compliance Panel did. Article 21.5 proceedings are meant to resolve disagreements over the existence or consistency with the covered agreements of a measure taken to comply. A compliance panel examines whether a Member has complied with the DSB's recommendations and rulings at the time of the panel request. The WTO dispute settlement system does not contemplate that parties will make new legal claims on new or amended measures midway through a compliance panel proceeding.

57. A number of procedural issues and other concerns would arise if the DSU were read as giving compliance panels the authority to examine new measures, or modifications to the measures at issue, during the course of the proceedings. For instance, parties would be obliged to make legal claims and undertake analysis of new or modified measures on short notice, without a meaningful opportunity to review the measures. Compliance panels would have to react to changes that occurred after some or all of the written submissions and meetings with the parties had passed, and they might have to decide whether to re-start the proceedings (and thereby delay the report beyond the date contemplated in DSU Article 21.5) or possibly make findings without the full benefit of the views of the parties (or the views of third parties). The DSU does not contemplate that disputes would be about such "moving targets." Furthermore, would responding parties and complaining parties each be able to add measures to the proceeding? There have been instances in the past when a responding party has wanted a panel to examine a measure that came into existence after the panel was established in order to claim that the alleged

inconsistency would in any event no longer exist.[81] The compliance Panel's approach appears to be asymmetrical – the rule would adhere only to the benefit of complaining parties, not responding parties.

58. For the above reasons, the Appellate Body should reverse the Panel and find that Review 9 is outside the compliance Panel's terms of reference. Under Article 6.2 of the DSU, Japan was required to list each separate and distinct measure in its Panel request. Japan did not, and could not, because the final results from Review 9 were not yet in existence at the time of the panel request, and such future measures cannot form part of a Panel's terms of reference.

IV. THE COMPLIANCE PANEL'S FINDINGS WITH RESPECT TO REVIEWS 1 THROUGH 9 CONSTITUTE LEGAL ERROR AND SHOULD BE REVERSED

A. Introduction

59. In this part of the U.S. appellant submission, the United States demonstrates that the compliance Panel erred in finding that the United States failed to comply with the DSB's recommendations and rulings with respect to importer-specific assessment rates determined in Reviews 1, 2, 3, 7 and 8 applied to entries that were, or will be, liquidated after the expiry of the RPT.[82] The compliance Panel also found that Reviews 4, 5, 6, and 9 were measures taken to comply,[83] and that the United States acted inconsistently with Articles 2.4 and 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 by applying zeroing in those reviews.[84] This finding of inconsistency also constitutes legal error.

---

[81] *See, e.g.*, *India – Autos (Panel)*, paras. 7.23-7.30; *Indonesia – Autos (Panel)*, para.14.9.
[82] Panel Report, para. 8.1(a).
[83] Panel Report, paras. 7.82, 7.114.
[84] Panel Report, para. 7.168.

60. It is well-settled that implementation of the DSB's recommendations and rulings applies only on a prospective basis. In the context of antidumping duties, the date of entry, rather than the date the duties are collected, is determinative in determining compliance. Therefore, under a correct understanding of the covered agreements, any post-RPT actions with respect to Reviews 1, 2, 3, 7 and 8 do not constitute a failure to comply with the DSB's recommendations and rulings in this dispute, because none of these reviews served as the basis for assessment of duties on entries made after the end of the RPT. Moreover, with respect to Reviews 4, 5, 6, and 9, the compliance Panel erred in finding that these are inconsistent with Articles 2.4 and 9.3 of the AD Agreement and Article VI:2 of the GATT 1994. All of those reviews also covered entries made before the end of the RPT.

61. The compliance Panel's findings, if left to stand, would impose a retroactive remedy on the United States and create inequality between prospective and retrospective assessment systems where there should be none. The AD Agreement is neutral between antidumping systems and does not favor one system over the other. The Panel failed to recognize that a proper interpretation of implementation requires that all systems be placed on an equal basis.

62. Even under the Appellate Body's recent interpretation of implementation in *US – Zeroing I (EC) (Article 21.5)*, the compliance Panel's findings were in error. The liquidations identified by the compliance Panel with respect to Reviews 1, 2, 3, 7, and 8 do not constitute a failure to comply because the only reason they occurred after the end of the RPT was as a result of judicial review in the United States. Moreover, the zeroing in Reviews 4, 5, and 6 did not result in any actions or effects that were inconsistent with the covered agreements after the conclusion of the RPT.

B. Implementation of the DSB's Recommendations and Rulings Applies Only Prospectively

63. The WTO dispute settlement system requires that implementation be determined on a *prospective* basis. The starting point in this appeal is Article 21.5 of the DSU, which provides for a dispute settlement proceeding "where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings [of the DSB]." The focus in an Article 21.5 proceeding is on whether, as of the time of panel establishment a measure taken to comply exists, and if so, whether that measure is consistent with the covered agreements. A Member's compliance with the DSB's recommendations and rulings is therefore determined on a prospective basis.

64. As the Appellate Body has repeatedly recognized, "remedies in WTO law are generally understood to be prospective in nature."[85] The Appellate Body's recent report in *US – Zeroing I (EC) (Article 21.5)* confirms that a Member is required to implement the DSB's recommendations and rulings with prospective effect only. In that dispute, the Appellate Body stated:

> Thus, the reasonable period of time allows a Member sufficient time to bring itself into conformity with its WTO obligations without being required to provide compensation or being subject to the suspension of concessions or other obligations. Given that the responding WTO Member is required to bring the measure found to be inconsistent into conformity with the relevant covered agreement within the reasonable period of time (where immediate compliance is impracticable), a failure to comply fully with, or an omission in the implementation of, the DSB's recommendations and rulings cannot be found before the end of the reasonable period of time. When a reasonable period of time for implementation has been determined, Article 21.3 of the DSU implies that the obligation to comply with the recommendations and rulings of the DSB has to be fulfilled

[85] *US – Upland Cotton (Article 21.5) (AB)*, para. 243 n.494.

> by the end of the reasonable period of time at the latest, and that the WTO-inconsistency has to cease by the end of the reasonable period of time *with prospective effect*.[406]
>
> ---
>
> [406] [footnote in original] As the Appellate Body indicated in *US – Upland Cotton (Article 21.5 – Brazil)*, the recommendations and rulings of the DSB create implementation obligations *with prospective effect*. (Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, footnote 494 to para. 243).[86]

65. The United States has argued throughout this dispute that Members are required to implement the DSB's recommendations and rulings only *prospectively* and that Japan was asking the compliance Panel to impose a retroactive remedy.[87] Japan insisted that it was seeking only a prospective remedy.[88] The compliance Panel concluded that "we do not consider it appropriate to resolve the issue before us on the basis of whether Japan is seeking a 'prospective' or 'retrospective' remedy."[89] The compliance Panel, however, improperly disregarded the importance of the prospective/retrospective distinction with respect to implementation of the DSB's recommendations and rulings, and by accepting Japan's theory of compliance, imposed a retroactive remedy where none is allowed.

66. In this section, the United States demonstrates that several provisions of the GATT 1994 and the AD Agreement provide textual support for the view that implementation is determined by the date of entry of the subject merchandise. We also show that the Panel's approach unfairly

---

[86] *US – Zeroing I (EC) (Article 21.5) (AB)*, para. 299 (citations omitted) (emphasis added).

[87] *See, e.g.,* U.S. First Written Submission, para. 54; U.S. Second Written Submission, paras. 47-50.

[88] *See, e.g.,* Japan Second Written Submission, para. 170 (Japan argues that its interpretation of the DSB's recommendations and rulings has solely prospective effect).

[89] Panel Report, para. 7.140.

disadvantages Members who have adopted retrospective duty assessment systems. Finally, we discuss how determining implementation by the date of entry provides the same relief in both retrospective and prospective systems and preserves the equality between the systems.

1. Several Provisions in the GATT 1994 and AD Agreement Demonstrate that Implementation Is Determined by the Date of Entry

67. When considering whether relief is "retroactive" or "prospective" in the context of antidumping duties, provisions contained in both the GATT 1994 and the AD Agreement support the position that the date of entry, as opposed to the date that final duties are collected, is determinative. The text of the GATT 1994 and the AD Agreement confirms that it is the legal regime in existence at the time that an import enters the Member's territory that determines whether the import is liable for the payment of antidumping duties.

68. Article VI:2 of the GATT 1994 provides: "In order to offset or prevent dumping, a contracting party may *levy* on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product."[90] Article VI:6(a) of the GATT 1994 reflects the fact that the levying of an antidumping duty generally takes place on "the importation of any product." Nonetheless, Ad Note, paragraphs 2 and 3 of Article VI states:

> As in many other cases in customs administration, a contracting party may require reasonable security (bond or cash deposit) for the payment of anti-dumping or countervailing duty pending final determination of the facts in any case of suspected dumping or subsidization.[91]

---

[90] Emphasis added.
[91] GATT 1994, Ad Article VI, paras. 2 & 3.

69. The Ad Note clarifies that, even for duties that are generally levied at the time of importation, Members may instead require a cash deposit or other security, in lieu of the duty, pending final determination of the relevant information. The liability, however, is incurred at the time of entry. Consistent with the Ad Note, assessment and collection in the U.S. system occurs after the date of importation. Indeed, a Commerce determination in an assessment review normally covers importations of the subject merchandise during the 12 months prior to the month in which the review is initiated.

70. Several provisions of the AD Agreement further support the proposition that the date of entry is the relevant date for determining whether prospective implementation occurred, regardless of when the administering authority determines the amount of dumping duty liability and collects the duties. Article 10.1 of the AD Agreement states that provisional measures and antidumping duties shall be applied only to "products which *enter for consumption* after the time" when the provisional or final determination enters into force, subject to certain exceptions.[92] This limitation applies even though the dumping activity that forms the basis for the dumping and injury findings necessarily occurs *prior* to the time that the determination enters into force. As Article 10.1 demonstrates, the critical factor for determining whether particular entries are liable for the assessment of antidumping or countervailing duties is the fact that liability for these duties is incurred on the date of entry.

71. Similarly, Article 8.6 of the AD Agreement states that if an exporter violates an undertaking, duties may be assessed on products "*entered for consumption* not more than 90 days

[92] Emphasis added.

before the application of . . . provisional measures, except that any such retroactive assessment shall not apply to imports *entered* before the violation of the undertaking."[93] Once again, the critical factor for determining the applicability of the provision is the date of entry.

72. In addition, Article 10.6 of the AD Agreement states that when certain criteria are satisfied, "[a] definitive anti-dumping duty may be levied on products which were *entered for consumption* not more than 90 days prior to the date of application of provisional measures."[94] However, under Article 10.8, "[n]o duties shall be levied retroactively pursuant to paragraph 6 on products *entered for consumption* prior to the date of initiation of the investigation."[95] As with Articles 8.6 and 10.1, whenever the AD Agreement specifies an applicable date for an action, the scope of applicability is based on entries occurring on or after that date.

73. The compliance Panel erroneously dismissed these textual arguments because they were based in the AD Agreement and the GATT 1994 rather than the DSU. According to the compliance Panel, determining implementation in this dispute should be focused on the DSU, rather than these other agreements, because the DSU "deal[s] specifically with the implementation of the recommendations and rulings of the DSB."[96] However, the DSU does not exist in a vacuum, but must be read in light of the rights and obligations contained in the covered agreements.[97] Here, the United States had the underlying obligation to comply with the

---

[93] Emphasis added.
[94] Emphasis added.
[95] Emphasis added.
[96] Panel Report, para. 7.148.
[97] DSU, Article 3.2; *US – OCTG from Argentina (Article 21.5) (Panel)*, n.39 ("the provisions of the DSU and the Anti-Dumping Agreement must be read together in a coherent manner"); *US – OCTG from Argentina (Article 21.5) (AB)*, para. 173 ("We believe also that the provisions of the DSU should not be read as altering the disciplines of Articles 11.3 and 11.4" of

substantive obligations covered by the DSB's recommendations and rulings. In this dispute, the recommendations and rulings pertained to the AD Agreement and the GATT 1994. The focus in the Article 21.5 panel proceeding was on the existence, or consistency with the AD Agreement or the GATT 1994, of measures taken to comply with the recommendations and rulings concerning the AD Agreement and the GATT 1994. Accordingly, these agreements, along with the DSU, are crucial to determining whether the United States complied with the DSB's recommendations and rulings, including what the United States was required to do in order to implement those recommendations and rulings.

74. The general understanding that prospective implementation obligations are triggered by the date of entry has also been recognized by previous panels.[98] In *US – Section 129*, for example, the panel acknowledged that U.S. implementation of adverse WTO reports concerning antidumping or countervailing duties applies only to entries occurring after the end of the RPT, and that such implementation obligations would not apply to prior entries.[99]

75. The EC, a third party in this dispute, has taken the position in its own domestic regulations that because relief based on WTO dispute resolution is prospective, such relief need not be granted for entries made prior to the end of the RPT.[100] The EC also took a prospective

---

the AD Agreement).

[98] Although the terms "implementation obligations" and "compliance obligations" are sometimes used as a convenient shorthand for the steps that must be taken in order to comply with DSB recommendations and rulings, the usage of such terms does not imply that DSB recommendations and rulings create *new* obligations that are substantively different from, or in addition to, the obligations under the covered agreements themselves that are the subject of the DSB recommendations and rulings. *See US – Zeroing I (EC) (Article 21.5) (AB)*, para. 298.

[99] *US – Section 129 (Panel)*, para. 5.52.

[100] *See Ikea Wholesale Ltd. v. Commissioners*, Case. C-351/04 (European Court of Justice, Sept. 27, 2007) (Exhibit US-A36); *see also* U.S. Answer to Panel Question 27. In

approach to implementation of recommendations and rulings of the DSB in the *EC – Chicken Cuts* dispute. In that dispute, the Appellate Body upheld the panel's findings that the EC had improperly classified certain chicken cuts for customs purposes, thereby imposing "customs duties on the products at issue that are in excess of the duties provided for" in the EC schedule of tariff commitments and breaching Articles II:1(a) and II:1(b) of the GATT 1994.[101] The EC informed the DSB that it "fully implemented the relevant DSB recommendations and rulings with respect to this dispute" through the entry into force of Commission Regulation (EC) No. 949/2006 of June 27, 2006.[102] That regulation provided that:

> this regulation should enter into force . . . at the end of the reasonable period of time granted by the WTO . . . . Recourse to the DSU is not subject to time limits. The recommendations in reports adopted by the DSB only have prospective effect. Consequently, this regulation cannot have retroactive effects nor provide interpretative guidance on a retroactive basis. Since it cannot operate to provide interpretative guidance for classification of goods which have been released for free circulation prior to [the end of the reasonable period of time] it cannot serve as a basis for the reimbursement of any duties paid prior to that date.[103]

76. The EC asserted compliance in that dispute by removing the border measure – the WTO-inconsistent duty – for *entries* (i.e. "good which have been released for free circulation") after the

---

paragraph 8 of its judgment, the court quoted the relevant EC regulation on "measures that may be taken by the Community following a report adopted by the WTO Dispute Settlement Body concerning anti-dumping and anti-subsidy matters":

> The recommendations in reports adopted by the [DSB] only have prospective effect. Consequently, it is appropriate to specify that any measures taken under this Regulation will take effect from the date of their entry into force unless otherwise specified, and, therefore, do not provide any basis for the reimbursement of the duties collected prior to that date.

[101] *EC – Chicken Cuts (AB)*, para. 347(c).
[102] WT/DS269/15/Add.1, WT/DS286/17/Add.1, circulated July 4, 2006 (Exhibit US-20).
[103] Council Regulation (EC) No. 949/2006, para. 9 (Exhibit US-20).

end of the RPT. The EC specifically declined to refund excess duties or otherwise correct the breach of Article II:1(a) and II:1(b) that the DSB had found to exist with respect to entries prior to the expiration of the reasonable period of time. Nonetheless, the EC asserted that its measure achieved full compliance.

2. The Compliance Panel's Approach Unfairly Disadvantages Members with Retrospective Antidumping Systems

77. The Panel ignored that under the AD Agreement, the different systems of duty assessment provided for in Article 9.3 – retrospective duty assessment, prospective duty assessment, and prospective normal value systems – are afforded equal treatment.[104] The Appellate Body has confirmed that the AD Agreement does not favor one system over the other, or place one system at a disadvantage. Rather, in the original proceeding, the Appellate Body recognized that, "[t]he Anti-Dumping Agreement is neutral as between different systems for levy and collection of anti-dumping duties."[105] Therefore, a proper interpretation of implementation requires that retrospective duty assessment, prospective duty assessment, and prospective normal value systems be placed on a "level playing field."

78. The compliance Panel erroneously dismissed this point, finding instead that "we do not consider that our task is to ensure that implementation obligations under prospective and retrospective assessment systems are identical."[106] The compliance Panel further asserted that "[h]aving chosen one system over the other, Members must respect the consequences of that

---

[104] Panel Report, para. 7.152.
[105] *US – Zeroing (Japan) (AB)*, para. 163.
[106] Panel Report, para. 7.152.

choice."[107] The Panel overlooks that the United States elected to adopt a retrospective system long before there was a WTO. And Members with retrospective systems cannot be presumed to have agreed to "consequences" only now being assigned by panels, such as this one, and the Appellate Body. Nor is there anything express in the DSU, AD Agreement or the GATT 1994 that a retrospective system would have these "consequences," so the Panel is wrong to assume there was any informed "choice" involved.

79. Furthermore, the compliance Panel once again refused to recognize the importance of the AD Agreement to determining compliance in this dispute. Similar to the compliance Panel's rejection of the U.S. textual arguments noted above, the compliance Panel dismissed the Appellate Body's statement calling for neutrality between antidumping systems because "the Appellate Body statement concerns the *AD Agreement,* not the DSU."[108] However, the AD Agreement is not irrelevant to this dispute. It is the principal basis for the DSB's recommendations and rulings and therefore must be considered in determining whether the United States complied with the DSB's recommendations and rulings.[109]

80. The compliance Panel found that the United States had compliance obligations with respect to importer-specific assessments made on merchandise entering *prior* to the end of the RPT because the United States collected duties on some of this merchandise *after* the end of the reasonable period of time.[110] Determination of final liability and collection at some point after importation is a principal feature of a retrospective system. Indeed, that is the main distinction

---

[107] Panel Report, para. 7.152.
[108] Panel Report, para. 7.152.
[109] *See* para. 73, *supra*.
[110] *See, e.g.,* Panel Report, paras. 7.154, 8.1(a).

between retrospective and prospective systems, as reflected in the text of Article 9.3.1 and 9.3.2. Article 9.3.1 provides:

> When the amount of the anti-dumping duty is assessed on a retrospective basis, the determination of the *final* liability for payment of anti-dumping duties shall take place as soon as possible . . . after . . . a request for a final assessment . . . has been made.[111]

81. By contrast, Article 9.3.2 contains no reference to "final liability." Instead, it states:

> When the amount of the anti-dumping duty is assessed on a prospective basis, provision shall be made for a prompt refund . . . of any duty paid in excess of the margin of dumping.

82. In the U.S. retrospective system, duties are not *assessed* at the time of entry.[112] Thus, only in retrospective systems does entry of merchandise trigger *potential* liability, because only in retrospective systems is *final* liability determined and collected at a later date. Panels have recognized that this feature is unique to retrospective systems.[113]

83. There is no textual justification for the compliance Panel's view that it need not ensure neutrality among differing antidumping systems. This approach is contrary to the Appellate Body's recognition that all systems of duty assessment must be afforded analogous treatment under the AD Agreement.[114] If a Member maintaining a retrospective system must act with respect to entries that occurred prior to the end of the RPT, as the compliance Panel has found here, compliance for retrospective systems would be very different and more extensive than for

---

[111] Emphasis added.

[112] *See, e.g., US – Zeroing (EC) (Panel)*, para. 2.4 (generally describing how duty assessment occurs under the U.S. retrospective system).

[113] *See, e.g.*, *US – Zeroing (EC) (Panel)*, para 2.4; *EC – Salmon (Panel)*, para. 7.744.

[114] *US – Zeroing (Japan) (AB)*, para. 163.

prospective duty assessment and prospective normal value systems. By contrast, recognizing that it is the date of entry that controls for purposes of compliance would maintain neutrality among the divergent systems**.**

3. Determining Implementation Based on Date of Entry Provides the Same Relief As Is Available Under a Prospective Antidumping System

84. An approach based on the date of entry would ensure equal treatment between retrospective and prospective dumping systems. The concept that implementation obligations apply only to future entries (i.e., entries occurring after the RPT) is not unique to retrospective systems. Focus on the date of entry as the appropriate date for implementation is consistent with the effect that a finding of inconsistency would have on an antidumping measure in a prospective antidumping system. Under such systems, the Member collects the amount of antidumping duties at the time of importation. If an antidumping measure is found to be inconsistent with the AD Agreement, the Member's obligation is to modify the measure as it applies at the border to imports occurring on or after the date of importation. The Member need not remedy the effects of the measure on imports that occurred prior to the end of the RPT. In other words, the Member is under no obligation to refund any antidumping duties assessed on importations occurring prior to the end of the RPT.[115] In this dispute, finding that the operative date for implementing the DSB's recommendations and rulings is assessment on entries occurring after the end of the RPT produces no different effect than that available under a prospective antidumping system, such as the EC's system. The AD Agreement's neutrality would be preserved.

---

[115] As noted in paragraphs 75-76 above, this outcome matches the understanding of implementation in tariff disputes generally, as demonstrated by the EC's approach to implementation in the *EC – Chicken Cuts* dispute.

C. The Appellate Body Should Apply the Proper Interpretation of Implementation Based on the Date of Entry and Reverse the Compliance Panel's Findings With Respect to Reviews 1 Through 9

1. Introduction

85. As the United States demonstrated above, 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. A Member must comply with the DSB's recommendations and rulings when assessing duties on merchandise entering *after* the end of the RPT. The Panel erroneously rejected the U.S. argument on prospective implementation, and imposed a retroactive remedy. Its findings against Reviews 1 through 9 therefore cannot stand.

86. Because none of the compliance Panel's bases for finding that the United States had failed to comply with the DSB's recommendations and rulings with respect to Reviews 1, 2, 3, 7, and 8 related to the assessment of duties on entries occurring after the conclusion of the RPT, the Appellate Body should reverse the compliance Panel's findings with respect to those reviews. Moreover, Reviews 4, 5, and 6, which the compliance Panel found to be measures taken to comply, all involve entries made before the RPT, and the United States did not assess duties pursuant to Reviews 4, 5, and 6 on any entries after the RPT. None of these reviews therefore provides a basis to find that the United States was acting inconsistently with the AD Agreement and the GATT 1994 at the time of Japan's Article 21.5 panel request.[116]

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

[116] Review 9 was issued after Japan's panel request. This review was not properly within the compliance Panel's terms of reference. However, if the Appellate Body affirms the compliance Panel's preliminary ruling with respect to Review 9, it should reject the finding of inconsistency because Review 9 involves entries that all occurred prior to the expiry of the RPT.

87. The DSB ruled that the United States acted inconsistently with Articles 2.4 and 9.3 of the AD Agreement by applying zeroing in Reviews 1, 2, 3, 7, and 8.[117] The compliance Panel found that the United States failed to comply with these recommendations and rulings because the United States liquidated (or would liquidate) after the end of the RPT certain entries on importer-specific assessment instructions issued pursuant to the rates calculated in Reviews 1, 2, 3, 7 and 8. However, it is uncontested that all of these liquidations applied (or would apply) to merchandise that entered the United States *long before* the end of the RPT, in some cases as long ago as 1999.[118] Entries liquidated pursuant to the rates calculated in Review 1 entered the United States between May 1, 1999 and April 30, 2000. Entries liquidated pursuant to the rates calculated in Reviews 7 and 8 entered the United States between May 1, 1999 and December 31, 1999. Entries liquidated pursuant to the rates calculated in Review 2 entered the United States between May 1, 2000 and April 30, 2001. Finally, entries liquidated pursuant to Review 3 entered the United States between May 1, 2002 and April 30, 2003. Accordingly, because none of these entries occurred after the RPT, the liquidation of these entries cannot demonstrate a failure to comply prospectively with the DSB's recommendations and rulings in this dispute.

88. The compliance Panel's ultimate finding of non-compliance rested on its finding that the United States failed to modify the importer-specific assessment rates for Reviews 1, 2, 3, 7, and 8 that were found to be WTO-inconsistent in the original proceeding.[119] However, for the reasons given above, that finding is an incorrect basis for assessing U.S. compliance, and the compliance

---

[117] *US – Zeroing (Japan) (AB)*, para. 190(e).

[118] Japan Article 21.5 Panel Request, Annex I: Periodic Reviews (indicating that Reviews 1, 2, 3, 7 and 8 all had periods of review which concluded prior to the end of the RPT).

[119] Panel Report, para. 7.149.

Panel's finding that the United States failed to comply with the DSB's recommendations and rulings with respect to Reviews 1, 2, 3, 7, and 8 should be reversed.

3. Reviews 4, 5, 6, and 9

89. The compliance Panel's analysis with respect to Reviews 4, 5, 6, and 9 focused on the assessment rates calculated in these reviews which the compliance Panel found had been inflated because of zeroing.[120] However, these assessment rates were calculated for entries occurring prior to the conclusion of the RPT. Specifically, Review 4 covered entries occurring between May 1, 2003 and April 20, 2004; Review 5 covered entries occurring between May 1, 2004 and April 30, 2005; Review 6 covered entries between May 1, 2005 and April 30, 2006;[121] and Review 9 covered entries between May 1, 2006 and April 30, 2007.[122] Therefore, because Reviews 4, 5, 6, and 9 do not cover entries occurring after the end of the RPT, the application of zeroing in those reviews also cannot serve as a basis for a finding of inconsistency.

D. The Recent Appellate Body Report in *US – Zeroing I (EC) (Article 21.5)* Does Not Support the Compliance Panel's Findings That the United States Failed to Comply With the DSB's Recommendations and Rulings in This Dispute

90. The Appellate Body recently addressed the issue of implementation in its report in *US – Zeroing I (EC) (Article 21.5).* We also note that the Appellate Body in *US – Zeroing I (EC) (Article 21.5)* explained that the facts in that dispute did not extend to liquidation that is delayed as a result of judicial review.[123] This was exactly the case with respect to the liquidation of

---

[120] Panel Report, para. 7.166.

[121] Japan Article 21.5 Panel Request, Annex I: Periodic Reviews (indicating that Reviews 4, 5, and 6 all had periods of review which concluded prior to the end of the RPT).

[122] Panel Report, para. 7.108.

[123] *US – Zeroing I (EC) (Article 21.5) (AB)*, para. 314.

entries based on rates calculated in Reviews 1, 2, 3, 7, and 8. Accordingly, the fact that the liquidation of these entries did not follow mechanically from the determination of final liability in those reviews but instead, followed or would follow judicial review, indicates that the compliance Panel was incorrect to find that those liquidations demonstrated a failure to comply with the DSB's recommendations and rulings in this dispute. Finally, the compliance Panel erred when it found Review 4, 5, and 6 were inconsistent with a covered agreement in this dispute because the determinations in these reviews were not issued and did not have any effects after the end of the RPT.

1. The Liquidations With Respect to Reviews 1, 2, 3, 7, and 8 Only Occurred After the End of the RPT as a Result of Judicial Review and do not Support the Panel's Finding of Non-Compliance

a. The Compliance Panel's Erroneous Findings and the Issue of Post-RPT Liquidation

91. In this dispute, the compliance Panel found that the United States failed to comply with the DSB's recommendations and rulings because the United States had taken (or will take) certain liquidation actions pursuant to reviews 1, 2, 3, 7, and 8 after the end of the RPT.[124] In making this finding, the compliance Panel noted that the issuance of liquidation instructions was delayed until after the end of the RPT as a result of judicial review of Commerce's determinations.[125] Specifically, during the pendency of the judicial review, Customs was enjoined from liquidating any of the relevant entries.[126]

---

[124] Panel Report, para. 7.192.
[125] Panel Report, para. 7.192.
[126] U.S. Second Written Submission, paras. 51-56.

92. Normally, Commerce issues liquidation instructions to Customs within 15 days of the publication of the final results of antidumping administrative reviews and Customs liquidates entries to the greatest extent practicable within 90 days of such instructions.[127] However, U.S. courts may issue injunctions, which prevent liquidation during the pendency of all court proceedings. If domestic judicial review had not occurred here, the relevant entries for Reviews 1, 2, 3, 7, and 8 would have been liquidated before the end of the RPT in January 2007, in some instances as long ago as 2001.[128] Accordingly, a key question in this appeal is whether the United States failed to comply with the DSB's recommendations and rulings after the end of the RPT, because it liquidated entries after that date for which liquidation had been suspended due to judicial review.

93. The United States raised this exact issue before the compliance Panel, but the compliance Panel simply concluded that the reasons for delay in liquidation, including judicial review, are irrelevant considerations.[129] According to the compliance Panel, "[w]e do not consider that [Articles 3.7, 19.1, and 21.3] of the DSU provide for such considerations to be taken into account. Instead, those provisions require universal compliance by the end of the RPT, no matter the factual circumstances of any given case."[130] The compliance Panel misunderstood the

---

[127] Panel Report, para. 7.192-7.193.

[128] For example, under the normal time frame, the final results for Review 1 were issued in mid-July 2001. Commerce would have issued liquidation instructions 15 days later, around the beginning of August 2001, and liquidations would have occurred no later than the start of November 2001. Likewise, the final results for Review 3 were issued in mid-September 2004. Commerce would have issued liquidation instructions 15 days later, around the start of October 2004, and liquidation would have occurred by the start of 2005.

[129] Panel Report, para. 7.153.

[130] Panel Report, para. 7.153.

relevance of judicial review to determining U.S. compliance with the DSB's recommendations and rulings.

94. The Appellate Body recently explained in *US – Zeroing I (EC) (Article 21.5)* that compliance with the recommendations and rulings of the DSB "implies cessation of zeroing in the assessment of final duty liability as of the end of the reasonable period of time."[131] The Appellate Body also explained that "measures that, in the ordinary course of the imposition of antidumping duties, derive *mechanically* from the assessment of duties would establish failure to comply *to the extent that* they are based on zeroing and that *they are applied after the end of the reasonable period of time.*"[132] However, the Appellate Body noted that it was not making 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.[133] The Appellate Body left open the possibility that it may address this issue at some point in the future. As we demonstrate below, a Member should not be found in non-compliance because liquidation was delayed until after the RPT due to domestic judicial proceedings.

b. Liquidation After the RPT due to Domestic Judicial Proceedings Cannot Support a Finding That a Member has Failed to Comply

[131] *US – Zeroing I (EC)(Article 21.5) (AB)*, para. 309.
[132] *US – Zeroing I (EC)(Article 21.5) (AB)*, para. 311 (emphasis added).
[133] *US – Zeroing I (EC)(Article 21.5) (AB)*, para. 314.

95. Article 13 of the AD Agreement requires Members to provide for independent judicial review.[134] A Member that maintains a system that provides for judicial review and judicial remedies for the review of administrative actions should not be subject to findings that it failed to comply based on a delay that is a consequence of judicial review. Nevertheless, the compliance Panel concluded that the United States had not complied simply because injunctions delayed liquidation of entries for Reviews 1, 2, 3, 7, and 8 until after the expiry of the RPT. What the United States must do to comply is determined by the covered agreements, in this case, the AD Agreement and the DSU.

96. The AD Agreement itself recognizes that judicial review may cause a delay in meeting certain obligations. Articles 9.3.1 and 9.3.2 impose time limits for assessing antidumping duties. However, footnote 20 to Article 9.3.1 expressly recognizes that observance of the time limits required in Articles 9.3.1 and 9.3.2 may not be possible where the product in question is subject to judicial review proceedings.[135] Thus, it is clear that if a particular time limit is not observed due to pending judicial review, the delay caused by the judicial review is not inconsistent with the AD Agreement. Likewise, 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

---

[134] AD Agreement, Art. 13. Similarly, Article X:3(b) of the GATT 1994 provides in part: "Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers. . . ."

[135] AD Agreement, Art. 9.3.1. & n. 20.

recommendations and rulings of the DSB, since but for judicial proceedings, the Member would have liquidated prior to the RPT.

97. Where judicial review was initiated, as here, the liquidation of entries can no longer derive mechanically from the administrative reviews challenged by Japan, but rather liquidation would occur in accordance with the court's final decision.[136] In this regard, the timing of liquidation is controlled by the independent judiciary and *not* the administering authority. In some cases, the court may issue an order sustaining the administering authority's determination, while in other cases the court may require changes to the determination that the administering authority reached in the administrative review. In either case, the assessment and liquidation are not mechanical but rather are conducted in accordance with the final judicial disposition. In other words, judicial review severs any so-called "mechanical" link between the assessment of liability in the original review determination and the liquidation instructions.[137]

98. As a systemic matter and as discussed in the preceding section, WTO obligations do not create inequalities between Members operating retrospective antidumping systems as compared to Members operating prospective antidumping systems. However, a finding that a Member failed to comply because liquidation was suspended until after the RPT due to litigation would give private litigants the ability to control compliance by Members operating retrospective

---

[136] 19 U.S.C. §§ 1516a (c) and (e) (Exhibit US-A27); 19 U.S.C. §§ 1675(a)(2)(C) and (a)(3)(C) (Exhibit US-A3).

[137] For example, a domestic court challenge caused Commerce to change discrete aspects of its determinations with respect to Review 1. Pursuant to the order of the domestic court with regard to Review 1, Commerce excluded a small amount of merchandise from Review 1 because it was determined to be outside the scope of the antidumping order. *See* Remand Redetermination, *SNR Roulements, et al. v. United States,* Consol. Court No. 01-00686, Slip. Op. 04-100 (Oct. 29, 2004) ("Review 1 Reexamination") (Exhibit US-A29).

antidumping systems. This is because such a litigant could delay liquidation of an entry for many years to ensure that entries were only liquidated after the expiry of the RPT.[138] This result would not occur in a prospective system, where the duty collection occurs on importation, i.e., at the time of entry.

99. The United States notes that the extent of challenges and appeals made in domestic litigation is largely under the control of private litigants. If post-RPT liquidation that was suspended due to judicial review could support a finding of non-compliance, then private parties would have perverse incentives to manufacture domestic litigation and prolong liquidation past the RPT to obtain what amounts to retroactive relief. In other words, private litigants would attempt to control what the United States must do to comply with the DSB's recommendations and rulings.

100. For the above reasons, the Appellate Body should find that liquidation which occurred (or will occur) after the RPT 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 RPT but for the delay caused by domestic judicial review.

2. Even Under the Interpretation of Prospective Implementation in *US – Zeroing I (EC) (Article 21.5)*, the Compliance Panel Erred in Finding That the United States Acted Inconsistently With Respect to Reviews 4, 5, and 6

[138] *See, e.g.*, Exhibit JPN-82 (liquidating certain entries that occurred before the WTO existed).

101. The compliance Panel found that Reviews 4, 5, and 6 were measures taken to comply that were inconsistent with Articles 2.4 and 9.3 of the AD Agreement and Article VI:2 of the GATT 1994. This finding cannot stand, because, as explained above, these reviews covered entries made before the RPT, and the United States did not assess any duties pursuant to these reviews after the RPT. However, even applying the Appellate Body's reasoning in *US – Zeroing I (EC) (Article 21.5)*, these reviews had no post-RPT effects (as Japan acknowledges, liquidation in those reviews is suspended as a result of pending judicial proceedings),[139] and the compliance Panel's finding of inconsistency constitutes legal error.

102. The United States notes at the outset that the Panel's findings with respect to Reviews 4, 5, and 6 are puzzling. The compliance Panel found that these reviews, concluded well before the end of the RPT (and for Reviews 4 and 5, before there were any DSB recommendations and rulings), were not only measures taken "to comply," but that they are inconsistent with a covered agreement. The compliance Panel, however, never explained the significance of its finding of inconsistency or whether it was anything more than an advisory opinion or *obiter dicta*. There is no point in finding after the end of the RPT that a measure "taken to comply" is inconsistent with a covered agreement unless that measure is in existence after the end of the RPT and is "affecting" the operation of a covered agreement after the end of the RPT.[140] Otherwise, the Member concerned has until the end of the RPT to bring any measure taken to comply into compliance. Yet the compliance Panel never made any such findings, or explained, in what way

[139] Japan's Answer to Panel Question 10(a).
[140] *US – Zeroing I (EC) (Article 21.5. (AB)*, para. 299.

these reviews remained in existence after the end of the RPT and were affecting the operation of a covered agreement. In fact there would be no basis for any such finding.

103. The Appellate Body in *US – Zeroing I (EC) (Article 21.5)* examined, *inter alia*, whether a number of administrative 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. The Appellate Body found that the final results of two antidumping administrative reviews demonstrated a failure to comply because the final results employed zeroing and were published after the conclusion of the RPT.[141] The Appellate Body also found that certain assessment instructions demonstrated a failure to comply because they were calculated using zeroing and issued after the conclusion of the RPT.[142] The United States respectfully disagrees that these findings reflect a correct interpretation of the covered agreements. Assuming, however, that the Division adopts the interpretations articulated in *US – Zeroing I (EC) (Article 21.5)*, the United States demonstrates below that certain of the compliance Panel's findings with respect to Reviews 4, 5, and 6 should be reversed.

104. The Appellate Body in *US – Zeroing I (EC) (Article 21.5)* examined a number of administrative reviews that employed zeroing and resulted in assessments of duties. It appears that the Appellate Body analyzed the various measures at issue as follows: Where the review determination was published and the assessment instructions were issued prior to the end of the RPT, the Appellate Body found that these reviews and assessment instructions were not a basis

[141] *US – Zeroing (EC) (I) (Article 21.5) (AB)*, paras. 326, 338.
[142] *US – Zeroing (EC) (I) (Article 21.5) (AB)*, paras. 326, 337-338, 345.

for finding a failure to comply.[143] Where a measure was put in place or had cognizable effects after the conclusion of the RPT, 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 there were such post-RPT effects that reflected the inconsistency found in the original determination. However, if the measure was not put in place or did not have any cognizable effects after the conclusion of the RPT, then that measure could not provide a basis for finding that a Member failed to comply with the DSB's recommendations and rulings in a dispute. In this regard, the Appellate Body stated: "to the extent that a measure . . . would be based on zeroing, the United States would fail to comply with the DSB's recommendations and rulings . . . if it were to *apply* that measure after the end of the reasonable period of time."[144]

105. Applying the Appellate Body's approach to Reviews 4, 5 and 6, it follows that these reviews cannot provide a basis for finding that the United States was acting inconsistently with Articles 2.4 and 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 at the time of Japan's panel request. Each of these reviews was concluded long before the end of the RPT.[145] Moreover, as a result of domestic litigation, assessment of duties calculated in these reviews was enjoined prior to the conclusion of the RPT and continues to be enjoined. In this regard, these reviews have had no post-RPT effects of the kind that give rise to a finding of inconsistency: any liquidation occurring after the RPT would have been occurred at that time (rather than earlier) solely as a result of judicial review proceedings, and as explained above, entries for which

---

[143] *US – Zeroing (EC) (I) (Article 21.5) (AB)*, para. 313 & n. 423.

[144] *US – Zeroing (EC) (I) (Article 21.5) (AB)*, para. 310 (emphasis added).

[145] Japan Article 21.5 Panel Request, Annex I: Periodic Reviews (Review 3 was concluded in 2004, Review 4 was concluded in 2005, and Review 5 was concluded in 2006).

liquidation was suspended until after the RPT due to domestic judicial proceedings do not give rise to a finding of lack of compliance at the end of the RPT.[146] Therefore, even under the reasoning in *US – Zeroing I (EC) (Article 21.5) (AB)*, Reviews 4, 5 and 6 cannot serve as the basis for a finding of WTO-inconsistency in this dispute.

V. THE COMPLIANCE PANEL ERRED IN FINDING THAT THE UNITED STATES IS IN BREACH OF ARTICLES II:1(A) AND II:2(B) OF THE GATT 1994 WITH RESPECT TO CERTAIN LIQUIDATION INSTRUCTIONS AND LIQUIDATION NOTICES

106. The compliance 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 Commerce's liquidation instructions set forth in Exhibits JPN-40A and JPN-77 to JPN-80, and the Customs liquidation notices set forth in Exhibits JPN-81 to JPN-87. Japan asserted that the United States acted inconsistently with its obligations under Articles II:1(a) and (b) of the GATT 1994 because after the reasonable period of time, it collected antidumping duties on the subject merchandise in excess of the bound tariffs in the U.S. Schedule of Concessions and in a manner inconsistent with Article VI of the AD Agreement.[147] The compliance Panel agreed.[148]

107. Japan's Article II claims are entirely derivative of Japan's claims under Articles 2.4 and 9.3 of the AD Agreement.[149] It was entirely unnecessary to make any Article II findings,

---

[146] The United States also recalls that the Panel did not make any findings with respect to cash deposit rates established in Reviews 4, 5, and 6.

[147] Japan First Written Submission, para. 139, n. 142.

[148] Panel Report, paras. 7.204-7.208.

[149] Panel Report, para 7.202 (". . . the alleged violation of Article II is dependent on a finding that the underlying administrative review is WTO-inconsistent . . . . we agree with the United States that Japan's Article II claims are derivative . . ."). Given the compliance Panel's findings regarding the derivative nature of Article II claims, the compliance Panel's finding of inconsistency with respect to Article II is limited strictly to the liquidation of entries in the

particularly in light of the fact that Japan failed to request such findings in its first written submission.[150] However, if the Appellate Body reverses the compliance Panel's findings that the United States failed to comply with the DSB's recommendations and rulings concerning Reviews 1, 2, 3, 7, and 8, the derivative findings that the United States violated Articles II:1(a) and (b) cannot stand and should likewise be reversed.

108. In any event, the compliance Panel erred by concluding that the liquidation instructions and liquidation notices constitute a breach of Article II of the GATT 1994. As we explained above, compliance with DSB recommendations and rulings with respect to the duties a Member imposes on particular merchandise should be evaluated by examining the Member's treatment of the merchandise on the date that the merchandise enters its territory, not on the date when the ministerial act of collection of duties occurs. Here, the liability for antidumping duties that Japan claims resulted in collection of duties above the bound rate was incurred prior to the expiration of the RPT, when the subject merchandise entered the United States. In addition, any liquidation that occurred after the RPT resulted from a delay due to domestic judicial review. Just as such liquidation cannot serve as a basis for a failure to comply, it cannot support a corollary finding that the United States acted inconsistently with Articles II:1(a) and (b) of the GATT 1994.

VI. Conclusion

Customs notices that can be tied to Reviews 1, 2, 7, and 8, which were subject to the compliance Panel's finding of a continued violation of the AD Agreement and the GATT 1994. Some line items on the notices have no relation to the reviews at issue either because they fall outside of the relevant period of review or relate to duties other than antidumping duties.

[150] Japan First Written Submission, para. 159.

For the reasons set out above, the United States respectfully asks the Appellate Body to reverse the compliance Panel's findings and to find that:

(1) the compliance Panel's finding that Review 9 is within the Panel's terms of reference is in error;

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

(3) the compliance Panel's finding that the United States is in continued violation of its obligations under Articles 2.4 and 9.3 of the AD Agreement and Article VI:2 of the GATT 1994, is in error;

(4) the compliance Panel's finding that the United States acted inconsistently with Articles 2.4 and 9.3 of the AD Agreement and Article VI:2 of the GATT 1994 by applying zeroing in the context of Reviews 4, 5, 6, and 9 is in error; and

(5) the compliance 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 RPT, namely with respect to Commerce's liquidation instructions set forth in Exhibits JPN-40A and JPN-77 to JPN-80 and Customs liquidation notices set forth in Exhibits JPN-81 and JPN-87 is in error.