United States – Measures Relating to Zeroing and Sunset Reviews

(AB-2009-2/DS322)

Recourse to Article 21.5 of the DSU by Japan

Oral Statement of the United States of America

June 29, 2009

I. Introduction

1. Good afternoon, Mr. Chairman and members of the Division. On behalf of the United States, we would like to thank you for the opportunity to appear before you today. Before turning to the substance of today's appeal, we would like to take a moment to commend the Appellate Body for its decision to open this hearing for observation by all WTO Members and the public. We thank Japan for also requesting this hearing to be open. The United States firmly believes that transparency in Appellate Body hearings promotes confidence in the WTO dispute settlement system overall and makes the WTO a stronger institution. This is the fifth such open Appellate Body hearing, and we look forward to many more.

2. As an initial matter, it is important to keep in mind that contrary to the title of this dispute, the issues on appeal here are not about zeroing. Rather, this appeal is about issues of a compliance panel's jurisdiction and what implementation requires in a particular setting. But before moving to the particular issues on appeal, just one word about zeroing: the Appellate Body has addressed the issue of "zeroing" in antidumping proceedings in a series of disputes, and the United States has publicly stated its intention to comply with the recommendations and rulings of the Dispute Settlement Body ("DSB") in those disputes. The United States is working actively to implement those recommendations and rulings, including those made in other disputes for which the reasonable period of time ("RPT") is still ongoing.

3. Turning to the appeal at hand, Japan's lengthy submission may have given the Division the misimpression that this dispute is broad and complex. However, at its core, this appeal concerns a very narrow issue – how should a compliance panel determine whether a Member with a retrospective assessment system has implemented the DSB's recommendations and rulings with respect to individual reviews? It is this question which we will primarily discuss in

our opening. The United States also recalls what we have not put at issue here – namely, the Panel's findings related to the "as such" zeroing measure and a single sunset review.

4. The Panel found that the United States failed to comply because after the RPT it liquidated, or would liquidate, entries pursuant to the WTO-inconsistent reviews. The Panel's view of implementation would require the United States to redo determinations that occurred years prior to the end of the RPT, regarding entries from as far back as 1999, and in two cases, involving orders that were revoked over nine years ago. The Panel improperly divorced the text of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") from the text of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") and fundamentally misinterpreted what the United States was required to do by the expiry of the RPT.

5. The United States complied with the DSB's "as applied" recommendations and rulings with respect to administrative reviews. The challenged reviews were not applied to any entries after the RPT. Moreover, any liquidation after the RPT occurred solely as a result of independent judicial review – an obligation imposed by the AD Agreement itself. Such liquidation cannot support a finding of non-compliance. Finally, the alleged measures taken to comply had no effects after the RPT, and do not provide any basis for a finding of inconsistency.

6. We now discuss the key aspects of our appeal in more detail.

II. The Panel Improperly Found That Review 9 Fell Within in its Terms of Reference

7. A threshold jurisdictional issue concerns the Panel's preliminary ruling with respect to Review 9. Months after the Panel began its proceeding, Japan asked the Panel to make findings with respect to Review 9. The Panel erroneously found that a measure not in existence at the

time the DSB set the terms of reference for a compliance panel could nonetheless be considered to be within those terms of reference.[1] The Panel's flawed view was that a measure not specified in a panel request could fall within a panel's terms of reference simply because that future measure was part of a "continuum" of similar measures, and because there was a "high degree of predictability" that the measure would come into existence.[2]

8. The Panel's approach has no basis in the text of the DSU – measures not in existence at the time of a panel request cannot fall within a panel's terms of reference. DSU Article 3.3 contemplates the "prompt settlement of situations where a Member considers that any benefits accruing to it directly or indirectly under the covered agreements *are being impaired*" by another Member's measures.[3] A non-existent measure cannot be impairing any such benefits and cannot fall within the scope of a dispute. The plain text of Article 21.5 is also clear – a compliance panel only has jurisdiction to review a disagreement over the existence or consistency of a measure *taken* to comply. The text of Article 21.5 does not contemplate nor allow for "a measure taken or that a Member is predicted to or might take" to comply. Japan never explains how measures that may come into existence in the future (and therefore by definition measures that have not yet been "taken") can be measures that were "taken" to comply at the time of the panel request.

9. Japan asserts that the Appellate Body has recognized "exceptions" to the rule that future

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[1] Panel Report, paras. 7.114, 7.116.

[2] Panel Report, paras. 7.110-7.111, 7.115-7.116.

[3] DSU Article 3.3 (emphasis added); *US – Upland Cotton (Panel)*, paras. 7.158-7.160.

measures may not fall within the panel's terms of reference. Japan also claims that Article 21.5 compliance proceedings "offer certain circumstances in which a further exception . . . is warranted."[4] Japan is mistaken with respect to both arguments.

10. First, the Appellate Body has never created any so-called "exceptions" to the text as negotiated and agreed by Members – indeed, the Appellate Body would lack authority to create any such "exception" – nor has the Appellate Body ever claimed to have done so. Rather, the Appellate Body has explained that the identification in a panel request of a measure may be considered to include post-establishment measures when those subsequent modifications *do not change the essence* of the measure identified in the panel request.[5] In other words, although a subsequent measure in certain circumstances may appear to be a new measure, it is in fact the same measure. The situation in this case is entirely different – each administrative review is "separate and distinct,"[6] and such separate and distinct reviews cannot be introduced later during a panel proceeding, even if related to the same antidumping order.

11. Second, Article 21.5 does not broaden a panel's terms of reference. In fact, the same rules governing terms of reference that apply to other disputes, also apply to compliance disputes, subject to the *further* limitations of Article 21.5 itself.[7] There is nothing in the text of Article 21.5 that would permit the expansion of a panel's terms of reference to include measures not in

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[4] Japan Appellee Submission, para. 375.

[5] *Chile – Price Band Systems (AB)*, para. 139.

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

[7] *US – FSC II (Article 21.5)*, paras. 58-61.

existence at the time of the compliance panel request. Article 21.5 is not intended to address ever-evolving disagreements during the course of panel proceedings.

12. Furthermore, the Panel's conclusion that "subsequent closely connected measures" is sufficiently specific to meet the requirement of Article 6.2 of the DSU is also unfounded.[8] Under that provision, a panel request must *identify* the *specific* measure at issue. As the Appellate Body recently recognized, the results of each administrative review are "separate and distinct."[9] And to meet the requirements of Article 6.2, Japan was required to identify each such measure in its panel request.

13. Japan claims that neither the United States nor third parties were prejudiced by the inclusion of Review 9 within the Panel's terms of reference.[10] These arguments are misdirected. In our appellant submission, we explained the systemic implications of improperly allowing future measures to fall within a panel's terms of reference.[11] The United States did not attempt to prove that it, or potential third parties, were deprived of due process. Nor was the United States required to do so. Article 6.2 reflects certain notions of procedural fairness. Among them is giving Members sufficient information so that they know whether to reserve their third-party rights and participate in a proceeding, as well as informing the responding Member of the case

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[8] U.S. Appellant Submission, para. 44.

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

[10] Japan Appellee Submission, paras. 425-43.

[11] U.S. Appellant Submission, para. 57.

against it.[12] That being said, despite Japan's assertions to the contrary, there is no additional requirement to demonstrate that a responding Member or a potential (and therefore unknowable) third party was deprived of due process or was prejudiced by the failure to specifically identify a measure in a panel request.

III. The Panel's Findings With Respect to Reviews 1-9 Constitute Legal Error and Should be Reversed

14. The United States intends to address the specific analysis regarding compliance in *US – Zeroing I (EC)(Article 21.5)* ("*EC I (Article 21.5)*"). However, we also intend to address initially the Panel's failure to acknowledge the date of entry of merchandise as the appropriate determinant of implementation, an issue the Appellate Body did not fully address in *EC I (Article 21.5)*.

A. Implementation is Determined by the Date of Entry

15. The United States has asked the Division to examine the important question of whether, in a case involving border measures on goods, such as this one, implementation should be determined by the date of entry of the goods. We understand that the Appellate Body recently addressed this issue in *EC I (Article 21.5)*, and we are not lightly raising this issue again in this appeal. This issue has significance not only in the antidumping area but for other border measures, potentially including measures such as ordinary tariffs, special agricultural safeguards, tariff preferences, and customs valuation. Accordingly, it is important for this Division to explore fully the textual arguments, rooted in provisions of the AD Agreement and the GATT

[12] *See, e.g., Brazil – Desiccated Coconut (AB)*, p. 22; *EC – Bananas III (Panel)*, para. 7.35.

1994. The Panel's failure to acknowledge the date of entry as the appropriate determinant of implementation undermines the required neutrality between retrospective and prospective antidumping systems. Therefore, we have raised this issue for the Division's thorough consideration.

16. As we have noted, examining the date of entry is consistent with the well-established rule that implementation in the WTO dispute settlement system is *prospective*.[13] Here, the Panel found against the United States with respect to Japan's claims regarding Reviews 1 through 9.[14] These reviews *all* pertained to entries occurring prior to the end of the RPT. If left to stand, the Panel's findings would have a retroactive effect and create inequality between prospective and retrospective assessment systems.

17. A Member complies with the DSB's recommendations and rulings concerning a particular administrative review when it ceases to apply the results of that review to entries occurring after the conclusion of the RPT. Various provisions of the GATT 1994 and the AD Agreement demonstrate that prospective implementation is determined by the date of entry.[15] The Panel improperly rejected this textual argument, finding that under the DSU: "If a measure found to be WTO-inconsistent is to be applied after the expiry of the RPT, that measure must have been brought 'into conformity', irrespective of the date of entry of the imports covered by

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[13] *See, e.g.*, *US – Upland Cotton (Article 21.5)(AB)*, para. 243, n.494.

[14] Panel Report, para. 8.1(a); Panel Report, para. 8.1(b).

[15] U.S. Appellant Submission, paras. 67-73; *see also* U.S. First Written Submission, paras. 59-64.

that measure."[16]

18. The reviews at issue do not exist in a vacuum. They determine final antidumping duty liability that was imposed on specific entries at the border at the time of entry. Accordingly, the relevant date for determining application of the measure at issue is the date of that entry. This date of entry analysis is similar for other types of measures such as ordinary tariffs or the special agricultural safeguard – if the WTO-inconsistent measure at issue is no longer being applied to entries after the end of the RPT, then the Member will have come into compliance.

19. The Panel's approach would lead to retroactive effects without any logical limitation. This is because an importer could require a Member to redo years-old measures for entries long before the end of the RPT simply by requesting the Member, after the end of the RPT, to re-calculate the border measure at issue. If the Member were to find that the border measure should apply without modification, then under the Panel's approach, that response would itself appear to "apply" the measure after the end of the RPT.

20. The United States has explained that date of entry is also the appropriate point of reference in terms of compliance because it ensures equality between Members with prospective and retrospective antidumping systems.[17] As the Appellate Body confirmed in the original dispute, the AD Agreement is neutral with respect to antidumping systems.[18] In contrast, Japan's theory of compliance would create significant inequalities between the obligations of Members

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[16] Panel Report, paras. 7.147-7.148.

[17] *See, e.g.*, U.S. First Written Submission, paras. 68-69; *see also* U.S. Appellant Submission, paras. 77-84.

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

operating prospective and retrospective systems. This is because Japan's theory relies on a necessary technical difference between retrospective and prospective systems. Specifically, in retrospective systems where a review has been requested there is no final assessment of duties until the review is concluded, whereupon entries may be liquidated. On the other hand, in prospective systems where a review has been requested duties are assessed at the border and then may be refunded. Japan argues that implementation should reach prior entries that remain unliquidated under a retrospective system. This is significant because there would be no analogous obligation under a prospective system to provide a refund. To the contrary, the United States has demonstrated that Members such as the EC expressly prohibit refund proceedings based on a finding of WTO-inconsistency.[19]

21. Contrary to Japan's assertion, using the date of entry to determine implementation maintains equality in both retrospective and prospective systems. Under *either system*, the assessment rate determined in a *review* is for prior entries. The required withdrawal of such rates as applied to entries made before the expiry of the RPT would require a retroactive effect under either system. In addition, under *either* system, the rate applied at the border is the basis for assessment in the absence of a review. Under this circumstance, when the rate applied at the border is found to be WTO-inconsistent, a Member cannot apply that rate as the assessment rate for goods that enter after the end of the RPT. Fundamentally, using date of entry to determine implementation maintains equality between systems because entry date is a universal and objective event and does not depend on the peculiarities of each Member's system for

[19] U.S. Appellant Submission, paras. 75-76, n.100.

administering antidumping duties. Consequently, prospective compliance would mean the same thing under either system.

2. Post-RPT Liquidations as a Result of Judicial Review Do Not Support the Panel's Finding of Non-Compliance

22. The Panel found that a delay in the liquidation until after the RPT due to independent judicial review under domestic law was an irrelevant consideration to determining compliance.[20] The Panel would have the United States affirmatively re-visit the final liability determined in some cases *more than five years* prior to the DSB's recommendations and rulings simply because injunctions issued pursuant to judicial review delayed liquidation of such entries until after the expiry of the RPT.

23. What the United States must do to comply in this dispute is determined by the DSU, as informed by the covered agreements. Here, the AD Agreement imposes obligations on Members with respect to the determination of antidumping duties. Among these is the obligation under Article 13 of the AD Agreement to provide *independent* judicial review. As is the case elsewhere, courts in the United States have the authority to stay administrative action (including action to finally assess and liquidate antidumping duties) pending the outcome of judicial proceedings to review that action. The Panel's approach – and Japan's – effectively subjects the United States to findings of non-compliance based on a delay beyond the RPT that is a consequence of the very judicial review required by the AD Agreement.

24. The Appellate Body, in *EC I (Article 21.5)*, found that the collection of duties which follows "mechanically" from the determination of final liability found to be WTO-inconsistent

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[20] Panel Report, para. 7.153.

could establish a failure to comply.[21] The Appellate Body, however, noted that it was not making findings against liquidations 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.[22]

25. The collection of duties that occurred after the end of the RPT in Reviews 1, 2, 7, and 8, did not follow "mechanically" from these reviews. Instead, judicial action stayed liquidation of the entries subject to these reviews, which severed the mechanical link between the collection of duties and the determinations of final liability which were found to be WTO-inconsistent in the original dispute. But for the judicial intervention at the request of private parties, the liquidations would have occurred years before the expiry of the RPT.

26. Negative consequences would result if liquidation after the RPT because of judicial review were found to provide a basis for a finding of non-compliance. The independent judicial review provided for in Article 13 should be understood as ensuring that Members adhere to their own legal regime, and should not be interpreted as a means for obtaining retroactive implementation. It is a well-established and accepted principle that compliance with dispute settlement recommendations and rulings requires prospective implementation only. If the Division were, instead, to adopt Japan's theory of compliance, private litigants would have every incentive to run to the courts with questionable claims in order to influence U.S. implementation by delaying liquidation. In contrast, private parties would be prevented from controlling

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[21] *See, e.g., US – Zeroing I (EC) (Article 21.5) (AB),* para. 310.

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

Members' compliance if a finding of failure to comply could not be made with respect to entries that remain unliquidated due to judicial review.

27. Japan, relying on *Brazil – Retreaded Tyres* and *US – Shrimp*, argues that the United States is responsible for the consequences of any decisions taken by its courts, but that point is not relevant here.[23] Unlike in those disputes where the courts mandated an outcome that was later determined to be WTO-inconsistent,[24] this dispute raises a narrow question: whether the delay in administrative action until after the RPT because of independent judicial review should be charged against the United States. As we have demonstrated, the AD Agreement does not countenance such a result.[25]

3. Reviews 4, 5, and 6 Had No Post-RPT Effects Supporting a Finding of Inconsistency

28. Even under the reasoning from *EC I (Article 21.5)*, the Panel had no basis for finding that Reviews 4, 5 and 6 were inconsistent with the AD Agreement and the GATT 1994. In *EC I (Article 21.5)*, where an antidumping review determination was published and the assessment instructions were issued prior to the end of the RPT, those reviews and instructions could not provide a basis for finding a failure to comply.[26] Similarly, because the Review 4, 5 and 6 determinations were published prior to the end of the RPT and the corresponding assessment

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[23] Japan Appellee Submission, paras. 283-84.

[24] *Brazil – Tyres (Panel)*, paras. 7.303-7.305; *US – Shrimp (AB)*, para. 173.

[25] AD Agreement, Article 13.

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

instructions have not been issued, these reviews and instructions have no post-RPT effects and cannot provide a basis for finding a failure to comply or an inconsistency.

29. Japan claims that the United States is incorrect to assert that Reviews 4, 5 and 6 do not have any post-RPT effects because entries from those reviews remain unliquidated.[27] In other words, Japan claims that the status of the entries remaining unliquidated provides a basis for finding that the United States acted inconsistently with the covered agreements. But these entries remain unliquidated as a result of the judicial review prescribed by Article 13 of the AD Agreement, and no action has been taken to liquidate them after the RPT. It cannot be presumed that the results of this judicial review will result in the collection of any duties at all.

IV. The Panel's Findings Under GATT Article II Should Be Reversed

30. Lastly, the Appellate Body should reverse the compliance Panel's findings that the United States is in violation of Articles II:1(a) and II:1(b) of the GATT 1994. Japan's claims under Article II of the GATT are entirely derivative of claims under the AD Agreement and Article VI of the GATT 1994. If the Appellate Body reverses the Panel's finding of inconsistency, it should likewise reverse the Panel's findings concerning GATT Article II. We further note that Japan never appealed the Panel's finding that Japan's Article II claims are entirely "derivative."[28] Accordingly, for this reason and the reasons in our submission, we would ask that the Appellate Body reject Japan's arguments with respect to Article II.[29]

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[27] Japan Appellee Submission, paras. 482, 484.

[28] Panel Report, para 7.202 (stating "we agree with the United States that Japan's Article II claims are derivative . . .".).

[29] Japan Appellee Submission, paras. 517-27.

V. Conclusion

31. For all of the forgoing reasons, as well as those set out in our written submission, we respectfully request that the Appellate Body reverse the Panel's findings that were the subject of the U.S. appeal.

32. We thank you for your attention and look forward to answering your questions.