*** *Check Against Delivery* ***

UNITED STATES – MEASURES RELATED TO ZEROING AND SUNSET REVIEWS

RECOURSE TO ARTICLE 21.5 OF THE DSU BY JAPAN

WT/DS322

OPENING STATEMENT OF THE UNITED STATES OF AMERICA AT THE SUBSTANTIVE MEETING OF THE PANEL

November 4, 2008

Mr. Chairperson, members of the Panel:

1. On behalf of the U.S. delegation, I would like to thank you for agreeing to serve on the Panel. As an initial matter, the United States would like to thank the Panel for agreeing to open the Panel's meeting to the public, including opening the third party session for those third parties willing to make their statements public. The Panel properly recognized that under the Dispute Settlement Understanding ("DSU") it has the authority to organize open sessions. Opening this meeting to the public will have a positive impact on the perception of the WTO dispute settlement system, particularly with respect to transparency. Permitting the public to observe proceedings and be able to see first-hand the professional, impartial, and objective manner in which they are conducted can only further enhance the credibility of the WTO.

2. Today in our statement we would like to focus on a few points concerning Japan's arguments. First, we will discuss how Japan is improperly trying to include measures which fall outside of the scope of this Article 21.5 proceeding. Second, we will refute Japan's claim that the United States has not complied with the recommendations and rulings of the Dispute Settlement Body ("DSB") from the original proceeding. More specifically, we will demonstrate

that the United States has eliminated the WTO inconsistencies found with respect to five administrative reviews. As to the challenged sunset review, the majority of the dumping margins relied on in that determination are not WTO-inconsistent and independently demonstrate that dumping at above the *de minimis* level continued after the imposition of the order. Accordingly, as we will show, it was unnecessary to change the challenged sunset review determination. And lastly, the United States has eliminated the single measure known as the "zeroing procedures" that was found to be WTO-inconsistent "as such."

I. SCOPE OF THIS DISPUTE

a. The Three Subsequent Reviews of *Ball Bearings from Japan* Are Outside the Scope of This Proceeding

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

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

rulings,[1] and in assessing whether a challenged measure is a "measure taken to comply," the Panel must look first to the recommendations and rulings of the DSB.[2]

5. Two of the administrative reviews of *Ball Bearings* challenged by Japan cannot be considered measures taken to comply because the final results in those reviews were adopted *prior* to the DSB's recommendations and rulings in the original proceeding. As the Appellate Body has correctly noted, "[a]s a whole, Article 21 deals with events *subsequent* to the DSB's adoption of recommendations and rulings in a particular dispute."[3] Measures taken by a Member prior to adoption of a dispute settlement report typically are not taken for the purpose of achieving compliance, and would not be within the scope of a proceeding under Article 21.5.

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

7. Japan has urged this Panel to take an expansive and unwarranted view of Article 21.5.[4] According to Japan's argument, any subsequent administrative review could fall within a compliance proceeding merely because it involved the same product exported from the same

---

[1] *Canada – Aircraft (Article 21.5) (AB)*, para. 36.

[2] *US – OCTG from Argentina (Article 21.5) (AB)*, para. 142; *US – Softwood Lumber IV (Article 21.5) (AB)*, para. 68.

[3] *US – Softwood Lumber IV (Article 21.5) (AB)*, para. 70 (emphasis in original).

[4] *See, e.g.*, Japan First Written Submission, paras. 90-91.

country by the same companies. However, as the Appellate Body noted in *US – Softwood Lumber IV (Art. 21.5)*, an approach where every subsequent administrative review was treated as a measure taken to comply "would be too sweeping."[5]

8. Japan relies frequently on the Appellate Body report in *US – Softwood Lumber IV (Art. 21.5)* in an attempt to show the alleged "particularly close relationship" between the original *Ball Bearings* reviews and the three subsequent reviews.[6] Japan's reliance is misplaced. Here, unlike in the *Softwood Lumber IV* dispute, two of the three subsequent determinations were made well before the adoption of the DSB's recommendations and rulings. These subsequent determinations thus could not logically have taken into consideration the recommendations and rulings of the DSB in the original dispute.

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

[5] *US – Softwood Lumber IV (Article 21.5) (AB)*, para. 87 (footnote omitted).

[6] *See, e.g.*, Japan First Written Submission, paras. 90-93; Japan Second Written Submission, paras. 42-44.

corresponded to the expiration of the RPT.[7] Finally, unlike the alleged measure taken to comply in *Softwood Lumber IV*, the 2005-06 administrative review did not incorporate elements from a Section 129 determination "in view of " the DSB's recommendations and rulings.

10. None of these three subsequent measures is a measure taken to comply. Contrary to Japan's assertion,[8] the United States has not asked this Panel to focus on the subjective intent of the United States in adopting the final results in the three administrative reviews. Rather, as we have just demonstrated, the three subsequent measures cannot *objectively* be considered measures taken to comply.

11. Japan also relies on the erroneous argument that the United States has declared that the three subsequent reviews of *Ball Bearings* are measures taken to comply.[9] However, the United States has explained that the measures subject to the DSB's recommendations and rulings were eliminated as an *incidental consequence* of the U.S. antidumping system when the cash deposit rate from one review was replaced by the cash deposit rate from the next review. This fact does not transform the subsequent reviews into "measures taken to comply" within the meaning of Article 21.5.

12. Japan worries that it will somehow be left without a remedy if the three subsequent reviews are excluded from this proceeding. However, the scope of a proceeding under Article 21.5 is limited by the text that Members have agreed to. The provisions of the DSU cannot be re-

---

[7] *US – Softwood Lumber IV (Article 21.5) (AB)*, para. 84.

[8] Japan Second Written Submission, paras. 19-23.

[9] Japan Second Written Submission, paras. 12-15.

written just to take into account one Member's view of the way things ought to be. Article 21.5 is clear: measures that are not measures taken to comply – like those at issue here – do not fall within the scope of a compliance proceeding. Japan cannot distort the requirements of Article 21.5 so as to challenge any measure it deems related to the original *Ball Bearings* reviews. Nor is Japan left without a remedy – Japan has the same remedies as every other Member with respect to a measure that is not a measure taken to comply.

b. Subsequent Administrative Reviews Are Outside the Scope of This Proceeding

13. The United States has also asked this Panel to reject any claims with respect to antidumping measures that were not specified in Japan's panel request because those measures were subsequent to that request. Japan would like to include any and all subsequent administrative reviews that it believes are "closely connected" to the DSB's recommendations and rulings, including the 2006-07 administrative review of *Ball Bearings from Japan*.[10] However, under Article 6.2 of the DSU, a panel request must identify the specific measures at issue, and under Article 7.1, the Panel's terms of reference are limited to those specific measures. Here, each determination that sets a margin of dumping for a defined period of time is separate and distinct. Under Article 6.2, Japan had to identify each such measure in its panel request. It did not and could not since the measures were not even in existence at the time of Japan's request for the establishment of this Panel. Indeed, Japan could not even know whether it would have wanted to make claims against a measure not yet in existence. Accordingly, these subsequent

[10] Japan's Request to Make a Supplemental Submission, Sept. 15, 2008.

administrative reviews cannot be subject to this compliance proceeding because they were not in existence at the time of the Panel's establishment.[11]

14. We recall that the Panel's grant of Japan's request to file a supplemental submission as to the 2006-07 administrative review of *Ball Bearings* was without prejudice to the U.S. preliminary objection under Article 6.2 of the DSU. The United States reiterates that this measure should be rejected as outside the scope of this proceeding because it was not in existence at the time of panel establishment. However, this administrative review is not within the Panel's terms of reference for another reason as well – it is not a measure taken to comply for the reasons provided in our November 3 submission.

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

15. In this dispute, the Appellate Body found five antidumping administrative reviews inconsistent with the AD Agreement and the GATT 1994. The United States fully implemented the DSB's recommendations and rulings with respect to these administrative reviews by withdrawing the antidumping orders covering two of the administrative reviews and withdrawing the cash deposit rates established in the remaining three administrative reviews.[12] As a result, none of the five administrative reviews is the basis for antidumping liability on entries occurring on or after the date of implementation. Thus, the United States has *prospectively* implemented the DSB's recommendations and rulings in this dispute and no further action is required.

---

[11] *US – Upland Cotton (Panel)*, paras. 7.158-7.160.

[12] *See, e.g.,* U.S. First Written Submission, paras. 66-67.

a. Japan's Theory of Implementation Must Be Rejected

16. Japan has raised one principal argument in response to the U.S. description of how it has implemented the DSB's recommendations and rulings. Japan asserts that implementation by the United States was insufficient because it did not undo action taken with respect to imports that entered the United States prior to the end of the RPT but that remained unliquidated after the end of the RPT – that is, "prior unliquidated entries."[13] We recall that "liquidation" refers to the ministerial process under U.S. law whereby the United States collects antidumping duties from importers.[14] It should not be confused with the determination of final liability which occurs either through an administrative review or, automatically, if no administrative review is requested.

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

i) Japan's Theory of Implementation Would Create Inequalities Between Retrospective and Prospective Antidumping Systems

---

[13] *See, e.g.,* Japan Second Written Submission, para 107.

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

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

19. Japan has been unable to provide any basis under the WTO agreements for establishing such radically different implementation obligations for Members with prospective and retrospective antidumping systems. In fact, none exists. The correct interpretative approach is to provide equal implementation obligations under either antidumping system.

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

ii) Japan's Theory of Implementation Is Not Prospective

21. Japan's theory of implementation does not provide for prospective relief, but instead would require the United States to implement retroactively the DSB's recommendations and rulings in this dispute. Japan incorrectly assumes that recalculating final liability for prior unliquidated entries is not retrospective because these entries have not been liquidated. However, there can be no question that Japan's theory leads to an "undoing of past acts" for these prior unliquidated entries and is, thus, *retrospective*. Specifically, under Japan's theory, the United States would have to revisit the determination of the final liability calculated for these unliquidated entries. This would undo the results of the antidumping administrative reviews as applied to these prior entries.

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

iii) Japan's Theory of Implementation Misapprehends Articles 18.3 and 9.3 of the AD Agreement

23. Japan's theory of implementation must also be rejected because it is premised on incorrect interpretations of Articles 18.3 and 9.3 of the AD Agreement. First, Japan asserts that pursuant to Article 18.3 of the AD Agreement, the AD Agreement applies to the five

administrative reviews because these reviews were based on applications made after January 2, 1995. As a result, Japan incorrectly concludes that there is no manner in which applying the DSB's recommendations and rulings in this dispute to prior unliquidated entries can be viewed as retroactive.[15]

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

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

[15] *See, e.g.,* Japan Second Written Submission, paras. 139-41.

"retroactive."

26. Japan also incorrectly argues that Article 9.3 of the AD Agreement requires implementation obligations with respect to the five administrative reviews to reach prior unliquidated entries because if the obligations do not, Article 9.3 would be rendered a nullity.[16] The U.S. obligations under Article 9.3 are the same as those for Members operating prospective systems – if the results of a review are found to be WTO inconsistent, those results must not be applied to future entries. Article 9.3 does not require a WTO Member to undo results of a review as to prior unliquidated entries.

b. Japan Otherwise Fails to Show Any Violations of the WTO Agreements

27. In addition to Japan's principal argument that implementation reaches prior unliquidated entries, Japan also has argued that – with respect to the five administrative reviews – the United States has violated various additional provisions of the WTO agreements.[17] These additional claims are fully addressed in our written submissions, which demonstrate that these claims are premised on misunderstandings of the WTO Agreements and mischaracterizations of the U.S. response to the DSB's recommendations and rulings in this dispute.[18]

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

28. Japan argues incorrectly that the November 1999 sunset review of *Anti-Friction Bearings*

---

[16] *See, e.g.,* Japan Second Written Submission, paras. 116-117.

[17] *See*, *e.g.*, Japan Second Written Submission, paras. 182-87.

[18] *See, e.g.*, U.S. Second Written Submission, paras. 71-78.

"could not, and cannot today, provide a valid legal basis under Article 11.3 for the continued maintenance of the antidumping order in question."[19] To the contrary: Absent a demonstration that there is no WTO-consistent basis for the likelihood of dumping determination, Japan cannot prevail upon its claim that the antidumping duty order should have been terminated. As the United States demonstrated in its written submissions, Japan's arguments are unfounded.

29. In the underlying dispute, Japan challenged a specific aspect of the November 1999 sunset review – namely, the reliance upon margins calculated with zeroing in the likelihood of dumping determination. With respect to that aspect, the Appellate Body made a specific finding that the United States acted inconsistently with Articles 2 and 11 of the AD Agreement in that particular review, "*when it relied on margins of dumping calculated in previous proceedings through the use of zeroing.*"[20] Accordingly, both Japan's challenge and the Appellate Body's finding of WTO inconsistency were limited to the extent the United States relied on margins from previous proceedings calculated *with zeroing*.

30. The original likelihood of dumping determination, however, did not rest exclusively upon margins that the Appellate Body found inconsistent with Article 11.3 of the AD Agreement. The remaining margins – in fact, the *majority* of margins – cannot be characterized as inconsistent with the AD Agreement because they either *predate* the AD Agreement or did not involve the use of a zeroing methodology. Each of these two categories of margins independently supports the criterion that Commerce applied, that is to say, that dumping continued at a level above *de*

[19] Japan First Written Submission, para 157.

[20] *US – Zeroing (Japan) (AB)*, para. 190(e) (emphasis added).

minimis after the imposition of the antidumping duty order. And neither the original panel nor the Appellate Body made any adverse findings regarding these margins.

31. There are at least three fundamental flaws in Japan's arguments. First, Japan's arguments are flawed procedurally. In the original proceeding, Japan did not challenge the margins that were determined *without zeroing* or the margins that predated the AD Agreement and the WTO. As such, Japan's assertion in this dispute that the United States should have presented the arguments defending its reliance upon non-zeroed margins and pre-WTO margins in the original proceeding is unfounded.[21] The United States had no obligation to defend these aspects of the November 1999 sunset review because Japan did not challenge them at that time.

32. Second, it is incorrect to interpret the Appellate Body's findings in this dispute as prohibiting the United States from relying upon margins calculated *without zeroing*. This is not an inconsequential matter. In the fifth administrative review, for example, which covered part of the relevant sunset review period, Commerce reviewed twenty-one respondents. For ten non-cooperating respondents, Commerce applied a dumping margin based upon pricing data in the petition.[22] This above *de minimis* rate was determined *without* zeroing. Because these respondents were not subsequently reviewed, their non-zeroed dumping margins represented their most recent dumping experience that is directly relevant to the likelihood of dumping

[21] Japan Second Written Submission, para. 192.

[22] *See Anti-Friction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, Germany, Italy, Japan, Singapore, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews*, 61 Fed. Reg. 66,472, 66,472-74 (Dec. 17, 1996).

determination for this antidumping duty order. This margin of dumping vitiates any suggestion by Japan that the antidumping duty order should have been terminated. Inexplicably, Japan did not address the U.S. reliance upon these non-zeroed margins in any of its written submissions.

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

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

34. The DSB's recommendations and rulings in the original dispute applied to the *single measure* known as the "zeroing procedures," regardless of the comparison methodology used or the type of antidumping proceeding.[23] Effective February 22, 2007, the United States removed that single measure by discontinuing zeroing in weighted-average to weighted-average comparisons in original investigations. Japan, however, disregards the fact that the DSB's recommendations and rulings pertained to a single measure. Japan now asserts that each use of zeroing is a separate measure that the United States should have withdrawn.

35. The panel in the original proceeding was explicit that the zeroing procedures were a single measure that applied in all contexts and when using all comparison methodologies. The panel found that "what Japan terms 'zeroing procedures' is *a measure* which can be challenged as such."[24] The Appellate Body upheld the panel's conclusion, saying that the zeroing

[23] *US – Zeroing (Japan) (Panel)*, para. 7.58; *US – Zeroing (Japan) (AB)*, paras. 88 & 190(a).

[24] *US – Zeroing (Japan) (Panel)*, para. 7.58 (emphasis added).

procedures "simply reflect different manifestations of *a single rule or norm*."[25]

36. We also recall that Japan took the very same position in the original proceeding. It argued that the zeroing procedures were "a *single measure* that applies to [weighted-average to weighted-average comparisons, transaction-to-transaction comparisons and weighted-average to transaction comparisons], used in any type of anti-dumping proceeding."[26] Thus, according to Japan's own original view, the zeroing procedures were a single measure that applied in all contexts. The original panel and the Appellate Body agreed, but Japan would now like to forget that it ever made and won this argument.

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

V. CONCLUSION

38. In conclusion, we want to thank the Panel again for this opportunity to respond to Japan's arguments in its written submissions and we look forward to responding to any questions the

---

[25] *US – Zeroing (Japan) (AB)*, para. 88 (emphasis added).

[26] Japan's Opening Statement at the Third Meeting of the Panel, June 12, 2006, para. 4 (emphasis in original); *US – Zeroing (Japan)(Panel)*, para. 6.19.

Panel may have.