World Trade Organisation
Panel Proceedings

UNITED STATES – MEASURES RELATING TO ZEROING AND SUNSET REVIEWS
(DS322)

Recourse to Article 21.5 of the DSU by Japan

Replies to the Panel's Questions by the European Communities

Geneva
26 November 2008
TABLE OF CONTENTS

I. INTRODUCTION .......................................................................................................................................... 2

II. TO THE EC ................................................................................................................................................ 3

III. TO NORWAY .......................................................................................................................................... 11

IV. TO HONG KONG, CHINA .................................................................................................................... 13

V. TO MEXICO ............................................................................................................................................. 13
I. INTRODUCTION

1. The European Communities thanks the Panel and the WTO Secretariat for the work already done in this case. In order to assist the Panel in resolving the present dispute, the European Communities would like to reply to all the questions asked by the Panel.

2. In doing so, as a preliminary matter, the European Communities would like to provide further clarification on one issue that was discussed during the oral hearing. In particular, the European Communities notes that the final assessment conducted by the USDOC in the context of administrative reviews is not the last decision or action taken by the United States in relation to the entries concerned. Indeed, even the amount established by the USDOC’s determination as a result of the administrative review proceeding is not final and conclusive. Once the USDOC has carried out its determination, it publishes the results of the administrative review (or its rescission) in the Federal Register. Interested parties may challenge those determinations before the USITC within 15 days of the publication of the notice in the Federal Register. Such an appeal may also involve the suspension of the issuance of assessment instructions by the USDOC to the USCBP until there is a final ruling by the US courts on the matter.

3. Once there is a final ruling from the US courts (or after the deadline for appeals have elapsed), the USDOC sends assessment instructions to the USCBP, which sends liquidation instructions to the ports authorities to liquidate the relevant entries at the established rates. Then, the local port officials liquidate entries. However, importers may file a protest against those liquidations before the USCBP. Only when there is a decision from the USCBP (or the period to file such a protest has elapsed), the liquidation becomes final and conclusive. In other words, only at that time the final liability for the importer is established. ¹ For the

¹ According to Title 19 USC Section 1514(a): "[a]ny clerical error, mistake of fact, or other inadvertence, whether or not resulting from or contained in an electronic transmission, adverse to the importer, in any entry, liquidation, or reliquidation, and, decisions of the Customs Service, including the legality of all orders and findings entering into the same, as to (...) (2) the classification and rate and amount of duties chargeable (...) shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed" (emphasis added). (Available at http://frwebgate4.access.gpo.gov/cgi-
sake of clarity, the following graphic summarises the different stages mentioned above.

4. All of these represent moments where the relevant US authorities (and thus the United States as such) take decisions or actions. If those decisions or actions are based on zeroing after the end of the reasonable period, the European Communities considers that they are contrary to the DSB's recommendations and rulings in the original dispute.

II. TO THE EC

Q.1: The Panel notes the European Communities' statement (at para. 51 of its third party submission) that "if liquidations of entries are pending after the end of the reasonable period (or, in the case of a prospective system, the result of a refund investigation, following a request from an importer, is still pending), the Member concerned should bring the measure into conformity by recalculating the new rates in a WTO-consistent manner and applying them to those entries."

(a) Does the European Communities' statement refer only to the entries that had initially been subject to the anti-dumping measure that was found to be WTO-inconsistent in the original proceeding?

5. No. The European Communities' statement refers to both (i) unliquidated entries which had initially been subject to the anti-dumping measure (being an original investigation or an administrative review) that was found to be WTO inconsistent in the original dispute, and (ii) unliquidated entries relating to subsequent administrative or other reviews in connection with the original measures. In the European Communities' view, if duties based on zeroing have not yet been liquidated by the end of the reasonable period, no new action can be taken with

bin/TEXTgate.cgi?WAISdocID=328825128297+0+1+0&WAISaction=retrieve). See EC Third Party Submission, para. 43.
respect to entries subject to such measures that is inconsistent with the adopted DSB reports, regardless of the date when the entries concerned were made.

6. The European Communities observes that the terms "liquidation" or "unliquidated" do not appear in the Anti-Dumping Agreement, but are terms of US municipal law. The panel in US – Section 129 considered that "unliquidated" implies that "the definitive duty, if any, to be levied on the imports remains undetermined" (emphasis added). In this respect, the European Communities considers that the concept that the US term "unliquidated entries" refers to is for all essential purposes the same in both retrospective and prospective anti-dumping duty systems. In prospective systems, "liquidation" is still pending until the results of a refund investigation have become final and conclusive (or the period to file such a request has elapsed); in retrospective systems, "unliquidated" entries exist until liquidation is final and conclusive (i.e., all the legal remedies available for the importer have been exhausted or the period to initiate appeal/protest proceedings has elapsed). However, the question as to when the final anti-dumping liability is final and conclusive is not a matter that is directly relevant to the issue before the Panel. Rather, the Panel is called to examine the measures brought before the Panel by Japan in this case (i.e., decisions and actions imputable to the United States) and make the requested rulings as regards their conformity with the DSB's recommendations and rulings in the original dispute and the covered agreements.

(b) Please specify which provision(s) of the covered agreements require(s) refund investigations (in prospective systems) to be conducted in this way.

7. According to Articles 21.1, 3.2, 3.3 and 3.4 of the DSU, WTO Members must comply with the DSB's recommendations and rulings by the end of the reasonable period of time at the latest. "Prompt compliance" is "essential" to ensure "effective resolution of disputes" and the "effective functioning of the WTO", which "serves to preserve the rights and obligations of Members under the covered agreements".

8. Thus, if a request for refund of duties based on a calculation methodology found to be WTO inconsistent is still pending in prospective anti-dumping systems, immediate compliance with the DSB's recommendations and rulings condemning

---

such methodology would imply that such a Member would have to stop taking any actions (or omissions) contrary to the adopted DSB report. In other words, it would imply that the Member concerned, when issuing its decision as regards the request for refund and calculating the duties which are legally owed, must apply a WTO consistent methodology to the entries covered by the request. Then, such a Member can only take actions for collecting the correct amount of duties (e.g., if liquidation was suspended) or should refund the excess duties collected from the importer.

(c) Would the European Communities make the same statement in respect of a refund proceeding initiated after expiry of the reasonable period of time (but covering imports that had been subject to the measure found to be WTO-inconsistent in the original proceeding)?

9. Yes. In case that a request for refund was filed after the end of the reasonable period of time, the European Communities maintains that such a request, even if it refers to entries made before the end of such a period, would have to be handled in a WTO consistent manner. In other words, any decision or actions taken by the competent authorities would have to comply with the DSB's recommendations and rulings as well as with the covered agreements.

10. For example, as mentioned in the context of another ongoing dispute on similar issues (i.e., DS294 – Article 21.5 DSU), the European Communities has refunded duties on entries made before the end of the reasonable period of time applying the new WTO-consistent methodology as a result of the EC-DRAMS case, pursuant to requests for refund filed before and after the end of that period.

3 EC Third Party Submission, paras 33 – 35.
4 For instance, an importer may choose to provide a guarantee (rather than paying the anti-dumping duties) with a view to challenging the amount of duties required at the time of importation before its national courts. Should a final negative decision be obtained, the guarantee would be executed (covering the amount of duties plus any legal interests due).
(d) In light of this statement, please comment on the United States' argument that the European Communities "maintains a regulation that prescribes how the recommendations and rulings of the DSB in antidumping disputes shall be implemented into EC law", whereby "any measure taken to comply cannot serve as a basis for reimbursement of antidumping duties collected prior to the date of implementation" (see para. 44 of the United States' SWS).

11. First, no EC measure is at issue in this dispute and EC municipal law is irrelevant to the Panel's objective assessment.

12. Second, as stated during the oral hearing, the European Communities requests the Panel to disregard the statements made by the United States as regards the European Communities' alleged "practice" to support its view that Members operating under prospective anti-dumping systems are not required to implement their WTO obligations as to prior entries through a refund proceeding. In particular, the European Communities observes that the United States refers to what it alleges is the European Communities' "practice" but does not argue that such alleged "practice" amounts to a "subsequent practice" within the meaning of Article 31.3(b) of the Vienna Convention. Further, the United States does not refer to the "practice" of other WTO Members using prospective anti-dumping systems to support its conclusions on the equality of results between retrospective and prospective systems. Therefore, the European Communities considers that the US attempt to defend the conformity of its actions in this compliance proceeding on the basis of how other WTO Members "would" act is irrelevant.

13. Third, in any event, for the sake of clarification and in order to assist the Panel, the European Communities would like to add that the Regulation cited by the United States merely provides that such measures take effect from the date of their entry into force and do not serve as the basis for reimbursement of duties collected prior to that date, "unless otherwise provided" (with respect to this last phrase, see the following point). Thus, a timely implementing measure adopted before the end of the reasonable period of time will not itself be the basis for reimbursement of prior entries (unless otherwise provided for). This is entirely consistent with the EC's arguments in the present case: the European Communities is not arguing that a US measure adopted prior to the end of the reasonable period must form the basis for
reimbursing prior duties. Rather, the European Communities is arguing that at least any decisions or actions taken after the end of the reasonable period to comply must be WTO consistent, which is an entirely different point.

14. Fourth, in any event, the EC Regulation in question provides expressly for the possibility to obtain reimbursement of duties collected prior to the entry into force of the measure taken to comply.\(^6\) Thus, the United States is obviously wrong to assert that it *precludes* the possibility of the reimbursement of duties on entries prior to the end of the reasonable period of time.

15. Moreover, as mentioned during the hearing, the European Communities takes its WTO obligations very seriously. In this respect, the European Communities has provided an example to the Panel where anti-dumping duties on imports of bed linen can be fully refunded (regardless of the date of entry) because they were calculated based on zeroing.\(^7\)

16. The *Ikea* case is the result of EC municipal law where an "interpretation in conformity" rule is in place. This requires domestic courts to interpret domestic laws and regulations in conformity with the obligations contained in international agreements. If the refund request is made pursuant to provisions of municipal law subject to an "interpretation in conformity" rule, and if that rule extends to interpretations emanating from panels and/or the Appellate Body, then it should be expected that any refund must be calculated in accordance with the correct WTO consistent discipline. Whilst the *Ikea* case involved a specific factual scenario under EC Council Regulation 1515/2001, the interpretation in conformity principle is clearly stated at outset of this judgment, and this is just one in a long line of EC law cases confirming that principle.

17. In contrast, instead of applying the conformity interpretation rule (*i.e.*, *Charming Betsy* doctrine), the United States has decided to apply a municipal law rule by which the judiciary shows deference to the executive authority's interpretation of ambiguous statute (*i.e.*, *Chevron* doctrine). In this respect, the European

---

5 EC Third Party Oral Statement, para. 32.
6 US Rebuttal Submission, footnote 61 ("unless otherwise provided for").
Communities considers that it may be of assistance to the Panel in order to understand the present imbalance between the position under US law and the position under EC law to refer to an amicus curiae brief filed in the context of a case before the US Supreme Court where the United States rejects the application of the conformity interpretation rule in favour of the Chevron deference.8

18. The manner in which WTO Members choose to properly implement their obligations under the covered agreements as clarified in adopted DSB reports (i.e., monist/dualist systems, interpretation in conformity rule, etc.) does not have any bearing on the extent and precise content of those WTO obligations. In the case at hand, even if the United States follows the Chevron deference rule in accordance with its municipal law, this does not mean that the United States can escape from complying with the DSB's recommendations and rulings in the original dispute by ignoring the adopted DSB reports and continuing to take positive actions diametrically against them after the end of the reasonable period of time. On the contrary, this situation raises serious systemic concerns about the entire US approach to ensuring conformity of its municipal law with its WTO obligations.

Q.2: At the oral hearing, the European Communities asserted that the United States should implement the recommendations and rulings of the DSB in respect of the importer-specific assessment rates determined in the reviews at issue in the original proceeding by recalculating them without zeroing. The Panel notes in this regard that, at para. 55 of its report in DS 294, the Appellate Body found that "the [zeroing] methodology applied by the USDOC in the administrative reviews at issue resulted in amounts of assessed anti-dumping duties that exceeded the foreign producers' or exporters' margins of dumping with which the anti-dumping duties had to be compared under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994." The Appellate Body further found (at para. 130 of the same report) that "the margin of dumping established for an exporter or foreign producer operates as a ceiling for the total amount of anti-dumping duties that can be levied on the entries of the subject product (from that exporter) covered by the duty assessment proceeding".

(a) Might there be cases in which, because the amount of anti-dumping duties collected before the end of the RPT exceeded the foreign producers' or exporters' margins of dumping, the collection of any additional anti-dumping duties after the end of the RPT would be precluded by Article 9.3, even if the individual importer-specific assessment rates relating to entries still to be liquidated after the end of

---

8 Amicus Curiae Brief filed by the European Commission in the course of the proceedings before the US Supreme Court in Corus Staal B.V. and Corus Steel USA Inc. vs USDOC (Exhibit EC-1). The ruling of the US Supreme Court dated December 2005 can be found at http://www.usdoj.gov/osg/briefs/2005/0responses/2005-0364.resp.pdf.
the RPT did not result from zeroing (because, for those individual transactions, the export price was always less than normal value)?

19. The European Communities maintains that the United States should make its calculations so as to properly reflect the degree of dumping (i.e., without zeroing) that occurred (if any), having a full opportunity to do so (in subsequent reviews of the measures concerned or in the appeals filed by importers against them) and at least with effect from the end of the reasonable period of time. In the European Communities' view, this does not necessarily imply that the United States was entitled to collect duties based on zeroing before the end of such a period (the European Communities does not understand that matter to be an issue in this dispute and takes no position on that matter in this dispute). In light of its WTO obligations, as clarified by the adopted DSB reports, the United States should have calculated the amount of anti-dumping duties due without zeroing in the first place. In this respect, the reasonable period of time to comply with the DSB's recommendations and rulings in the original dispute cannot necessarily be regarded as a mechanism to shield all the actions taken by the Member concerned during such a period; rather, the Member concerned is given a period of time to take the necessary steps to "bring its measure" into conformity with its WTO obligations.

20. Article 9.3 of the Anti-Dumping Agreement (alone or in connection with Article 9.2) precludes the collection of duties which exceed the margin of dumping as established under Article 2. This obligation applies to entries made before or after the end of the reasonable period.

21. For instance, suppose that for a particular period of review, there were two importers (A and B) subject to the payment of anti-dumping duties. Suppose that the amount of duties based on zeroing for the exporter concerned was 100 (Importer A = 50 and Importer B = 50), whereas the dumping margin calculated without zeroing would have been 10 (Importer A = 0 and Importer B = 10). Following the example, it may be possible that Importer A has already paid 50 before the end of the reasonable period and that such collection of duties is final

---

9 EC Third Party Submission, para. 45; and EC Third Party Oral Statement, paras 10 and 30.
and conclusive (since Importer A decides not to contest the anti-dumping determination). In other words, once the dumping margin has been lowered to 10 (without zeroing) after the end of the reasonable period of time, it would result that the United States has already collected five times more from Importer A (which should have not paid anything).

22. In the European Communities' view, Article 9.3 of the *Anti-Dumping Agreement* precluded the collection of 50 from Importer A. However, as a result of the adopted DSB reports, the United States was given an additional period of time to bring its actions into conformity with its obligations. Thus, *at least* after the end of the reasonable period of time, the United States is precluded from collecting 50 from Importer B. Likewise, since the dumping margin for the exporter concerned without zeroing was 10, the United States can no longer collect any amount of anti-dumping duties from Importer B. In other words, the fact that the United States has already collected 50 where the WTO-consistent dumping margin (i.e., without zeroing) for the exporter concerned was 10 would imply that the collection of 10 from Importer B is precluded by Article 9.3 of the *Anti-Dumping Agreement*. Such a collection of duties *after* the end of the reasonable period of time would be WTO inconsistent insofar as the collection of 10 from Importer B would exceed the dumping margin established for the exporter concerned.
23. No. The fact that the United States collected 50 from Importer A before the end of the reasonable period of time and nothing from Importer B after the end of the reasonable period of time does not imply that one importer has paid another's anti-dumping duties. It implies that one importer exercised its legal rights to challenge the US determinations, thereby obtaining the assessment and liquidation of its duties due in accordance with the US obligations under Article 9.3 of the *Anti-Dumping Agreement* after the end of the reasonable period of time, whereas the other did not. The European Communities does not understand Japan to have raised in these proceedings any question with respect to the WTO consistency of the prior collection. The European Communities has confined itself to arguing that at least any subsequent collection *i.e.*, after the end of the reasonable period of time, must be WTO consistent. In any event, the European Communities would like to highlight again that this hypothetical situation would arise from the US own decisions and actions taken against the covered agreements. In the European Communities' view, this Panel should examine the actions taken by the United States after the end of the reasonable period of time in light of the US obligations under the DSB's recommendations and rulings and the covered agreements, regardless of the characterisation of those actions from the US municipal law perspective.

III. **TO NORWAY**

**Q.3:** Norway asserts at para. 21 of its third party submission that "*[t]he important point is not when a review (of one of the measures found to violate WTO rules in the original case) is initiated, but whether it was completed and/or continued to have effects after the end of the reasonable period of time."*

(a) What sort of "effects" might Reviews 4 and / or 5, which were completed before 24 December 2007, continue to have after the end of the RPT?

24. As a general point the European Communities considers that the key point is whether or not there are US actions or omissions after the end of the reasonable period that are WTO inconsistent. If so, the United States has clearly failed to

---

10 EC Third Party Submission, para. 45; EC Oral Statement, paras 10, 30 and 38.
comply *immediately* with effect from the end of such a period. The Panel does not need to consider a threshold question of whether or not prior administrative reviews continue to have "effects" – it is enough that there are subsequent WTO inconsistent actions or omissions.

25. That said, the European Communities considers that it is clear that such prior administrative reviews do continue to have effects. In this respect, the European Communities understands that the United States still seeks collection of duties based on zeroing with respect to Reviews 4 and 5. Thus, insofar as the United States still relies on the results of those reviews as the legal basis to claim the collection of duties based on zeroing, the measures remain effectively in place. In addition, as mentioned during the hearing, those reviews have effects since the dumping margins based on zeroing in those reviews will be used as the basis for the likelihood of recurrence of dumping determination in the context of sunset reviews or in any other type of reviews pursuant to Article 11.2 of the *Anti-Dumping Agreement* (i.e., change in circumstances).

26. The question of whether a measure is still in place at the time of the establishment of the panel is different from the question of whether or not a measure falls under the scope of a compliance panel.

27. The Panel's examination as to whether those reviews are "measures taken to comply" in this case should be distinguished from the question of what are the consequences of a Panel's finding that such a measure is WTO-inconsistent. Indeed, if a particular measure is no longer in place (e.g., the measure has been revoked and there are no unliquidated entries pending after the end of the reasonable period), the recommendation to bring it into conformity may reflect this fact. However, it is not up to a panel to exclude certain measures from its scope of review and from its findings merely because, from its perspective, such a measure no longer exists. Indeed, the European Communities notes that a panel should not enter into examining the consequences of its findings in the municipal law of...
WTO Members; rather, a panel is called upon to examine the facts and make a finding as to the legal claim raised by the party concerned.

IV. TO HONG KONG, CHINA

Q.4: The Panel notes Hong Kong, China's argument that the United States had the choice of whether or not to liquidate import entries covered by Reviews 1, 2 and 3 before the expiry of the RPT. The Panel also notes that Article 13 of the AD Agreement requires Members to "maintain judicial ... procedures for the purpose, inter alia, of the prompt review of administrative actions relating to final determinations". Since the United States is required to provide for judicial review of its administrative review determinations, to what extent may the United States be said to have chosen to delay liquidation of the relevant import entries? Should the United States have liquidated regardless of the judicial proceedings relating to USDOC's treatment of those entries?

28. Interested parties may challenge anti-dumping determinations following the procedures established in accordance with US municipal law. Thus, liquidations are not final and conclusive until all the steps available have been exhausted (either because decisions have been obtained from the competent administrative authorities or national courts, or because the deadlines for initiating the relevant appeal/protest proceedings have elapsed). In principle, the United States could not decide to collect duties and thus deny judicial review of its actions without infringing its own legal system (in addition to Article 13 of the Anti-Dumping Agreement).

29. However, this is effectively what the United States has done in the present case. Indeed, the US position in this case (based on the date of entry) implies that, no matter what legal actions the interested parties bring against the final assessments concluded before (and after) the end of the reasonable period, the outcome of those legal actions is irrelevant. In other words, since importers cannot do anything to get the United States to collect the correct amount of anti-dumping duties (if any), the United States takes the position that it has in effect already "liquidated" those entries, regardless of the results of the ongoing judicial proceedings.

V. TO MEXICO

11 EC Third Party Oral Statement, para. 25.
Q.5: At para. 15 of its oral statement, Mexico asserts that the reviews at issue in the original proceeding "continue to have significant legal effects after the RPT", including "the potential application of the erroneous importer-specific assessment rates" to unliquidated entries.

(a) The Panel notes Mexico's use of the word "potential"? Does the word "potential" qualify the word "application", in the sense that the importer-specific assessment rates might not be applied by the United States to unliquidated entries? Or is the word "potential" used to suggest that the relevant importer-specific assessment rates might not be "erroneous"? Please explain.

30. The European Communities understands Mexico's statement to refer to the likely collection of importer-specific assessment rates based on zeroing (should the United States continue collecting them in the future). Each time the United States collects those importer-specific assessment rates based on zeroing after the end of the reasonable period of time involves an action imputable to the United States contrary to the DSB's recommendations and rulings in the original dispute and the covered agreements.

31. If the importer-specific assessment rates have been calculated using zeroing (as found by the adopted DSB reports with respect to the original measures or by this compliance Panel with respect to the subsequent reviews), then those rates would be "erroneous" in the sense of "WTO-inconsistent".

(b) Are the importer-specific assessment rates determined in the original reviews necessarily WTO-inconsistent? Please explain.

32. Yes. The adopted DSB reports found that certain US determinations carried out in the context of the administrative reviews at issue were contrary to the covered agreements because of the use of zeroing. Nothing has changed since then. Therefore, the US actions for collecting those importer-specific assessment rates even after the end of the reasonable period are necessarily WTO-inconsistent.