World Trade Organisation
Article 22.6 Panel Proceedings

United States – Measures Relating to Zeroing and Sunset Reviews
(DS322)

Third Party Written Submission
by the European Union

Geneva
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I. INTRODUCTION

1. The European Union makes this third party written submission because of its systemic interest in the correct and consistent interpretation and application of the covered agreements and other relevant documents, including in this case the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), the Anti-Dumping Agreement and the GATT 1994.

2. As the Panel will be aware, the European Union and the United States are currently engaged in arbitration panel proceedings in DS294 US-Zeroing, in which Japan has also participated as a third party. Many of the claims and arguments of the Parties are the same in both panel proceedings, and have already been dealt with in detail in Japan's Written Submission. The European Union will not repeat those observations in detail in this submission, rather confining itself to a summary of the main points. We look forward to and greatly value the opportunity of participating in the hearing and further commenting on the respective positions of the Parties as they are further elucidated during the hearing and following questions from the Arbitration Panel. We stand ready to respond to any questions that the Arbitration Panel may have for the European Union.

II. BURDEN OF PROOF

3. The European Union agrees with Japan's submissions regarding the burden of proof.1 The burden of proof rests on the United States in these proceedings. That means that the United States had the burden of making a prima facie case in its Written Submission to the effect that the proposed level of suspension of concessions or other obligations is not equivalent to the level of nullification or impairment. A prima facie case requires that relevant facts are asserted, evidence adduced, claims made and arguments developed. Absent any one of these, the Arbitration Panel must find that the United States has failed to make a prima facie case and find in favour of Japan.

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1 Japan's Written Submission, paras 9 to 12.
4. The *prima facie* case that the United States had to make was that the proposed level of suspension of concessions or other obligations is not equivalent to the level of nullification or impairment. That means that the United States had to address itself to the specific proposal made by Japan. To the extent that the United States has failed to do that, and instead simply made its own proposal, the United States has simply failed to make any case at all. Making a proposal about an alternative measure is not the same as demonstrating that the proposal before the Arbitration Panel is WTO inconsistent. It is not the task of this Arbitration Panel to set out what type of proposal it might prefer; and it was not the task of the United States to make a proposal in that respect. Rather, the analysis must begin with and remain anchored to Japan's proposal.

5. Furthermore, the European Union does not agree with the United States' apparent conception of the way the burden of proof operates in practice. The United States appears to believe that it need only find one fault – that is, one thing with which the Arbitration Panel might not agree - however minor, in Japan's proposal, and that will entitle the United States and the Arbitration Panel to set aside the entirety of Japan's proposal, and re-construct a suspension of concessions or other obligations from nothing, based on their own preferences. That would empty the notion of burden of proof of any meaning – and is certainly not the way in which the burden of proof operates in original or compliance panel proceedings. Rather, the Arbitration Panel must consider each US claim as it relates to a particular aspect of Japan's proposal, and if the Arbitration Panel rejects that US claim, it must confirm that particular aspect of Japan's proposal. That is the only approach that will give proper meaning to the application of the notion of burden of proof in the context of these proceedings.

6. Finally, the European Union considers that the United States was obliged to make a *prima facie* case in its Written Submission. The Arbitration Panel is entitled to put questions to the United States in order to clarify the facts, evidence, claims and arguments that have actually been advanced. It is not entitled to put questions to the United States in order to elicit new facts, new evidence, new claims or new arguments – that would involve making the case for the United States, which is something that the Arbitration Panel is precluded from doing.
III. NULLIFICATION OR IMPAIRMENT WITH EFFECT FROM THE END OF THE REASONABLE PERIOD OF TIME

7. The European Union agrees with Japan that it is appropriate to measure nullification or impairment arising at least since the end of the reasonable period of time. The arguments in support of that view, and against the US view, are extensively and eloquently set out in Japan's Written Submission and the European Union considers it unnecessary to repeat them in detail. The European Union has advanced similar considerations in its own Article 22.6 Arbitration Panel in DS294 US-Zeroing. We would however add that this Arbitration Panel does not need to decide with respect to nullification or impairment arising prior to the end of the reasonable period of time since Japan, like the European Union in DS294, has made no proposal with respect to that matter, which is not therefore in dispute between the Parties.

8. In particular, the European Union has explained in the context of its own arbitration panel proceedings with the United States that Article 3.8 of the DSU states expressly that infringement of a WTO obligation is presumed to give rise to nullification or impairment. The facts and law being unchanged, the finding of infringement (and thus the presumed nullification or impairment) relates to the entire period from adoption of the measure to the date of the finding, and stretches into the future until such time as the measure is brought into compliance.

9. Any measure, and certainly the measures in this case, have a scope that is defined in material terms (the products to which they apply), geographical terms (for example, they apply to the European Union), personal terms (the firms to which they apply) and temporal terms (the period of time during which they apply). Any conception of the presumed nullification or impairment must take each of these scope elements fully into consideration. To put the matter in slightly different terms, a measure, no matter how otherwise draconian, that applies to no product, or no territory, or no firms, is harmless (leaving aside chilling effect issues). Similarly, a measure, no matter how otherwise draconian, that applies for no time

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2 Japan's Written Submission, paras 18 to 79.
3 The EU submissions in the Article 22.6 DSU arbitration panel proceedings in DS294 are fully available at http://trade.ec.europa.eu/wtodispute/show.cfm?id=168&code=1 eu-submissions.
is also perfectly harmless (leaving aside chilling effect issues). Thus, it is impossible to disconnect the impact of a measure from the temporal scope of its application – either in whole, or in part.

10. Thus, for example, if in considering the question of nullification or impairment, the adjudicator would simply ignore one of the products to which the measure applies, then the adjudicator would have made a legal error in the appreciation of nullification or impairment. Similarly, if the adjudicator would only consider exports from part of the complaining Member, then again the adjudicator would have made a legal error in the appreciation of nullification or impairment. Precisely the same would be true if the adjudicator would fail to take into account certain firms subject to the measure. And in exactly the same way if the adjudicator would fail to take into account the entire period during which the measure applied, then the adjudicator would have made a legal error in the appreciation of nullification or impairment.

11. Article 22 of the DSU requires that the proposed level of the suspension of concessions or other obligations should be equivalent to the level of nullification or impairment. Thus, having correctly conceived of nullification or impairment by reference to the four scope elements of the WTO inconsistent measure (material, geographical, personal and temporal) the adjudicator must similarly conceive of the suspension of concessions or other obligations in exactly the same terms. Failure to do so would amount to a legal error in the appreciation of the equivalence rule. For example, if a trade effects approach is adopted by the complaining Member, and the lost trade is measured as 100, an award of 80 (excluding certain products) would be inconsistent with the equivalence rule. Similarly, if, in measuring lost trade, exports from certain parts of the complaining Member would be excluded, then once again the equivalence rule would not have been respected. The same would be true if certain firms would be excluded. And precisely the same would be true if the temporal scope of the measure would be treated as less than what it actually is.

12. Thus, the ordinary meaning of the relevant provisions, considered in their context, compels the conclusion: according to Article 3.8 violation is presumed to give rise
13. This conclusion also comports with the object and purpose of the relevant provisions, which is to induce compliance. A conception of Article 22 according to which retaliation rights, if not used, waste away with the passage of time, even after an award, is not consistent with that objective. Rather, it is consistent with the objective of inducing compliance that, with the passage of time, the pressure on the defending Member to comply should at least hold is value, also in the sense that the first year of retaliation would express the accumulated nullification or impairment. A "use it or lose it" approach to retaliation rights would put pressure on the complaining Member to proceed rapidly to implementing retaliation. That is also not consistent with the rules that retaliation is the last resort and that the preferred solution is a resolution of the dispute without retaliation. If retaliation rights hold their value, then the complaining Member can engage in further reasoned attempts to persuade the defending Member to comply, without actually retaliating, in the knowledge that at the least the passage of time does not mean that the complaining Member is incurring a financial penalty.

14. Moreover, the US assertion that Japan does not suffer trade effects from measures (in this case AD Orders) which have been revoked misses the point. With this, the US attempts to relitigate an issue which was already decided in the context of compliance proceedings in this and other disputes, i.e., that any conduct of the implementing Member that was found WTO-inconsistent by the DSB must cease by the end of the RPT. In this respect, the fact that the US has revoked some AD Orders is irrelevant if the US continues collecting today anti-dumping duties based on zeroing with respect to entries subject to the WTO-inconsistent measures. Further, the European Union considers that if the United States considers that it

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4 Appellate Body Report, US-Zeroing (EC) (Article 21.5 – EC), para. 309: ("Thus, the implementing Member would be able to extend the reasonable period of time and delay compliance depending on when it chooses to undertake final duty assessment. Such a result would deprive of meaning the notion of "reasonable period of time" in which a Member shall comply, as provided for in Article 21.3 of the DSU, and be contrary to the implementation mechanism of the DSU").
has since complied, in whole in part, it is for the United States to bring an Article 21.5 DSU compliance panel. Indeed, if the United States considers that it can replace its zeroing procedures by another WTO-consistent methodology and, at the same time, maintain its measures, it is for the United States to do so first (something the United States has not yet done) and then, if so, initiate compliance proceedings.

IV. **NULLIFICATION OR IMPAIRMENT MAY BE MEASURED IN TERMS OF EXCESS DUTIES**

15. The European Union agrees with Japan that nullification or impairment may be measured in terms of excess duties with respect to pre-RPT entries. The arguments in support of that view, and against the US view, are extensively and eloquently set out in Japan's Written Submission and the European Union considers it unnecessary to repeat them. The European Union has advanced similar considerations in its own Article 22.6 Arbitration Panel in DS294 *US-Zeroing*. In essence, the selection of the nature of the proposed suspension of concessions or other obligations is a matter for Japan; Japan is entitled to propose a suspension of concessions or other obligations that consists in imposing additional amounts of duty on US imports; and in such a case the question for this Arbitration Panel is simply whether or not the amount that Japan proposes to collect is equivalent to the level of nullification or impairment, measured in terms of the excess duties collected by the United States with respect to pre-RPT entries.

V. **JAPAN'S COUNTERFACTUAL FOR THE "AS APPLIED" SUNSET REVIEW**

16. The European Union agrees with Japan that Japan's counterfactual for the "as applied" sunset review should form the basis for the calculation. The arguments in support of that view, and against the US view, are extensively and eloquently set out in Japan's Written Submission and the European Union considers it unnecessary to repeat them in detail. The European Union has advanced similar

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5 US Written Submission, para. 82.
6 Japan's Written Submission, paras 80 to 100.
7 Japan's Written Submission, paras 103 to 117.
considerations in its own Article 22.6 Arbitration Panel in DS294 US-Zeroing. In fact, the European Union has explained its view that not every countermeasure requires a counterfactual; and that even when a counterfactual is used, the matter is to be assessed by reference to the WTO inconsistent measure, as opposed to the reason for its inconsistency.

17. In particular, the European Union has explained in the context of its own arbitration panel proceedings with the United States that the starting point for the analysis is the fact that the DSB has found that, at the end of the reasonable period of time, through a number of measures (actions and omissions), the United States fails to comply with the recommendations and rulings of the DSB and continues to act inconsistently with its obligations under the covered agreements.

18. The Appellate Body has made it clear that disputes relate to "measures", as provided for in Article 3.3 of the DSU,\(^8\) and it is equally clear that when such measure infringes the obligations assumed under a covered agreement nullification or impairment is presumed.\(^9\) The relevant DSB recommendations and rulings relate to the measure, and the recommendation to the defending Member is that "it bring the measure into conformity".\(^10\) Furthermore, an Article 21.5 compliance panel addresses the question of whether or not the defending Member has complied with the recommendations and rulings of the DSB (which relate to the measure found WTO inconsistent), and this by specific reference to the existence or conformity of "measures taken to comply".\(^11\) Article 22.2 of the DSU provides expressly that suspension of concessions or obligations is triggered "if the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time". Article 22.8 of the DSU is equally clear: "the suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed", and the DSB

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\(^8\) Appellate Body Report, *US-Corrosion-Resistant Steel Sunset Review*, para. 81.
\(^9\) DSU, Article 3.8.
\(^10\) DSU, Article 19.1.
\(^11\) DSU, Article 21.5.
keeps the matter under surveillance until "the recommendations to bring [the] measure into conformity with the covered agreements" have been implemented.

19. Thus, it is abundantly clear from the express terms of the DSU that the entire process, including the Article 22.6 proceedings, is conducted by reference to the measure. As long as the inconsistent measure has not been brought into full conformity, the complaining Member is entitled to suspend concessions or other obligations by reference to that inconsistent measure. There is no basis in the text of the DSU for seeking to narrow the scope of the measure, at the stage of Article 22.6 proceedings, to one part of what has previously been identified as the measure.

20. In essence, what the United States is arguing is that this Arbitration Panel, instead of taking as its staring point the finding that a particular measure is WTO inconsistent, should rather take as its starting point the reason why that measure has been found WTO inconsistent, and attempt to assess the question of equivalence by reference to that reason, instead of the measure itself. Not only would such an approach contradict the express terms of the DSU, but on a moment's reflection it is immediately apparent that such an approach would be completely unworkable. There are essentially an infinite number of reasons why a particular measure might be WTO inconsistent. In most if not all cases it will be impossible to assess equivalence by reference to the reason as opposed to the measure, and indeed this is what generally informs the delimitation of the measure in the first place.

21. For example, a complaining Member might object to a measure imposing an anti-dumping duty on the grounds that the investigating authority has failed to assess or correctly assess one of the injury factors set out in Article 3.4 of the Anti-Dumping Agreement. The measure is the measure imposing the anti-dumping duty, not the injury analysis, or that part of the injury analysis that relates to the Article 3.4 factors, or that part of the analysis that relates to the incorrectly assessed factor.

12 Appellate Body Report, US/Canada – Continued Suspension, para. 305 ("[A] dispute could not be brought to its finality unless the implementing measure rectifies the inconsistencies found in the DSB's recommendations and rulings and is not in other ways inconsistent with the covered agreements" (emphasis added).
Similarly, if the measure is not brought into compliance, the equivalence of the requested suspension of concessions is assessed by reference to the measure imposing the anti-dumping duty, not the injury analysis, or that part of the injury analysis that relates to the Article 3.4 factors, or that part of the analysis that relates to the incorrectly assessed factor.

22. It is not for the complaining Member and still less an arbitration panel to imagine what the consequence of the correct assessment of the injury factor might be. On the contrary, it has been repeatedly emphasised in the case law that the question of how to bring the measure into conformity (ranging from correcting the injury factor and re-affirming the injury determination to withdrawing the measure) is a matter for the defending Member. Precisely the same would be true for any inconsistency in the dumping calculation. The relative ease or difficulty of anticipating and eventually quantifying the consequence of one possible and partial implementing action does not detract from the fact that the legal obligation to bring the measure into compliance rests with the defending Member and that until such time as that occurs (and eventually it is recognised by a multilateral finding in the context of Articles 21.5 or 22.8 DSU proceedings adopted by the DSB) the complaining Member will have the right to suspend concessions equivalent to the nullification or impairment relating to the measure as opposed to the reason for its WTO inconsistency.

VI. JAPAN'S COUNTERFACTUAL FOR THE PERIODIC REVIEW FINDINGS

23. The European Union agrees with Japan that Japan's counterfactual for the periodic review findings should form the basis for the calculation. The arguments in support of that view, and against the US view, are extensively and eloquently set

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13 Japan's Written Submission, paras 118 to 142.
24. In addition, the European Union agrees with Japan\(^ {14}\) and equally observes that the United States has previously withheld and continues to withhold from this Arbitration Panel the evidence in the sole possession of the United States that would permit, through the simple removal of one instruction from a computer program, the exact calculation of the rate of duty without zeroing. Thus, not only does the United States refuse to comply, but in addition, rather than discussing the issues on the merits, and notwithstanding the fact that it has the burden of proof, the United States continues to indulge in the litigation technique of seeking to deprive other WTO Members and WTO adjudicators of information potentially relevant to a (partial) consideration of compensation. In plain language, the United States refuses to produce the evidence. Consequently, in the EU's view, the Arbitration Panel can and must draw the only reasonable conclusion: the evidence withheld by the United States would confirm the truth of Japan's submissions.

VII. **THE UNITED STATES MUST CEASE APPLYING ZEROED DUTY RATES AFTER THE END OF THE RPT**

25. The European Union agrees with Japan that the United States must cease applying zeroed duty rates after the end of the reasonable period of time.\(^ {15}\) The arguments in support of that view, and against the US view, are extensively and eloquently set out in Japan's Written Submission and the European Union considers it unnecessary to repeat them in detail. The European Union has advanced similar considerations in its own Article 22.6 Arbitration Panel in DS294 *US-Zeroing*.

VIII. **INTEREST PAYMENTS**

\(^ {14}\) Japan's Written Submission, para. 134.

\(^ {15}\) Japan's Written Submission, paras 143 to 152.
26. The European Union agrees with Japan that the calculation should take into account interest, as also reflected in the domestic legislation of the United States.\textsuperscript{16} The arguments in support of that view, and against the US view, are extensively and eloquently set out in Japan's Written Submission and the European Union considers it unnecessary to repeat them in detail. The only reason that the European Union has not made a similar proposal in its own Article 22.6 Arbitration Panel in DS294 \textit{US-Zeroing} is because the United States has not provided the specific data that would have permitted the European Union to make the necessary calculation.

\textbf{IX. USE OF GTAP ELASTICITIES}

27. The European Union agrees with Japan that the GTAP elasticities provide an appropriate basis for the calculation,\textsuperscript{17} as well as with Japan's other responses to US criticisms of its methodology.\textsuperscript{18} The arguments in support of these views, and against the US views, are extensively and eloquently set out in Japan's Written Submission and the European Union considers it unnecessary to repeat them in detail.

\textsuperscript{16} Japan's Written Submission, paras 154 to 169.
\textsuperscript{17} Japan's Written Submission, paras 174 to 183.
\textsuperscript{18} Japan's Written Submission, paras 184 to 202.