IN THE WORLD TRADE ORGANISATION

USA – Measures relating to Zeroing and Sunset Reviews

Recourse to Article 21.5 of the DSU Japan

(WT/DS322)

Third Party Submission

by

Norway

Geneva

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US – OCTG Sunset Review (Article 21.5 – Argentina)	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods From Argentina – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS268/AB/RW, adopted 11 May 2007
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I. INTRODUCTION

1. Norway welcomes this opportunity to be heard and to present its views as a third party in this dispute brought by Japan to resolve a disagreement as to the existence or conformity with the covered agreements of measures taken by the United States to comply with the previously adopted recommendations and rulings of the WTO Dispute Settlement Body (DSB) in the original dispute.

2. The original dispute dealt with the issue of zeroing in anti-dumping investigations and administrative reviews. The Appellate Body found that in a number of instances the zeroing methodologies employed by the United States were inconsistent with the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.[1] The DSB adopted the report on 23 January 2007.

3. The United States has in its own opinion implemented the recommendations and rulings of the DSB in this case.[2] Japan disagrees for a number of reasons as set out in its Panel Request and First Written Submission.

4. Norway will not address all of the issues upon which there are disagreement between the parties to the dispute. Rather, Norway will confine itself to discuss the following issues:

   - The preliminary issue discussed in the First Written Submissions of Japan and the United States[3]: what measures are included in the scope of this proceeding - in other words – what measures are within the Panel's jurisdiction (chapter II); and

   - the extension of one sunset review challenged in the original dispute (chapter III).

II. JURISDICTION OF THE PANEL

A. Introduction

5. In light of previous experiences, Japan at the outset submits that "the various actions and omissions that it challenges in these proceedings fall within the scope of Article 21.5 of

1 Appellate Body Report, *US – Zeroing (Japan)*, para. 190.
2 United States, First Written Submission, paras. 16-20.
3 Japan, First Written Submission, paras. 57-65; and United States, First Written Submission, paras. 28 and 30-49.

the DSU".[4] More specifically, Japan sets out that three subsequent reviews that "supersedes" the periodic reviews covered by DSB's rulings and recommendations must be viewed as "measures taken to comply" under DSU Article 21.5. Japan argues that these subsequent reviews are "replacement measures that undermine the United States" compliance with the DSB's recommendations and rulings regarding the original periodic reviews".[5]

6. The United States, on the other hand, posits that the three subsequent reviews at issue are not "measures taken to comply" and therefore outside the scope of these proceedings.[6]

7. In addition, the United States requests a preliminary ruling that Japan fails to meet the specificity requirement of Article 6.2 of the DSU, by attempting "to include future, indeterminate measures within the scope of the proceeding".[7] This point will not be discussed by Norway.

B. The scope of Article 21.5

8. Article 21.5 of the Dispute Settlement Understanding (DSU) determines the scope of a Panel's jurisdiction in compliance proceedings. The relevant part of this provision reads that:

> Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through to these dispute settlement procedures, including wherever possible resort to the original panel.

9. Panels and the Appellate Body have ruled on the scope of Article 21.5 several times, and set out the correct legal interpretation to be given to the provision. However, as the Parties seem to disagree on how the provision should be understood, Norway finds it pertinent to repeat the legal reasoning set out in WTO case law.[8]

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4 Japan, First Written Submission, para. 58.
5 Japan, First Written Submission, para. 52.
6 United States, First Written Submission, para. 28.
7 United States, First Written Submission, para 29.
8 The United States makes an argument against the interpretation and application of Article 21.5 set out in previous cases, and their relevance to the present dispute, by stating that none of the reports establishes a "comprehensive standard to replace the agreed text of Article 21.5" (United States First Written Submission para. 35). This argument of the United States misses the point, which is that the legal

10. It follows from the wording of Article 21.5 that both positive acts taken to comply ("consistency") and omissions ("existence") are covered. The Appellate Body confirmed this in *US – Softwood Lumber IV (21.5)*:

> The word " existence" suggests that measures falling within the scope of Article 21.5 encompass not only positive acts, but also omissions. It also suggests that, as part of its assessment of whether a measure taken to comply exists, a panel may need to take account of facts and circumstances that impact or affect such existence".[9]

11. A complaining Member may thus challenge measures that have been adopted with a view to comply with the recommendations and rulings of the DSB, but also lack of such measures, or a combination of both in situations where the measures taken to comply, through omissions or otherwise, may achieve only partial compliance.[10].

12. Further, Panels and the Appellate Body has underlined that it is not up to the responding Member alone to determine what constitute a measure taken to comply. Rather, it is for the panel to make this determination.[11] The Appellate Body held however that "characterizing an act by a Member as a measure taken to comply when that Member maintains otherwise is not something that should be done lightly by a panel".[12]

13. To assist a panel in making such a determination, the Appellate Body in *US – Softwood Lumber IV (Article 21.5 – Canada)* identified some additional criteria, requiring the panel to scrutinize the relationship to the declared "measure taken to comply", and to the recommendations and rulings of the DSB, "which may, depending on the particular facts, call for an examination of the timing, nature and effects of the various measures".[13]

14. Three measures were at issue in *US – Softwood Lumber IV (21.5 – Canada)*: a) the original investigation that was the subject of the DSB's recommendations and rulings; b) a "Section 129 determination" replacing the original investigation; and c) an

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reasoning from these previous reports in no way can or do "replace" the text of the DSU, but are simply interpretations made in full conformity with the DSU as well as application of the standard embodied in Article 21.5 to facts that are similar to those before us in the present disupte.,

9 Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 67.
10 *See* also Appellate Body Report, *US – FSC II(21.5)*, para. 60.
11 Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 73 with references.
12 Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 75.
13 Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77.

"administrative review" (called "First Assessment Review"). Based on the criteria mentioned, the Appellate Body came to the conclusion that the First Assessment Review was within the scope of the terms of reference for the panel. Key considerations for the Appellate Body in coming to this conclusion were the fact that 1) the First Assessment Review concerned the same product that was the subject of the original investigations; 2) all three measures were countervailing duty proceedings conducted by the same US agency; 3) the methodology at issue was the same; and 4) it was the same disputed determination.[14] The Appellate Body also stressed the important nexus that existed between the administrative review and the "Section 129 determination" in that the cash deposit rate established in the Section 129 determination was subsequently "updated" or "superseded" by the cash deposit rate resulting from the administrative review.[15]

15. It is worth mentioning that the Appellate Body in *US – Subsidies on Upland Cotton (21.5 – Brazil)* with regard to its finding in *US – Softwood Lumber IV (Article 21.5 – Canada),* noted that the First Assessment Review fell within the scope of Article 21.5 because it was "inextricably linked" and "clearly connected" with the measure in the original dispute, and underlined in this regard that the administrative review determination "had the effect of undermining compliance with the DSB's recommendations and rulings. It further noted that *US – Softwood Lumber IV (Article 21.5 – Canada)* "concerned the identification of closely connected measures so as to avoid circumvention".[16]

16. The United States interprets the Appellate Body's observations in *US – Subsidies on Upland Cotton (21.5 – Brazil)* as counselling "against the unwarranted expansion of Article 21.5 proceedings to cover subsequent administrative reviews simply because of the similarities between such reviews and those subject to DSB's recommendations and rulings".[17] In Norway's view the United States misunderstands the Appellate Body in this regards. Rather, Norway submits that the Appellate Body through the mentioned observations consolidates its previous interpretation of the scope of Article 21.5.

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14 Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada),* para. 83.
15 Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada),* para. 84-85.
16 Appellate Body Report, *US – Subsidies on Upland Cotton (21.5 - Brazil),* para. 205.
17 United States, First Written Submission, para 47.

C. The scope of the Panel's jurisdiction in the case at hand

17. The three periodic reviews at issue (cfr. paragraph 5 above) were neither part of the original proceedings, nor declared by the United States to be measures taken to comply with the rulings and recommendations by the DSB.[18] It is therefore for the Panel to determine whether or not the reviews are "measures taken to comply" within the meaning of Article 21.5. As set out in Section B, this requires that the Panel makes a concrete analysis of the measures to see if they have a sufficiently close nexus to another measure taken to comply or the recommendations and rulings of the DSB.

18. Norway believes that the Panel, following the same analysis as the panel and the Appellate Body in *US – Softwood Lumber IV (21.5 – Canada)* should find that the three subsequent reviews at issue in the current proceedings are within its terms of reference as "measures taken to comply". This does not mean that all aspects of these reviews fall within the Panel's jurisdiction. The panel and the Appellate Body in *US – Softwood Lumber IV (21.5 – Canada)* limited their analysis to the aspects of later reviews that concerned the methodology contested before the original panel. Based on the same approach, where "zeroing" is the contested methodology, any subsequent measure that continues or discontinues zeroing in respect of the same product (and where the subsequent measure "updates" or "supersedes" (or "replaces") previous calculations of dumping for the products subject to the same anti-dumping order) will be a "measure taken to comply".

19. Norway stresses that the fact that each administrative review in the US system relates to a distinct period has no bearing on the analysis. Each administrative review must be considered a continuum within one single anti-dumping order, as it sets final duty obligations based on the previous period and sets new cash deposit rates for the next period. Were it not so, then the United States could avoid its WTO obligations simply by enacting a new measure every year repeating the same violation.

20. The United States argues that two of the subsequent reviews identified by Japan cannot be considered measures taken to comply because they pre-date the adoption of the DSB's recommendations and rulings in the original dispute.[19] In light of previous

[18] Japan, First Written Submission, para. 62.
[19] United Stated, First Written Submission, para. 33.

findings of the Appellate Body it must be clear that the United States cannot be heard with this argument.

21. In *US – Softwood Lumber IV (Article 21.5 - Canada)* the Appellate Body assessed a measure that was initiated before the adoption of the report. Still the measure was considered to be part of the scope of the proceeding. The Appellate Body stated in that case that "[w]e recognize that the First Assessment Review was not initiated in order to comply with the recommendations and rulings of the DSB, and that it operated under its own timelines and procedures (…)". That fact was, nevertheless, not sufficient to overcome the multiple and specific links that existed between the measure in the original dispute, the measure declared to have been taken to comply and the contested measure. In Norway's view, similar considerations apply in the case at hand. The 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.

22. The United States also posits that "measures taken by a Member prior to the adoption of a dispute settlement report typically are not taken for the purpose of achieving compliance and cannot be within the scope of an Article 21.5 proceeding".[20] In this regard, Norway would like to emphasize that the Appellate Body has held that "[t]he fact that Article 21.5 mandates a panel to assess "existence" and "consistency" tends to weigh against an interpretation of Article 21.5 that would confine the scope of a panel's jurisdiction to measures that *move in the direction of,* or *have the objective of achieving*, compliance."[21] Measures cannot be excluded from the scope of compliance proceedings due to the purpose for which they have been taken.[22]

23. There can be no doubt that the three subsequent periodic reviews at issue has the effect of undermining the compliance by the United States with the recommendations and rulings by the DSB. Like in *US – Softwood Lumber IV (21.5 – Canada)* the Panel in these proceedings should identify the closeness of the relevant measures so as to avoid circumvention. If these reviews were not to fall within the scope of the proceeding, it would turn the United States' system of duty assessment into a moving target that escapes from anti-duty disciplines. A new panel would need to be started for each

[20] United Stated First Written Submission, para. 33.
[21] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 67.

administrative review, and when another administrative review superseded the first, another panel would have to be started.

24. The Appellate Body has stated that "the aim of Article 21.5 of the DSU is to promote the prompt compliance with DSB recommendations and rulings and the consistency of "measures taken to comply" with the covered agreements by making it unnecessary for a complainant to begin new proceedings and by making efficient use of the original panellists and their relevant experience".[23] Requiring Japan to initiate new panel proceedings in order to challenge dumping determinations in measures that confirm and supersede the original measures would run counter to the said objective.

25. In light of the above, it is Norway's opinion that all actions and omissions challenged by Japan in this dispute fall within the scope of the Panel's jurisdiction as provided for in Article 21.5 of the DSU, including the three specific subsequent periodic reviews that have superseded the original measures.

III. SUNSET REVIEWS

26. In its First Written Submission paragraph 29, Japan notes that the United States extended one of the two sunset reviews covered by the DSB's recommendations and rulings in the original dispute through a subsequent sunset review. Japan challenges the United States' omission to implement the DSB's recommendations and rulings with regard to this sunset review. Amongst others, Japan claims that this omission results in a continued violation of Article 11.3 of the *Anti-Dumping Agreement*.[24]

27. Article 11.3 provides that a sunset review may serve as a basis for maintaining an anti-dumping duty for more than five years. The continuation of the duty requires, however, that the sunset review determination conforms fully with the rules of the *Anti-Dumping Agreement*.

28. The Appellate Body has held that all dumping margins in sunset reviews conducted in accordance with Article 11.3, must conform to the disciplines of Article 2.4. If the margins are calculated using a methodology that is inconsistent with Article 2.4, then

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22 Panel Report, *US – Gambling (21.5)*, para. 6.24.

23 Appellate Body Report, *US – OCTG Sunset Review (Article 21.5 – Argentina)*, para. 151, referring to Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 - Canada)*, para 72.

this could give rise to an inconsistency not only with Article 2.4, but also with Article 11.3.[25] The Appellate Body has confirmed that this also applies where the investigating authority relies on margins calculated (with the use of zeroing) during periodic reviews.[26]

29. In the original case, the Appellate Body stated:

> 184. In the present case, the Panel found, as a matter of fact, that, in its likelihood-of-dumping determination, the USDOC relied "on margins of dumping established in prior proceedings".[27] The Panel further found that these margins were calculated during periodic reviews "on the basis of simple zeroing".[28]
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> 185. We have previously concluded[29] that zeroing, as it relates to periodic reviews, is inconsistent, as such, with Article 2.4 and Article 9.3. As the likelihood-of-dumping determinations in the sunset reviews at issue in this appeal relied on margins of dumping calculated inconsistently with the *Anti-Dumping Agreement*, they are inconsistent with Article 11.3 of that Agreement.[30]

30. Consequently, the sunset review of 1999 was found to be inconsistent with Article 11.3 of the *Anti-dumping Agreement* in the original dispute.

31. Clearly, an inconsistent Sunset Review cannot serve as a basis for the continuation of an anti-dumping measure. It appears from the facts that the United States did not redo the likelihood-of-dumping determination of the 1999 Sunset Review.[31]

32. The United States appears to argue that it was not required to redo the determination because "... it was unnecessary to modify the final results of the challenged sunset review.".[32] The rationale seems to be that the margins that formed the basis for the likelihood determination fell into three categories: (i) those calculated, impermissibly, with zeroing; (ii) those calculated without zeroing; and (iii) those calculated with zeroing but predating the entry into force of the Uruguay Round agreements.[33]. Furthermore, that – according to the United States – they believe they would have come

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24 Japan, First Written Submission, paras 155 – 158.
25 See e.g. Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, paras. 127 and 130.
26 Appellate Body Report, *US – Zeroing (Japan)*.
27 Appellate Body Report, *US – Zeroing (Japan)*, original footnote 408: "Panel Report, para. 7.255."
28 Appellate Body Report, *US – Zeroing (Japan)*, original footnote 409: "*Ibid.*, para. 7.256."
29 Appellate Body Report, *US – Zeroing (Japan)*, original footnote 410: "See, *supra*, paras. 166 and 169."
30 Appellate Body Report, *US – Zeroing (Japan)*, paras. 188 – 189, with original footnotes.
31 United States, First Written Submission, para. 75.
32 United States, First Written Submission, para. 75. Emphasis added.
33 United States, First Written Submission, para. 75

to the same likelihood determination in any case and therefore had no need to redo the original determinations.

33. This approach by the United States is misguided. Where some (if not all) margins relied upon have been found to be calculated in violation of the *Anti-Dumping Agreement*, a mere statement in its First Written Subsmission that the United States would have come to the same result in any case is not sufficient to show compliance. The United States would have to show that it, *with correctly calculated dumping margins*, would have reached the same likelihood determination. And, furthermore, only the correctly calculated margins could then be used to set the anti-dumping duty rates for the future.

34. The United States argues against any need for them to redo the original, WTO-inconsistent, calculations by arguing that the Appellate Body in *US – Corrosion Resistant Steel Sunset Review (at para. 123)*, did not require that fresh margins be calculated.[34] This statement by the United States misrepresents the conclusions of the Appellate Body in that report. The Appellate Body went on to state that, to the extent that a Member relies on dumping margins for a sunset review determination, then such margins must always conform to the disciplines of Article 2.4[35].

35. This means that all margins that are relied upon for a sunset review determination must be calculated without zeroing. Relying on previous margins – irrespective of when those margins were calculated, be it from the original investigation, periodic reviews, new shipper reviews, changed circumstances reviews or sunset reviews[36] – is impermissible when those margins were calculated with zeroing.

36. Rather than do nothing, the United States would have been expected to do a Section 129 review of the Sunset Review of 1999, redo all margin calculations that were calculated with any form of zeroing (if the were to rely on dumping margins for their likelihood determination), and present fresh information that could credibly support a likelihood determination.

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34 United States, First Written Submission, para. 76.

35 Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 127

36 Norway sees no reason to distinguish here between margins that predate and postdate the entry into force of the Uruguay Round agreements. All likelihood determinations that are performed *after* the entry into force of the Uruguay Round agreements must conform with Article 11.3 of the *Anti-Dumping Agreement.* Any margin from before 1995 that was calculated with zeroing cannot be the basis for a likelihood determination today.

37. Such a determination could then be subject to scrutiny for consistency with the findings and recommendations of the DSB and the *Anti-Dumping Agreement.* The United States, however, chose to do nothing to bring itself into conformity with the findings and recommendations of the DSB. This omission implies that the United States remains in violation of its obligations under Article 11.3 of the *Anti-Dumping Agreement.*

IV. CONCLUSION

38. Norway respectfully requests the Panel to examine carefully the facts presented by the Parties to this case in light of our arguments, in order to ensure a proper and consistent interpretation of the DSU and the *Anti-Dumping Agreement*.