IN THE WORLD TRADE ORGANISATION

Before the Appellate Body

(DS322 / AB-2009-2)

United States – Measures Relating to Zeroing and Sunset Reviews. Recourse to Article 21.5 of the DSU by Japan.

Third Participant Submission

by

Norway

Geneva
15 June 2009

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Table of cases cited in this submission

Short Title	Full Case Title and Citation
Brazil – Desiccated Coconut	Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted 20 March 1997
EC – Bananas III (US)	Panel Report, *European Communities — Regime for the Importation, Sale and Distribution of Bananas III)*, WT/DS27/R, adopted 25 September 1997 as modified by the Appellate Body Report, WT/DS27/AB/R
United States – Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998
Australia – Salmon (21.5)	Panel Report, *Australia – Measures Affecting Importation of Salmon. Recourse to DSU Article 21.5 by Canada*, WT/DS18/RW, adopted 20 March 2000
Chile – Price Band System	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002
US – Upland Cotton	Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, adopted 21 March 2005 as modified by the Appellate Body Report WT/DS267/AB/R
EC – Chicken Cuts	Appellate Body Report, *European Communities – Customs Clarification of Boneless Frozen Chicken Cuts*, WT/DS269/AB/R, adopted 27 September 2005
EC – Selected Customs Matters	Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006
Brazil – Tyres	Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres* WT/DS332/AB/R, adopted 17 December 2007
United States – Zeroing I (21.5 – EC)	Appellate Body Report, *United States — Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing). Recourse to DSU Article 21.5 by the European Communities*, WT/DS294/RW, adopted 11 June 2009
Panel Report	*United States – Measures Relating to Zeroing and Sunset Reviews. Recourse to DSU Article 21.5 by Japan*, WT/DS322/RW

I INTRODUCTION AND EXECUTIVE SUMMARY

1. Norway appreciates the opportunity to submit its views before the Appellate Body in this dispute.

2. As a third participant, Norway does not address all of the grounds for appeal presented by the United States. Rather, Norway has chosen to focus on the following issues:

   (i) Whether the Panel erred in finding that Review 9 fell within the Panel's terms of reference (chapter II);

   (ii) Whether the Panel erred in finding that the United States failed to comply with the DSB's recommendations and rulings with respect to importer-specific assessment rates determined in Reviews 1, 2, 3, 7 and 8 (Chapter III).

3. With regard to the first point, Norway is of the view that the Panel correctly found that Review 9 fell within its terms of reference. The Appellate Body has found that although the "general rule" is that measures falling within a panel's terms of reference must be in existence at the time of the panel's establishment, subsequent measures may in "certain limited circumstances" fall within the terms of reference. In light of previous Appellate Body practice, Norway submits that the circumstances in this case warrant a departure from the general rule. Furthermore, it is Norway's opinion that Japan's panel request properly identified Review 9 and the inclusion of Review 9 did not harm the due process right of the United States or the third parties.

4. Regarding the second issue, Norway focuses on the question of whether domestic judicial review procedures can excuse non-compliance after the end of the RPT. Norway agrees with the Panel that such domestic procedures do not represent an exception from WTO compliance obligations. The Appellate Body has stated that the United States must take responsibility for the acts of its own government, including the judiciary. It is the United States' own courts that have initiated the judicial reviews under United States law. Although the reviews have consequences for the enforcement of Review 1, 2, 3, 7 and 8, the United States cannot deny responsibility for these judicial reviews and is therefore not exempted from its WTO compliance obligations because of these acts.

II THE PANEL CORRECTLY FOUND THAT REVIEW 9 FELL WITHIN ITS TERMS OF REFERENCE

1 Introduction

5. The United States appeals the Panel's inclusion of Review 9 within its terms of reference, arguing that Japan failed to properly identify the measure in accordance with DSU Article 6.2 and that Review 9 fell outside the Panel's jurisdiction, as it was not yet in existence at the time of the panel request.[1]

6. For reasons explained below, Norway agrees with the Panel's finding that Review 9 fell within its terms of reference.

2 "Future measures" may be included in a panel's terms of reference

7. DSU Article 6.2 provides in relevant part that a panel request shall "identify the specific measures at issue". The Appellate Body has found that there are "two essential purposes of the terms of reference"[2]:

> "First, terms of reference fulfil an important due process objective – they give the parties and third parties sufficient information concerning the claims at issue in the dispute in order to allow them an opportunity to respond to the complainant's case. Second, they establish the jurisdiction of the panel by defining the precise claims at issue in the dispute".[3]

8. On the basis of this, the Appellate Body in *EC – Chicken Cuts* held that

> "as *a general rule*, the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel. However, measures enacted subsequent to the establishment of the panel, may, in *certain limited circumstances*, fall within a panel's terms of reference".[4]

9. In *EC – Selected Customs Matters*, the Appellate Body expressed that "this general rule (…) is qualified by at least two exceptions".[5] The United States submits that the

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1 United States Appellate Submission, para. 43.
2 Appellate Body Report, *EC – Chicken Cuts*, para 155.
3 Appellate Body Report, *Brazil – Desiccated Coconut*, page 22.
4 Appellate Body Report, *EC – Chicken Cuts*, para. 156 (emphasize added).
5 Appellate Body Report, *EC – Selected Customs Matters*, para. 184. The Appellate Body made reference *firstly* to its findings in *Chile – Price Band System* (para. 139), where the Appellate Body held that a panel has the authority to examine a legal instrument enacted after the establishment of the panel that amends a measure identified in the panel request, provided that the amendment does not

situation in this dispute does not fall within these two exceptions.[6] However, the use of the phrase "at least" suggests that the list of exceptions identified by the Appellate Body is not exhaustive. There may thus be other circumstances warranting departure from the "general rule" than the two mentioned.

10. Indeed, the Panel found that the circumstances in this case are of such a nature that a departure from the general rule is warranted, primarily due to the fact that the contested measure was part of a continuum of yearly measures where one measure superseded the other, and that the review had already been requested at the time of the panel request.[7]

11. In its assessment the Panel relied amongst others on the reasoning by the panel in *Australia – Salmon (21.5)*.[8] In that dispute, the panel found that an import ban introduced during the panel proceedings was within its terms of reference. After having found that the import ban was a "measure taken to comply", the Panel pointed to the special characteristics of compliance proceedings when it noted that

> "compliance is often an ongoing or continuous process and once it has been identified as such in the panel request, (…) any "measure taken to comply" can be presumed to fall within the panel's mandate, unless a genuine lack of notice can be pointed to".[9]

12. As the Panel observed in footnote 142 of its report, "in *US – Softwood Lumber IV(21.5 – Canada)* at para. 74, the Appellate Body stated that it was appropriate for the panel in *Australia – Salmon (21.5)* to have included within its jurisdiction an import ban on salmon adopted by the state of Tasmania".

13. The circumstances in *Australia – Salmon (21.5)* are in important ways similar to the circumstances in this dispute, and as such justify the Panel's inclusion of Review 9 within its terms of reference.

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change the essence of the identified measure. *Secondly*, The Appellate Body made reference to its report in *US – Upland Cotton* (para. 263), where the Appellate Body held that panels are allowed to examine a measure "whose legislative basis has expired, but whose effects are alleged to be impairing the benefits accruing to the requesting Member under a covered agreement" at the time of the establishment of the panel.

6 United States Appellate Submission, para. 51.
7 Panel Report, 7.116.
8 Panel Report, footnote 142.
9 Panel Report, *Australia – Salmon (21.5)*, para. 7.10.

3. Japan's panel request properly identified Review 9

14. The United States argues that Japan's panel request did not properly identify Review 9. The panel request referred to three types of measures: 1) five administrative reviews at issue in the original dispute; 2) "three closely connected period periodic reviews that the United States argues "superseded" the original reviews"; and 3) "any other subsequent closely connected measures". Review 9 falls within the third category.

15. Norway will address two issues in this section: 1) may a category of measures satisfy the specificity requirement in DSU Article 6.2; and 2) if so, is the phrase "subsequent closely connected measures" sufficiently specific so as to define the claim at issue?

16. With regard to the first issue, it is clear from previous WTO jurisprudence that panels and the Appellate Body have accepted that a category of measures may be sufficiently specific to fulfil the specificity requirement in Article 6.2. *Inter alia*, the panel in *Australia – Salmon (21.5)* found that Canada's reference to "measures taken to comply" that Australia "has taken or does take" was specific enough to satisfy Article 6.2.[10] Furthermore, in *EC – Bananas III (US)* the panel and the Appellate Body accepted a reference to a category of subsequent measures as being sufficiently specific to satisfy Article 6.2.[11]

17. When it comes to whether or not the phrase "subsequent closely connected measures" with sufficient specificity defined the claim at issue, Norway would like to quote the Panel, which stated that the description"[...] covers subsequent periodic reviews, occurring under the same identified anti-dumping duty order, which "supersede" the reviews named in the panel request[...]".[12]

18. The United States is trying to counter this argument by claiming that the phrase "subsequent closely connected measures" is "broad enough and vague enough to encompass a variety of measures, such as subsequent administrative determinations, ministerial corrections, or remand determinations in court proceedings".[13] However, and as the Panel duly noted, the United States itself early in the proceedings clearly

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10 Panel Report, *Australia – Salmon (21.5)*, para. 7.10
11 Panel Report, *EC – Bananas III (US)*, para 7.27 and Appellate Body Report, *EC – Bananas III (US)*, para. 140.
12 Panel Report, para 7.103.
13 United States Appellant's Submission, para 45.

anticipated what the phrase was intended to cover.[14] Indeed, in its First Written Submission, the United States submits that "Japan is trying to include in the panel's terms of reference any future administrative reviews related to the eight identified in its panel request".[15]

19. The United States also refers to *United States – Upland Cotton*, where the panel turned down Brazil's claim to include a measure that "did not exist, had never existed and might not subsequently have come into existence" at the time of the panel request, characterizing the claim as "entirely speculative".[16] It is asserted by the United States that the Panel overlooked the fact that the final results of Review were "entirely unknown at the time of the panel request" and that Japan's claim therefore was not "entirely predictable".[17]

20. In light of the particularities of the United States anti-dumping system and the circumstances of this case, the United States cannot be heard with these arguments.

21. First of all, and as highlighted by the Panel, "under the United States' retrospective anti-dumping duty assessment, if requested, administrative reviews for a particular anti-dumping duty order occur at a specific date each year".[18] Review 9 took part in what the Panel characterizes as "a chain of measures or a continuum (…) in which each new review superseded the previous one".[19] All of the Reviews had the same purpose, namely to assess anti-dumping duties under the same anti-dumping order. The United States should therefore "reasonably have expected" that future administrative reviews might fall within the Panel's jurisdiction.[20]

22. Furthermore, the facts of this case show that not only had Review 9 been requested before Japan's panel request, but it was also initiated well in advance of the panel request.[21] As such, the inclusion of Review 9 as "a subsequent closely connected measure" should not in any way come as a surprise to the United States.

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14 Panel Report, para. 7.105.
15 United States First Written Submission, para. 50.
16 United States Appellant's Submission, para 47-48.
17 United States Appellant's Submission, para. 50.
18 Panel Report, para. 7.105.
19 Panel Report, para. 7.116.
20 Panel Report, para. 7.105.
21 Panel Report, para. 7.111.

23. Based on the above, Norway agrees with the Panel's assessment that the measure at issue (Review 9) was properly identified in Japan's panel request.

4. Due Process Objectives

24. The United States claims amongst others that it would harm the parties' due process rights, if measures adopted during the panel proceedings were allowed to be included in a panel's terms of reference under DSU Article 6.2.[22]

25. In paragraph 7 above, Norway referred to a statement by the Appellate Body pointing to due process as one of the two essential purposes of the terms of reference of a panel. The relevant question in this regard is if the phrase "any other subsequent closely connected measures" in the panel request gave "parties and third parties sufficient information concerning the claims at issue in the dispute in order to allow them an opportunity to respond to the complainant's case".[23] Norway will briefly look into this both from the perspective of the United States and from the perspective of the third parties.

26. As shown in paragraph 18, the United States was already at the time of the panel request aware that the third category of Japan's panel request was intended to include "any future administrative reviews related to the eight identified in its panel request". Review 9 – "future administrative review" – was initiated at the time of the panel request, and thus the United States had sufficient notice with regard to the measure and was not deprived of the opportunity to review the measure or respond to the corresponding claims. As an additional point, Norway submits that Review 9 did not represent any significant new elements compared to Reviews 4, 5 and 6 either in relation to evidence or arguments (except with regard to the question of terms of reference).

27. Also the thirds parties were given sufficient notice of the measure. The third parties received both the United States First Written Submission (where the United States itself mentioned the issue of Japan trying to include "future administrative reviews") and the parties' supplemental submissions on Review 9 before the third party hearing,

[22] United States Appellant's Submission, para. 57.
[23] Appellate Body Report, *Brazil – Desiccated Coconut*, page 22.

and thus had ample opportunity to respond to Japan's claim. This is evidenced by the fact that at least two of the third parties substantively addressed the issue.[24] Norway recognized the issue in its third party submission, but did not comment on it.[25]

28. In Norway's opinion, both the United States and the third parties to this dispute were sufficiently informed so as to allow them ample opportunity to respond to the claims with regard to Review 9.

III THE PANEL CORRECTLY FOUND THAT THE UNITED STATES FAILED TO COMPLY WITH THE DSB'S RECOMMENDATIONS AND RULINGS WITH RESPECT TO IMPORTER-SPECIFIC ASSESSMENT RATES IN REVIEWS 1, 2, 3, 7 AND 8

1 Introduction

29. The United States claims in its appeal that the Panel erred in finding that the United States failed to comply with the DSB's recommendations and rulings with respect to importer-specific assessment rates determined in Reviews 1, 2, 3, 7 and 8 applied to entries that were, or will be, liquidated after the expiry of the RPT.[26]

30. To support this claim, the United States submits 1) that the date of entry of the merchandise, rather than the date of liquidation of the anti-dumping duties, is determinative for evaluating compliance with the DSB's recommendations and rulings in the original dispute; and 2) that it is excused from fulfilling its compliance obligations because of actions from United States courts.

31. For reasons explained in the following, Norway disagrees with the arguments of United States, and is of the view that the Panel correctly found that the United States has failed to fulfil its obligations to comply with regard to Reviews 1, 2, 3, 7 and 8.

32. Norway does not see any need for addressing the first line of argument of the United States. The Appellate Body has already found that the use of zeroing during administrative reviews after the expiration of the RPT is WTO-inconsistent, even if the date of entry of the merchandise was before the end of the RPT.[27] The United

[24] Panel Report, paras. 7,98 and 7.99.
[25] Norwegian Third Party Submission, para. 7.
[26] United States Appellant's Submission, para. 59.
[27] Appellate Body Report, *United States – Zeroing I (21.5)*, para. 308-309.

States can therefore not be heard by its claim that the date of entry, rather than the date of liquidation of the anti-dumping duties, is determinative for evaluating compliance.

33. In light of this, Norway will focus its discussion on the question of whether the Panel was correct in finding that domestic judicial review procedures cannot excuse non-compliance after the end of the RPT.

2 The panel was correct in finding that domestic judicial review procedures cannot excuse non-compliance after the end of the RPT

34. The United States submits that

> "the Appellate Body should find that liquidation which occurred (or will occur) after the RPT in relation to Reviews 1, 2, 3, 7 and 8 does not demonstrate that the United States failed to comply with the recommendations and rulings of the DSB because these liquidations would have occurred prior to the RPT but for the delay caused by domestic judicial review."[28]

35. The Panel found that DSU Articles 3.7, 19.1 and 21.3, as the relevant articles when assessing compliance, "require universal compliance by the end of the RPT, no matter factual circumstances of any given case".[29] The United States submits that the Panel misunderstood the relevance of judicial review to determining U.S. compliance with the DSB's recommendations and rulings.

36. Norway notes that the United States seems to argue that domestic court proceedings represent an exception from the compliance obligations in the DSU. In Norway's opinion, this is not the case, and the United States cannot be heard with this argument.

37. The Appellate Body has not expressed its opinion on the particular "question of whether actions to liquidate duties that are based on administrative review determinations issued before the end of the reasonable period of time, and that has been delayed as a result of judicial proceedings, fall within the scope of the implementation obligations".[30]

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28 United States Appellant's Submission, para. 100.
29 Panel Report, para. 153.
30 Appellate Body Report, *United States – Zeroing I (21.5)*, para. 314.

38. However, the panel and the Appellate Body in *Brazil – Tyres* expressed their views on the significance of Brazilian court injunctions that hindered Brazil in fulfilling the requirements of GATT Article XX. These court injunctions were not seen as representing a justification for not complying with Brazil's rights and obligations under WTO law.[31]

39. The panel and Appellate Body in *Brazil – Tyres* considered correctly that the court proceedings were facts that could not be disregarded and that did not change in any way the WTO obligations of Brazil.[32] The Panel in this dispute did the same with regard to the United States compliance obligations.

40. The United States asserts that it cannot be held responsible for domestic judicial proceedings that are initiated by private parties. Norway disagrees with this assertion. The Appellate Body in *United States – Shrimp* expressed the view that the United States "bears responsibility for acts of all its departments of government, including its judiciary."[33] Thus, the United States bears responsibility for the domestic judicial proceedings and the delays these involved with regard to the collection of duties.

41. It is the United States' own courts that have initiated the judicial reviews under United States law, something which has consequences for the enforcement of Review 1, 2, 3, 7 and 8. As the Panel rightly found, the United States cannot deny responsibility for these judicial reviews and is therefore not exempted from its WTO compliance obligations because of these acts.

42. Lastly, Norway would briefly like to address the point raised by the United States with regard to footnote 20 of the *Anti-Dumping Agreement*.[34] The United States notes that Article 13 of the *Anti-Dumping Agreement* requires Members to provide for independent judicial review, and argues that a Member that maintains a system that provides for such review "should not be subject to findings that it failed to comply based on a delay that is a consequence of judicial review". Furthermore, the United States observes that the *Anti-Dumping Agreement* itself recognizes that "expressly recognizes that observance of the time limits required in Articles 9.3.1 and 9.3.2 may

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31 Panel Report, *Brazil - Tyres*, para. 7.305 and Appellate Body Report, *Brazil – Tyres*, para. 252.
32 Panel Report, *Brazil - Tyres*, para. 7.305 and Appellate Body Report, *Brazil – Tyres*, para. 252.
33 Appellate Body Report, *United States – Shrimp*, para. 173, citing United States – Gasoline, page 28.
34 United States Appellant's Submission, para. 96.

not be possible where the product in question is subject to judicial review proceedings."

43. The United States cannot be heard with this argument. Footnote 20 only provides an exception to the time limits in Article 9.3 of the *Anti-Dumping Agreement*. It does *not* provide an exception to the compliance obligations in the DSU.

44. To conclude, Norway is of the view that the Panel correctly found that domestic judicial review procedures cannot excuse non-compliance by the United States after the end of the RPT

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45. Norway, in this third participant submission has only touched upon some of the interpretative issues raised in this appeal. Norway reserves the right to address other issues in its oral statement before the Appellate Body.