(As held)

In the World Trade Organisation
Before the Appellate Body

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

AB-2009-2

Oral Statement by Norway as Third Participant

Hearing of the Appellate Body

Geneva
29 June 2009

Mr Presiding Member, Members of the Division,

1. Norway would like to thank you for the opportunity to make a brief statement at this meeting.

2. In its written submission, Norway focussed on two of the main issues of this appeal. First, we stated our support with the Panel's finding that Review 9 fell within its terms of reference. Secondly, we expressed our agreement with the Panel that domestic judicial review procedures cannot excuse non-compliance after the end of the reasonable period of time (RPT). The legal arguments behind our views on these two issues are explained in our written submission and I shall here only refer you to the arguments presented therein.

3. Today, Norway would like to offer its views on whether the Panel was correct when it found that the United States acted inconsistently with Articles 2.4 and 9.3 of the *Anti-dumping Agreement* and Article VI:2 of the GATT 1994 by applying zeroing in Reviews 4, 5, 6 and 9.

4. The United States does not seem to claim that zeroing was not used in these reviews. Rather the United States claims that the reviews "cannot serve as the basis for a finding of WTO inconsistency in this dispute".[1]

5. The United States presents three arguments in support of its claim. Norway will in the following briefly address each of these arguments and thereby explain why Norway believes the Panel did not err in finding WTO-inconsistency with regard to Reviews 4, 5, 6 and 9.

6. The first argument offered by the United States is that the application of zeroing in the four reviews "cannot serve as a basis for a finding of inconsistency" because the reviews "do not cover entries occurring after the end of the RPT".[2] Norway understands this argument as being based on the United States' view that implementation obligations with regard to anti-dumping duties only exist in connection with entries occurring after the end of the RPT. Norway would like to point to the fact that the Appellate Body already has found that the date of entry is not determinative when it comes to deciding

[1] United States Appellant Submission, para. 89 and 105.
[2] United States Appellant Submission, para. 89.

the scope of implementation obligations.[3] In light of this, Norway submits that this argument should be dismissed.

7. Also the second argument is related to timing. The United States argues that Reviews 4, 5 and 6 were "concluded long before the end of the RPT" and therefore cannot serve as a basis for a finding of WTO inconsistency.[4] Norway is of the opinion that the United States cannot be heard with this argument. First of all, the Appellate Body has ruled that measures may be taken to comply before the DSB's recommendations and rulings are adopted, which is long before the end of the RPT.[5] Furthermore, the obligation in DSU Article 21.3, makes it incumbent upon the implementing Member to adopt compliance measures before the expiry of the RPT. Indeed, the whole purpose of the RPT is to grant a Member time to adopt the necessary measures to comply with the recommendations and rulings of the DSB.

8. Coming to the third argument, the United States asserts that Reviews 4, 5 and 6 cannot serve as basis for a finding of inconsistency because they "have no post-RPT effects of the kind that give rise to" such a finding.[6] Norway notes that the Panel, as a factual matter, found that importer-specific assessment rates determined in the three reviews continued to have legal effects after the RPT.[7] The United States' assertion that these reviews did not have post-RPT effects is therefore not correct. The United States further contends that there cannot be a finding of lack of compliance at the end of the RPT for "entries for which liquidation was suspended until after the RPT due to domestic judicial proceedings".[8] In our written submission, we discussed this argument with regard to original measures (Reviews 1, 2, 3, 7 and 8). As we explained there, any consequences arising from the judicial reviews initiated by the United States' own courts under its own law must be the United States' own responsibility. There is nothing in the DSU that excuses an implementing Member from its compliance obligations where post-RPT effects are suspended due to domestic judicial review proceedings. As the Panel

[3] Appellate Body Report, US – Zeroing (21.5 – EC), para. 308-309.
[4] United States Appellant Submission, para. 105.
[5] Appellate Body Report, US – Zeroing (21.5 – EC), para 224.
[6] United States Appellant Submission, para. 105.
[7] Panel Report, para. 7.74, 7.75 and 7.79.
[8] United States Appellant Submission, para. 105.

observed: "[t]he reasons why the United States finds itself in continuing violation are not pertinent to our finding".[9]

Mr Presiding Member, Members of the Division,

9. This concludes our statement here today. Thank you for your attention.

[9] Panel Report, footnote 167.